UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION, Plaintiff v. THOMAS K. JONES, in his official capacity as Ethics Enforcement Officer for The State of Connecticut Office of State Ethics, and CAROL CARSON, in her official capacity as Executive Director of The State of Connecticut Office of State Ethics, Defendants	:	CIVIL NO. 3:09-cv-00851 (JBA) JUNE 25, 2009

MEMORANDUM OF LAW OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT, IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The American Civil Liberties Union of Connecticut ("ACLU-CT") submits this Memorandum of Law in support of plaintiff's motion for a preliminary injunction.

I. INTRODUCTION

The amicus relies upon the facts as they appear in the plaintiff's Memorandum of Law and supporting materials. Based on these, the defendants' definition of lobbying is nigh limitless. And alarming.

An example suffices. The City of New Haven has adopted a policy of insisting that the sponsors of parades, including but not limited to political parades that are

conducted for the purpose of supporting or opposing pending legislation, pay for the costs of assigned police overtime. New Haven Register, "Freddie Fixer parade may be a no-go," http://nhregister.com/articles/2009/03/31/news/a3-nefreddie.txt. Suppose that these costs were to exceed $2,000. (According to the news story, they would.) And suppose that the sponsor does pay, as the City requires it to do. Suppose, finally, that the purpose of the parade is to support or oppose pending legislation. According to the defendants, the sponsor would have to register as a lobbyist.[1]

Registration would certainly be necessary if the paraders, at the sponsor's behest, were to exhort members of the public to contact lawmakers in support of, or in opposition to, the bill. But the duty may extend even further. Significantly, the defendants have told the plaintiff that its *internet postings* constitute lobbying only because these postings did, in fact, exhort viewers to contact lawmakers. Aff. Of the Most Reverend William E. Lori ("Lori Aff."), para. 21. But they have made no such representation about the public rally. And by their own logic, why should they? When a sponsoring organization exhorts sympathizers to contact lawmakers, it communicates a message to those lawmakers: "We have numbers; you had better listen to us." When it conducts a parade or rally in front of the building where the Legislature sits, it communicates the same message, with or without an accompanying exhortation. For that matter, it communicates this message regardless of where the parade or rally takes place, because it can count upon the media to bring the event to the Legislature's attention. The defendants, in short, would treat all political parades and rallies – including those that occur in the most pristine of public forums – as lobbying, whenever the associated costs exceed $2,000. Even if a religious

[1] The amicus does not acknowledge that the cost-shifting policy in its present form is constitutional, and is indeed engaged in ongoing efforts to have it modified or rescinded.

sponsor can claim some special constitutional or statutory exemption from the registration requirement, as plaintiff contends, the exemption would not shield non-religious speakers.

The amicus agrees with the plaintiff's arguments.[2] It writes to make three additional arguments of its own. First: the plaintiff's rally implicates petitioning rights as well as the speech, assembly and religion rights that the plaintiff already asserts – and this has consequences. Second, the pertinent portions of Connecticut's lobbying statute are vague *as applied* to the rally. Third, the application of the lobbying statute to the rally violates the plaintiff's right to anonymous speech in a public forum.

All three of these arguments address the rally, and not the internet advocacy as such. However, once the rally vanishes from the equation, the internet advocacy – even if it is not protected (and again, the amicus agrees with the plaintiff that it is) – cannot support the defendants' actions on its own, inasmuch the defendants do not appear to cite any relevant internet-related expenditures. Complaint, paras. 37, 38. The plaintiff should in consequence prevail.

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[2] As a technical matter, the amicus thinks the plaintiff mistaken in asserting that Connecticut's Religious Freedom Act, Conn. Gen. Stat. Section 52-571b, "change[s] the standard of review for free exercise claims under the Connecticut Constitution." Plaintiff's Memorandum of Law In Support of Plaintiff's Motion For Preliminary Injunction ("Plfs. Mem.") at 26 n.10. See Broadley v. Board of Education, 229 Conn. 1, 7-8, n.14 (1994) (questioning whether the Legislature can control state constitutional standards of review). But the statute itself clearly applies strict scrutiny when religious objectors seek exceptions to generally applicable laws.

