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IN THE SUPREME COURT OF FLORIDA

CASE NO: 67,630

Maurice Ferre

Petitioner,

vs.

State of Florida, ex rel.
Janet Reno, as State Attorney of the
Eleventh Judicial Circuit of Florida

Respondent.

INITIAL BRIEF OF PETITIONER

On Review from the Third District Court of Appeal

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Statement of the Case

In 1983 the State of Florida brought suit against Maurice Ferre for violation of Chapter 106, Florida Statutes - Florida's Campaign Financing Law. (R. 1-10, 30-39). The state's amended complaint alleged that Ferre violated section 106.141(10), Florida Statutes (1981), which prohibits candidates from receiving post-election contributions, by accepting $35,000 in $1,000 contributions subsequent to his re-election to office on November 10, 1981. (R. 35). For violation of this statute, the state asked the court to assess a civil penalty under section 775.083(1)(d), Florida Statutes (1981), in the form of a $1,000 fine. (R. 35).

The amended complaint also alleged that Ferre violated section 106.08(2), Florida Statutes, (1981) which requires post-election contributions to be returned to contributors, by failing to return to contributors the $35,000 which Ferre received after his 1981 election to office. (R. 35-36). For violation of this provision, the state asked that the court assess against Ferre as a civil penalty a fine of $70,000, pursuant to the contributions-times-two penalty set out in section 106.08(5), Florida Statutes. (R. 35). As a convenience to the court, each of these statutes is set out in relevant part in the appendix to this brief.

The parties stipulated that there were no genuine issues of material fact. (R. 65). The trial court denied

Ferre's motion to dismiss the complaint on various grounds, including an assertion by Ferre that Chapter 106 violated the First Amendment to the United States Constitution. (R. 63). In due course, the trial court granted a summary judgment in favor of the state. (R. 90-93). Finding, however, that the mandatory double penalty described in Section 106.08(5)

> would be unreasonably harsh and oppressive and would bear no reasonable relationship to the offense committed or the wrong sought to be redressed

(R. 92-93), the trial court instead imposed a civil fine of $35,000 against Ferre.

On appeal, the Third District Court of Appeal affirmed the trial court's summary judgment for the state and held that the applicable statutes were constitutional. The district court overturned the trial court's determination that the mandatory double penalty of section 106.08(5) was excessive, however, and it applied the statute to require the $70,000 civil fine which the state had requested. A copy of the district court's opinion, which is reported at 478 So.2d 1077, is also attached as an appendix to this brief.

Ferre petitioned this court to review the decision of the district court of appeal. Jurisdiction was accepted, the case set for oral argument on June 4, and petitioner's brief was scheduled to be served on or before March 31.

Statement of the Facts

Maurice Ferre was the mayor of the City of Miami. He was a candidate for re-election to that office in both the primary election held on November 3, 1981 and the general election held on November 10, 1981. He was in fact re-elected to the office of mayor on November 10, 1981.

Following his election to office, Ferre discovered that there may have been a deficit in his 1981 campaign fund. On December 15, 1981, Ferre received delivery of and accepted 35 checks, from 35 individual contributors, each in the amount of $1,000. These checks were made payable to the Maurice Ferre Campaign Fund, there deposited, and used to defray the campaign deficit. (R. 65).

Statement of the Issue

WHETHER THE STATUTORY BAN ON ACCEPTING AND EXPENDING POST-ELECTION CONTRIBUTIONS VIOLATES THE FIRST AMENDMENT GUARANTEE OF FREE SPEECH?

Summary of Argument

The statutes at issue in this case implicate the First Amendment to the United States Constitution. Buckley v. Valeo, 424 U.S. 1 (1976); Sadowski v. Shevin, 345 So.2d 330 (Fla. 1977). The statutes place an impermissible quantity restriction on the amount which candidates can raise and expend, as opposed to a permissible limit on the time, the place or the manner of communicating political ideas. Sadowski v. Shevin, supra. Ferre has standing to raise the constitutional issues presented.