II. ARGUMENT

A. The Rally Implicates Petitioning Rights, Which Defendants Incorrectly Conflate With "Lobbying."

Petitioning in its classic form consists of attempts, by the people, "to make their wishes known to their representatives"; it likewise encompasses "the approach of citizens or groups of them to administrative agencies . . . and to courts . . .." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). But it is more than that. It includes, in particular, "activity designed *to influence public sentiment* concerning the passage and enforcement of laws as well as appeals for redress made directly to the government." Webb v. Fury, 282 S.E.2d 28, 42 (W. Va. 1981) (emphasis added), citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 142 (1961) (petition clause protects "circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents" disseminated for the purpose of "influenc[ing] the passage and enforcement of laws") and Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288, 297 (8th Cir. 1978) ("a publicity campaign involving the media and various citizen groups," aimed at producing government action, was an exercise of petitioning rights).[3] It is clear, from these authorities, that the public rally in the instant case was a paradigm of petitioning activity – regardless of whether the plaintiff was aiming its message at the Legislature or the general public, regardless of whether speakers exhorted listeners to contact lawmakers, and regardless of whether the speakers did so (if they did so at all) at the plaintiff's behest or on their own initiative.

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[3] Webb v. Fury was overruled in part, on other grounds, in Harris v. Adkins, 432 S.E. 2d 549, 552 (W.Va. 1993). Webb had also held that petitioning activity is absolutely immune from defamation liability. It was that portion of the ruling that Harris overturned. Harris states that Webb is only repudiated "to the extent" of this inconsistency. Id. Webb's definition of petitioning remains good law.

The fact that the rally involved petitioning, in addition to speech, does not alter the First Amendment analysis, for the Supreme Court has held that the same constitutional principles control both. McDonald v. Smith, 472 U.S. 479, 482, 486 (1985). But it underscores the illogic of the defendants' position.

That position, reduced to its essentials, appears to be as follows: lobbying consists of attempts, by the people, to make their wishes known to their representatives; it likewise encompasses the approach of citizens or groups of them to administrative agencies. *And it includes activity designed to influence public sentiment concerning the passage and enforcement of laws* – say, at a public rally – regardless of whether the sponsor was aiming its message at the Legislature or the general public, regardless of whether speakers exhorted listeners to contact lawmakers, and regardless of whether the speakers did so (if they did so at all) at the sponsor's behest or on their own initiative. In other words, in defendants' reckoning petitioning is presumptively protected from legislative control unless the legislature, by calling it lobbying (and setting the contribution floor low enough), chooses to control it. This conflation of petitioning and lobbying would swallow not only the public forum doctrine – see the Introduction to this Memorandum, supra – but the petition clause too, except insofar as the clause protects "approach[es] . . . to courts," California Motor, i.e., the bringing of lawsuits. The proposition is self-refuting.

The Supreme Court, keenly aware of the need to carve out a protected zone, for petitioning activity, that lobbying statutes cannot reach, has defined lobbying narrowly, as involving only "direct communications with members of [the Legislature]" or indirect communications occurring "through an artificially stimulated letter campaign." U.S. v.

Harriss, 347 U.S. 612, 620 (1954). Defendants appear, self-servingly, to construe the latter expression as swallowing both the public forum doctrine and most of the petition clause. But a close attention to context suggests a much more restrictive reading. In an explanatory footnote, the Court proffers, as an example of such a campaign, the activities of "[t]hose who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams . . . . " Id. at 620, n.10. This language is strongly suggestive of centrally generated, choreographed materials that are disseminated to targeted loyalists who, acting as mere conduits, dutifully sign these materials and transmit them to their representatives. That is a far cry from addressing the public through a mass rally in a public forum, or even from exhorting members of the public to communicate with lawmakers on their own. Cf. Commodity Futures Trading Comm'n v. Vartuli, 228 F.3d 94, 111 (2d Cir. 2000) (in commercial speech settings, utterances are not protected when they instruct recipients to act "in an entirely mechanical way . . . without intercession of the mind or the will . . ..").