Contributions and expenditures are not separable. Both limit political expression. Citizens Against Rent Control v. Berkley, 454 U.S. 290 (1981). Statutes which limit political expression are subject to exacting scrutiny. Winn-Dixie Stores, Inc. v. State, 408 So.2d 211 (Fla. 1981). They can be sustained only if there are compelling governmental interests, and if they are narrowly tailored to the evil which the legislature has sought to remedy. Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. ____ , 84 L.Ed.2d 455 (1984); Winn-Dixie Stores, Inc. v. State, supra.

Two governmental interests are asserted in this case -- preventing corruption through post-election contributions, and disclosing to electors before they vote the identity of

campaign contributors. Neither is sufficiently compelling, however, so as to warrant limiting the full and free expression of political ideas. Not only do the statutes fail to address post-election corruption possibilities, but they are not drawn narrowly.

The state's interest in stemming the appearance of corruption has never been strong enough to permit an absolute ban on contributions and a ceiling on expenditures. Florida's campaign finance law places an absolute ban on post-election contributions. In so doing, it goes farther to restrict speech than the dollar limit on the amount of an individual's contributions which was found to be a constitutionally permissible regulation of First Amendment freedoms in Buckley v. Valeo, 424 U.S. 1 (1976). In fact, the absolute ban on post-election contributions is no different from an unconstitutional ceiling on a candidate's expenditures, of the type found impermissible in Buckley v. Valeo, supra; Citizens Against Rent Control v. Berkley, 454 U.S. 290 (1981).

Disclosure as a goal is elusive. Florida allows political action committees to expend unlimited amounts in support of candidates. No other state appears to prohibit post-election contributions to finance deficits. Some have less restrictive means of achieving the same end.

Post-election receipts are not "contributions" under the election laws. The mandatory double penalty for unreturned contributions is excessive.

Argument

I. Preliminary considerations

In the course of this proceeding, the state has argued a number of matters designed to forestall Ferre's constitutional attack on the statutes at issue. The district court mentioned but did not dwell on these collateral assertions in reaching the constitutional issues framed by the stipulated facts. In the interest of completeness, Ferre will first address, briefly, each of the subsidiary issues previously argued by the state.

A. The statutory ban on accepting and expending post-election contributions implicates free speech.

There can be no doubt that the statutory prohibitions on accepting and expending post-election campaign contributions, and requiring their return to contributors, are political campaign finance limitations which directly implicate free speech rights protected by the First Amendment to the United States Constitution. See Buckley v. Valeo, 424 U.S. 1 (1976); Sadowski v. Shevin, 345 So.2d 330 (Fla. 1977); Winn-Dixie Stores, Inc. v. State, 408 So.2d 211 (Fla. 1981). The district court correctly rejected the state's argument to the contrary and assumed that these statutes impact First Amendment rights. 478 So.2d at 1079.

B. The statutory prohibitions are financial limitations, rather than time, place and manner restrictions.

Ferre acknowledges that the state may legitimately regulate the methods by which political expression are communicated, by placing restrictions on the place, manner or time of communication. See Sadowski v. Shevin, 345 So.2d at 333, quoting from Buckley v. Valeo. Restrictions of this type have been upheld, for example, as to picketing, parading, demonstrating and using a soundtruck. Id. These types of regulatory restraints on the methodology of expression are wholly distinct from "direct quantity restrictions" on the amount and expenditure of contributions, to quote the Court in Buckley.

These statutes entail the amount a candidate can receive, with an inevitable and unconstitutional consequence.

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression . . . .

Buckley v. Valeo, 424 U.S. at 19-20.

The statute which Ferre was found to have violated, section 106.08, is entitled "Contributions, limitations on." It contains, along with post-election receipt prohibitions, the maximum dollar expenditures which may be made for various offices. The district court correctly rejected the state's argument that these campaign finance prohibition statutes are merely time restraints. 478 So.2d at 1079. See Sadowski v. Shevin, supra, which rejected the notion that the legislature

can decree time frames in which to limit amounts that can be expended, in order to create a "political season" for political campaigns. See also Citizens Against Rent Control v. Berkley, 454 U.S. 290 (1981).