The Second Circuit has intimated a similarly narrow view of Harriss in Stern v. General Electric Co., 924 F.2d 472, 478 (2d Cir. 1991). Citing Harriss, the panel held that corporate directors did not become lobbyists, subject to reporting requirements, merely because they had exhorted employees to contribute to a company-sponsored political action committee that lobbied members of Congress. The amicus respectfully urges this Court to follow suit.[4]

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[4] As far as the amicus is aware, the only case within the Second Circuit, besides Stern, that addresses Harriss' application to "indirect" lobbying is Commission on Independent Colleges and Universities ("CICU") v. New York Temporary Commission on Reg. of Lobbying, 534 F.Supp. 489 (N.D.N.Y. 1982). CICU opines that the New York legislature

B. Connecticut's Lobbying Statute Is Vague As Applied To Plaintiff's Rally.

The Constitution's void-for-vagueness doctrine is governed by three broad precepts. First, a vagueness challenge can be brought either facially or as applied. Smith v. Goguen, 415 U.S. 566, 571-572 (1974). Second, the challenge can arise under the Due Process Clause or under the First Amendment, but the First Amendment vagueness inquiry is more searching. "When a statute's literal scope . . . is capable of reaching expression shielded by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." Id. at 573. "If [a law] interferes with the right of free speech or of association, a more stringent vagueness test should apply." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982). Third, vagueness analysis reflects two concerns. One is that "ordinary people" have notice, ahead of time, of whether their behavior will expose them to sanctions. Kolender v. Lawson, 461 U.S. 352, 357 (1983). Otherwise, speakers will "steer far wider of the unlawful zone," and potentially valuable speech will be stifled. Baggett v. Bullitt, 377 U.S. 360, 372 (1974) (internal quotation marks and citation omitted). The other is that law enforcement authorities be given clear enough guidelines to prevent "arbitrary or

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intended to stay within Harriss' limits, but does not definitively spell out those limits. Id. at 497.

Cases that are sometimes cited as taking a broad view of "artificially stimulated" campaigns in fact do nothing of the kind. Some reject *facial* challenges to lobbying statutes but leave the door wide open to as-applied ones, as here. E.g., Kimbell v. Hooper, 665 A.2d 44 (Vt. 1995). And Minnesota State Ethical Practices v. National Rifle Association, 761 F.2d 509 (8th Cir. 1985) appears to have involved precisely the sort of "canned" letters that even the plaintiff and amicus would recognize as falling within the definition of "artificially stimulated," inasmuch as the NRA is well known for generating these. In any case, the NRA's activities, whatever they may have been, were many steps removed from a public rally. See, also, U.S. v. Rumely, 345 U.S. 41, 47 (1953) (lobbying regulations are constitutional only as applied to direct representations and not to "attempts to saturate the thinking of the community").

discriminatory enforcement." Kolender at 357 (1983). The second concern is the more important. Id. at 358; Smith, supra, 415 U.S. at 574.

The amicus assumes, arguendo, that the pertinent portion of Connecticut's lobbying statute, Conn. Gen. Stat. Section 1-91(k), can survive a facial vagueness challenge. The section seems clear enough under normal circumstances: for instance, in its application to the in-person buttonholing of lawmakers in Capitol corridors and offices. If that is so, one could not say that "no set of circumstances exists under which the Act would be valid," U.S. v. Salerno, 481 U.S. 739, 745 (1987); or that the law is vague in the "vast majority of its intended applications," Hill v. Colorado, 530 U.S. 703, 733 (2000). Those are the present-day facial vagueness tests.[5]

As-applied analysis, however, yields a different result.

C.G.S. § 1-91(k), which defines lobbying, states, in pertinent part: "'Lobbying' means *communicating directly* or soliciting others to communicate with any official or his staff in the legislative or executive branch of government or in a quasi-public agency, for the *purpose* of *influencing* any legislative or administrative action . . .." (emphasis added). According to one source, to "communicate" means "(a) To convey information about; make known; impart; (b) To reveal clearly; manifest." "Directly" means "without anyone or anything intervening." A "purpose" is "(1) The object toward which one strives or for which something exists; an aim or a goal; (2) A result or effect that is intended or desired. See synonyms at intention." To "influence" is "(1) To produce an

[5] It is not clear which of the two tests the present Supreme Court uses. Compare City of Chicago v. Morales, 527 U.S. 41, 55 n. 22 (1999) (plurality opinion of Justice Stevens) with id. at 73-98 (dissenting opinion of Justice Scalia). It is not necessary for this Court to resolve the uncertainty, inasmuch as neither the plaintiff nor the amicus proposes a facial attack.

effect on by imperceptible or intangible means; sway; (2) To affect the nature, development or condition of; modify." Free Online Dictionary, http://www.thefreedictionary.com (citing the American Heritage Dictionary, Fourth Ed. (2000)).

Buttonholing a lawmaker within the four walls of the Capitol building surely constitutes communicating directly with that lawmaker for the purpose of influencing legislative action. Once one moves outside that building, however – and *a fortiori* when one enters the public square – the highlighted terms lend themselves to a bewildering variety of possibilities. When one sponsors speech, or speaks one's self, to a large audience outside the Capitol, where lawmakers are within earshot, does that constitute "communicating directly" with the lawmakers for the "purpose" of influencing legislation? Does it matter whether the sponsor or speaker selects the location *because* lawmakers will be within earshot, or is it enough that the location was chosen for other reasons – say, its symbolic value, cf. Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983) – with awareness that lawmakers would, or might, be within earshot? The dictionary definitions of purpose – "intended" *or* "desired" – suggest that a purpose can consist of something less than goal-oriented behavior. Under the statute, does it? It is axiomatic, in criminal law, that one's intentions can often be presumed from the natural and probable consequences of one's actions. Is that true here?

That is not all. On the by-no-means-certain supposition that merely sponsoring or speaking at the rally does not amount to "communicating directly," what happens if the speaker exhorts listeners at the rally to contact lawmakers themselves? Can the speaker be said to be "communicating directly" with those lawmakers, "without anyone

or anything intervening," when the communication will not be completed unless and until those listeners choose to do as the speaker asks? Is that mediating choice, of the listener, an "intervening" occurrence? And what becomes of the "direct[ness]" requirement when the causal chain is extended to the sponsor, who might or might not have known, suspected or been able to control what the speaker would say?[6] Finally, and not least significantly: when, as here, the advocacy occurs in broad daylight, in the public square, is the sponsor aiming at "produc[ing] an effect by *imperceptible* means" (emphasis added)?[7]

With its open-ended language, C.G.S. § 1-91(k), as applied to the plaintiff's rally, lacks the necessary precision either to give notice or to curb discretionary law enforcement. Assuredly it gave the plaintiff no notice that sponsoring a public rally in a public forum would invite sanctions; in Bishop Lori's words, "I certainly did not consider any of my or the Diocese's activities . . . to be 'lobbying.'" Lori Aff., para. 16. The plaintiff's only safe option, therefore, would have been to "steer wider of the unlawful zone" – which is exactly what should not happen. Baggett, supra. And though the plaintiff is arguably on notice now because of the defendants' enforcement threats, this

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[6] These ambiguities support the distinction that amicus suggests in the preceding section of this Memorandum: between generating form letters, en masse, for disciples to sign and forward, and exhorting supporters to draft letters, send emails or place phone calls on their own. The latter require far more in the way of "intervening" action; therefore it makes sense to define "artificially stimulated letter campaigns" as comprising only the former. Cf. Commodity Futures Trading Commission v. Vartuli, supra. The amicus does not suggest that centrally generated form letters are exactly like the unprotected utterances in Vartuli, but they resemble those utterances more than they do the plaintiff's.