C. Standing

Section 106.08(2) directs a candidate to return, rather than expend on his campaign's behalf, any contribution received within five days prior to an election and any received after the election is held. Sections 106.08(5) and 106.141(10), respectively, impose a civil fine equal to twice the amount of unreturned contributions and direct criminal penalties for accepting post-election contributions. These statutes have been applied against Ferre. Obviously he has standing to challenge their constitutionality. See Village of Schaumberg v. Citizens for a Better Environment, 444 U.S 620, 634 (1980); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

The district court correctly swept aside the state's contention that Ferre lacked standing to challenge the constitutionality of statutes proscribing the receipt of post-election contributions. 478 So.2d at 1078. In any event, the state did not argue Ferre's lack of standing before the trial court. It was improper to raise the argument for the first time on appeal. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); Cowart v. City of West Palm Beach, 255 So.2d 673 (Fla. 1971).

II. First Amendment infringement

A. Contribution restrictions limit political expression

Contribution limits automatically affect expenditures, and any limit on expenditures necessarily operates as a direct restraint on freedom of expression. Citizens Against Rent Control v. Berkley, 454 U.S. 290, 300 (1981). Contributions and expenditures are two sides of the same coin. This language is more than mere metaphor. See Buckley v. Valeo, supra. In fact, it is because of this inextricable tie between the source of campaign funds and their expenditure that limitations on individual contributions will be upheld only when designed to be the least intrusive method of affecting expression, and only when they serve a compelling governmental interest. See First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens Against Rent Control v. Berkley, supra.

Florida's post-election contribution ban, the second aspect of a two part statute which also bans the expenditure of contributions received within 5 days before the election,* effectively constitutes a limitation on campaign spending. If a candidate cannot accept contributions as a campaign intensifies and comes to a close, and if he faces criminal and civil prosecution if there happens to be a deficit when the

*Section 106.08(2), Fla. Stat. (1981).

campaign books are reconciled, the state has forced the candidate to limit his campaign spending. His freedom of expression is chilled. The First Amendment, however, denies to the state the power to determine in this way that spending to promote one's own political views can be curtailed. See Buckley v. Valeo, 424 U.S. at 57-8.

> [T]he equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views . . . .

This is also the message of Sadowski, of course. The district court differentiated the court's decision in Sadowski, however, by characterizing it merely as an "expenditure" case. 478 So.2d at 1081. Respectfully, the court's distinction is superficial. More importantly, it misses the entire point of Buckley and Berkley. Without contributions, which the Supreme Court has repeatedly declared are the basis for equal political activity in the market place of ideas, there can be no freedom of access to voters through expenditures.

Section 106.08(2) directly inhibits the quantity of speech by prohibiting the expenditure of contributions received not merely after the election but within the five days preceding an election. The statute is at odds with this court's Sadowski decision on the critical holding that the First Amendment authorizes campaign spending of unlimited amounts, without a "season" for that activity. This statute

not only impairs the absolute quantity of speech by cutting off expenditure sources absolutely, but it does so at the most critical time in any campaign. In this sense, it is actually more intrusive on the dissemination of political expression than the statute found unconstitutional in Sadowski.

There is another aspect of this issue which cannot be ignored -- the practical side. This court in Sadowski was keenly aware of the practical effect of any limitation on a candidate's financial ability to conduct a political campaign. It recognized that there cannot be a prescribed period of time in which contributions can alone be solicited and expenditures made, without curtailing First Amendment rights.

The statutes under which Ferre is charged are, in practical effect, even more restrictive than that struck down in Sadowski. They impair a candidate's opportunity to pace his campaign to an election day crescendo, to respond to last-minute attacks by opponents, to address late-breaking issues in the campaign and, as was the situation here, even to identify himself and his candidacy adequately in a one-week run-off election. These are the very concerns which the Court addressed in Mills v. Alabama, 384 U.S. 214 (1966). These statutes, like the one in Mills, have the effect of barring a supporter's ability to support his candidate with financial help at the key period in the campaign.

In short, the policies found to be of constitutional import and encouraged to blossom by the Sadowski decision apply

here. They cannot be rejected with an off-hand suggestion that Sadowski was an expenditure case, while this is a contribution case.