[7] Interestingly, in Buckley v. Valeo, 424 U.S. 1, 76 (1976), the U.S. Supreme Court found that the phrase "for the purpose of influencing" an election raised "serious problems of vagueness," and avoided *facial* invalidation only by construing the federal statute narrowly.

does not cure the statute's other, and more important, deficiency: the utter absence of clear guidelines that would limit the defendants' discretionary powers. To this day, for example, the defendants seem still not to know whether "lobbying," at public rallies, requires express exhortations to contact lawmakers, or even on what basis to make that call. If they have acquired any insights into the subject, they have not "communicat[ed]" them to the plaintiff, as far as the amicus is aware.

A recent and closely similar case, Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021 (9th Cir. 2009), provides what the amicus believes is a template for this one. The plaintiff, a church, challenged a campaign disclosure law, and an implementing regulation, as violating its right to free speech. The law required the disclosure of "contributions" and "expenditures," to political committees, occurring in the course of "ballot issue" campaigns. Under the regulation, "contributions" and "expenditures" included "in-kind" gifts, which were defined as "the provision of a good or service either without charge or with a charge below its fair market value." 556 F.3d at 1028 (internal quotation marks omitted). The church had allowed an outside party to place petitions in its lobby, supporting a ballot initiative, and its minister – speaking from the pulpit during a regular Sunday service – had encouraged his parishioners to sign the petition. A state commission found the church to be non-compliant with the statute for failing to disclose these activities: a finding that exposed the church to possible criminal prosecution.

The court concluded that the regulation was not facially vague, because it "poses no vagueness problem in the 'vast majority of its intended applications.'" Id. at 1028 (citation to Hill v. Colorado, supra omitted). Nevertheless, the regulation was vague *as*

applied to activity that "brings no detriment to [the donor] *and* carries no market value." Id. at 1029 (emphasis in original). As the church's "services" – allowing the placement of the petitions, encouraging parishioners to sign them – fell squarely within this definition, it had had no advance notice that the commission would treat these "services" as "in-kind expenditures." Id. at 1029-30.

When compared to C.G.S. § 1-91(k), the Canyon Ferry regulation is a model of clarity. The amicus urges this Court to rule accordingly.

C. The Application of Connecticut's Lobbying Statute to Plaintiff's Rally Violates Plaintiff's Right To Anonymous Speech In a Public Forum.

If the plaintiff must register as a lobbyist based on its sponsorship of a rally, it must in the process disclose its identity. This compelled disclosure violates its First Amendment right to speak anonymously in public.[8]

The right to anonymous expression has been recognized in this country since 1960, when the Supreme Court protected the anonymous distribution of handbills on city streets. Talley v. California, 362 U.S. 60 (1960). The Court observed that "an identification requirement would tend to affect freedom to distribute information . . ." and that anonymous speech, in England and America, has "played an important role in the progress of mankind." Id. at 65. A generation later the Court re-affirmed, and extended, the right in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995). McIntyre struck down a state law that prohibited the circulation of anonymous leaflets aimed at

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[8] As far as the amicus can discern, it makes no difference whether one characterizes the right as a right to anonymous expression or as a subset of the broader right not to be compelled to speak, e.g., Wooley v. Maynard, 430 U.S. 705 (1977). The analysis appears to be the same regardless. Nor does it matter that the plaintiff itself, in this case, did not wish to speak anonymously, for it can nevertheless assert the rights of those who do. Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 167 n.14 (2002).

influencing the outcome of "issue" elections: referenda, initiatives and the like. The right inures to organizations as well as to individuals, American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979, 989-992 (9th Cir. 2004); and the latter do not forfeit the right merely by voluntarily disclosing their physical identities – as when they participate in demonstrations or distribute literature door-to-door. Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 166-167 (2002).

As with other constitutional rights, the right to anonymous expression is not absolute. There is no "litmus paper test"; rather, the level of protection depends upon a multiplicity of factors. McIntyre, 514 U.S. at 344-345 (internal quotation marks and citation omitted).

One factor is "how and when" the self-identification requirement applies. Heller, supra, 378 F.2d at 991. Thus, a regulation that merely requires "disclosure of campaign-related expenditures and distributions" is likelier to pass muster than one "prohibiting the distribution of anonymous literature." Id. at 992. In the same vein, a disclosure law may be more or less suspect according to the timing of the mandated disclosure: before, during or after the speech. Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 200 (1999); Green v. City of Raleigh, 523 F.3d 293, 302 (4th Cir. 2008). If the disclosure must occur in advance of the speech, as a prerequisite to speaking, the law operates as a classic prior restraint. Commodity Futures Trading Commission, supra, 238 F.3d at 109. If it must occur simultaneously with the speech, it is problematic for two reasons: first, it "alters [the content of the] communication," because it forces the speaker to include information that he or she would rather withhold, Heller, 378 F.3d at

1001;[9] second, it exposes the speaker to a greater "risk of heat of the moment harassment" and, "[e]ven when it does not have the effect of facilitating harassment, [it] chills speech by inclining individuals toward silence." Id. at 378 F.2d at 991-992. Accord, Buckley, 535 U.S. at 199 (internal quotation marks and citation omitted). A disclosure obligation that takes effect only after the fact is arguably less threatening to First Amendment values. Id. at 200. Another consideration in the "how and when" analysis is whether the identifying information, once disclosed, is available to the public. Watchtower, 536 U.S. at 166. See Boardley v. U.S. Department of the Interior, 605 F.Supp. 8, 19 (D.D.C. 2009) (upholding limited identification requirement, for persons distributing literature in national parks, in part because there was "no evidence in this record that permit applications are available for public inspection").[10]

The context of the compelled disclosure also matters. It is well settled, for instance, that the government has a greater interest in identifying contributors to candidates for elective office than in identifying those who spend money on so-called "issue advocacy." Vermont Right to Life Committee, Inc. v. Sorrell, 221 F.3d 376 (2d

[9] A compelled self-identification law is content-based by definition: "It is a regulation of pure speech [and] a direct regulation of the content of speech." McIntyre, 514 U.S. at 345. And McIntyre's disclosure obligation was "defined by . . .content," i.e., content-based, in a second sense: it applied only to communications "designed to influence the voters." Id. Similarly, C.G.S. § 1-91 applies only to communications designed to influence lawmakers. Indeed, Rigdon v. Perry, 962 F.Supp. 150, 163-164 (D.D.C. 1997) deems such laws not only content-based, but viewpoint-based, inasmuch as they come into play when speakers exhort supporters to contact lawmakers – not when the speakers exhort supporters to refrain from doing so. Being content-based, these laws cannot be dismissed as mere time, place and manner regulations. A time, place and manner regulation must above all be content-neutral. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

[10] Public disclosure may be somewhat less objectionable when it is delayed until after the expressive activity is over. Buckley, 525 U.S. at 198-199.

Cir. 2000); compare McIntyre, supra, with Seymour v. Elections Enforcement Commission, 255 Conn. 78, 762 A.2d 880 (2000). (Seymour upheld a disclosure requirement that was similar to McIntyre's, except that Seymour's was limited to materials that advocated the election or defeat of a candidate.)

Finally, if the "how and when" matter, so too must the "where." Boardley, supra, and Green, supra, upheld, against anonymity challenges, regulations that required speakers in a national park and on public streets, respectively, to reveal their names on permit applications. Both courts did so, however, *only on the understanding that just one speaker, out of any group of speakers, was obliged to come forward.* The others did not have to identify themselves at all, and the group was free to choose who, among its members, would represent it. Boardley, 605 F.Supp. at 18; Green, 523 F.3d at 302. The regulations were sustained as minimally necessary to enable police to maintain communications with the demonstrators. It is scarcely surprising that both courts would insist that the regulations be minimally intrusive, for parks and streets, in common with the exterior grounds of core government buildings such as state capitols, are quintessential public forums where expressive rights are at their apogee. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 43-45 (1983); Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998); Make the Road By Walking, Inc. v. Turner, 378 F.3d 133, 142 (2d Cir. 2004); Capitol Square Review Board v. Pinette, 515 U.S. 753 (1995) (exterior grounds of core government buildings). Accord, Justice For All v. Faulkner, 410 F.3d 760, 765 (5th Cir. 2005) (invalidating prohibition of anonymous student speech on a state university campus, which the court characterized as a "designated" public forum).

Using these criteria, it is clear that the plaintiff can assert anonymous speech rights of the highest order. Connecticut lobbyists must register, i.e., self-identify, before they lobby. Plfs. Mem. at 13-14. Therefore the registration requirement operates as a prior restraint. Even in its after-the-fact applications, moreover, the requirement subjects the plaintiff to substantial burdens, which the plaintiff has persuasively described. Plfs. Mem. at 8, 12-17. Thus the requirement "chills speech by inclining [the plaintiff] toward silence." Heller, supra, 378 F.3d at 992. The names of registered lobbyists are accessible to the public on the OSE website. And the disclosure that the defendants seek pertains to issue advocacy – not to advocacy in candidate elections.

Perhaps most importantly, the speech that the defendants wish to regulate took place in quintessential public forums: the grounds of the state capitol, an adjacent park. There is a simple and key difference between that sort of speech and the prototypical lobbying that takes place in capitol corridors and offices. The grounds and the park are public forums, Capitol Square, supra. *Capitol interiors are not.* Bynum v. U.S. Capitol Police Board, 93 F.Supp.2d 50, 56 (D.D.C. 2000); ACT-UP v. Walp, 755 F.Supp. 1281, 1288 (M.D. Pa. 1991); Markowitz v. U.S., 598 A.2d 398, 404 (D.C. 1991). Yet the plaintiff, unlike the ones in Boardley and Green, supra, was not free to designate a proxy to register on its behalf.[11]

[11] In addition to the above-cited cases, the amicus has just learned that the Ninth Circuit, sitting in bank, has this day decided Berger v. City of Seattle, No. 05-3572, DC No. CV-03-03238-JCR, http://www.ca9.uscourts.gov/datastore/opinions/2009/06/24/05-35752.pdf. Berger invalidates an ordinance which, inter alia, required individual street performers to obtain permits before performing in the Seattle Center – a public park, hence a public forum. According to the majority, "Registration requirements . . . dissuade potential speakers *by eliminating the possibility of anonymous speech.*" Slip Opinion at 7722 (emphasis added).

The amicus thinks it unnecessary to replicate the standard-of-review analysis that appears in the Plaintiff's Memorandum at 20-25. That analysis is the same regardless of whether one characterizes C.G.S. § 1-91 as burdening speech, Plfs. Mem. at 16-20, or as burdening anonymous speech, inasmuch as both involve pure content regulation. Either way, the outcome is the same: the statute cannot validly be applied to the rally.[12]

Earlier in this Memorandum, the amicus demonstrated that the defendants' broad definition of lobbying threatens to swallow petitioning rights and the public forum doctrine. Now they would have it swallow anonymous speech rights as well. The amicus respectfully but vigorously demurs.

III. CONCLUSION

The amicus realizes that the plaintiff's positions, on the underlying legislative issues, are not universally popular, and indeed the amicus itself has opposed some of them, as in Kerrigan v. Commissioner, 289 Conn. 135 (2009) (recognizing a state constitutional right to gay marriage). As Second Circuit judge and U.S. Supreme Court nominee Sotomayor has trenchantly observed, however, this must not affect the disposition of the plaintiff's important First Amendment claims. Pappas v. Giuliani, 290 F.3d 143, 154 (2d Cir. 2002) (Sotomayor, J., dissenting).

For the above-stated reasons, and the reasons stated in Plaintiff's Memorandum of Law, the amicus urges that the Plaintiff's Motion for a Preliminary Injunction be granted.

Hartford, Connecticut
June 25, 2009

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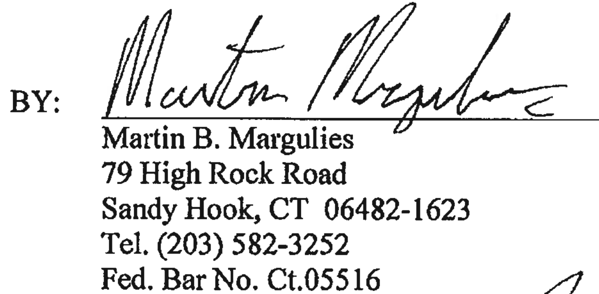
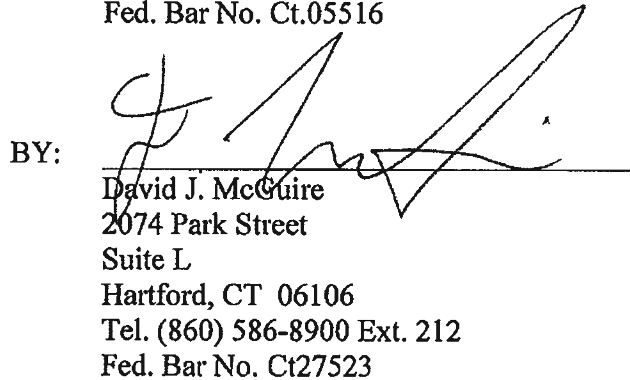
[12] Although the amicus has chosen to focus upon the rally, rather than upon the plaintiff's internet advocacy, it may be useful to note that courts have also recognized a right to anonymous internet speech. Independent Newspapers, Inc. v. Brodie, 966 A.2d. 432 (Md. 2009); Jaynes v. Com., 666 S.E.2d 303 (Va. 2008). Both cases cite Watchtower Bible and McIntyre.

Respectfully Submitted,

AMICUS CURIAE, THE
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF CONNECTICUT

BY: 

Martin B. Margulies
79 High Rock Road
Sandy Hook, CT 06482-1623
Tel. (203) 582-3252
Fed. Bar No. Ct.05516

BY: 

David J. McGuire
2074 Park Street
Suite L
Hartford, CT 06106
Tel. (860) 586-8900 Ext. 212
Fed. Bar No. Ct27523

Michael Pedevillano, Student Intern
On the Brief

CERTIFICATION

This is to certify that on this 25th day of June 2009, a copy of the foregoing was personally filed. A copy of the same was sent via U.S. Mail, postage prepaid, to:

Assistant Attorney General Susan Quinn Cobb
Office of the Attorney General
55 Elm Street, 4th Floor
Hartford, CT 06106

Michael Shea, Esq
Day Pitney LLP
242 Trumbull Street
Hartford, CT 06103

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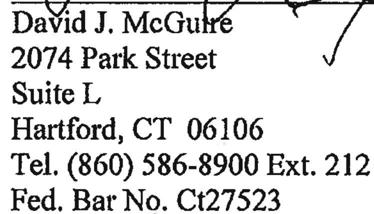

BY: ______________________________
David J. McGuire
2074 Park Street
Suite L
Hartford, CT 06106
Tel. (860) 586-8900 Ext. 212
Fed. Bar No. Ct27523