B. Statutes limiting political expression are subject to exacting scrutiny

One need not search long to find the standard by which to evaluate statutes which impose election campaign contribution limitations. This court recently restated the test with elegant simplicity in Winn-Dixie Stores, Inc. v. State, 408 So.2d 211, 212 (Fla. 1981):

> Limitations on the amounts that persons may contribute or spend in campaigns to influence the results of political elections affect activities that are at the core of the First Amendment's protection of freedom of expression and association. When such limitations have a substantial impact on such activities, they impinge upon First Amendment rights. Laws which have such impact are subject to exacting scrutiny: they must be supported by a compelling governmental interest and must be narrowly drawn so as to involve no more infringement than is necessary. First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), Buckley v. Valeo, 424 S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

The district court's analysis in this case, Ferre suggests, is flawed fundamentally because it failed to accord First Amendment rights the high degree of vitality which the "exacting scrutiny" test demands. The district court viewed these statutes as having "minimal impact on First Amendment rights" (478 So.2d at 1081), from which premise it was easy to

evaluate the governmental interests as "compelling." But, as taught by Sadowski and by Winn-Dixie, that which absolutely cuts off the expression of political views is not a minimal intrusion on the First Amendment. The constitutional imperative must have dominant emphasis. From that starting point, a rigorous scrutiny is used to evaluate the competing interests of government which are asserted to be compelling enough to overwhelm the suppression of speech.

Before leaving the exacting scrutiny test, it is revealing to pause and consider the effect of these statutes in the stipulated context of this case. This case arose from a mayoral race in the city of Miami. As will be seen, the statutory prohibitions on post-election contributions and on 5-day, pre-election contributions, when coupled with Florida's prohibition on deficit campaign financing (section 106.11(3), Florida Statutes (1981)), pose restrictions which are not only unreasonable and oppressive but literally defy compliance by the most careful candidate.

Under the city charter, a general municipal election must be held one week following the primary if no candidate receives a majority of the votes cast. See City of Miami, Charter Sec. 8. Therefore, candidates who have emerged from the pack and are privileged to run in the mayoral general election are given less than two days to gather contributions for their head-to-head election. In this context, the statute

quite clearly restricts debate on the issues, and between the candidates, at a time when the voters most need information.

Seen in this light, these statutes effectively create an unrealistically short political season for speech by restricting the time for political campaigning. The Constitution, of course, prohibits the enactment of such laws. Mills v. Alabama, supra. In Mills, the court held unconstitutional an Alabama statute which prohibited the publication of editorials on election day. The reason was obvious:

> The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those 'last minute' charges on election day, the only time they can be effectively answered.

384 U.S. at 220. Moreover, there is virtually no difference between this case and the restrictions struck down by this Court in Sadowski.

> [T]he §106.15(1) regulation of election activities is a restraint of free speech and a restriction on the quantity of a candidate's communication and diversity of political speech contrary to the dictates of the Supreme Court of the United States in Buckley v. Valeo. . . .

345 So.2d at 332.

C. No compelling governmental interests

Having determined that campaign contributions and expenditures are entitled to full First Amendment protection,

it is then necessary to ask whether there is a "sufficiently strong governmental interest" served by the restrictions in these statutes, and whether the law is "narrowly tailored to the evil that may legitimately be regulated." Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. ____, 84 L.Ed.2d 455 (1984) (hereinafter called "FEC"). Or, as this court recently phrased it, laws restricting expression "must be supported by a compelling governmental interest and must be narrowly drawn so as to involve no more infringement than is necessary." Winn-Dixie Stores, Inc. v. State, 408 So.2d 211, 212 (Fla. 1981). Ferre suggests that the interests asserted are not sufficiently compelling.

The state asserted, and the district court evaluated, only two governmental interests for the state's adoption of these statutes: the prevention of corruption and the appearance of corruption; and the goal of allowing the public to be informed before an election of the candidate's contributors.

The appearance of corruption has its concerns rooted in the notion that political favors result, or can appear to result, from so-called quid pro quo contributions in dollars. See FEC and Buckley, supra. But, both FEC and Buckley involved the threat of large contributions. This case involves contributions limited in amount, by the legislative policy, to $1,000 per person. There can be no appearance of corruption,

Ferre suggests, from post-election contributions which can be no greater than pre-election contributions. A contributor has the right to express his support for a candidate with financial aid one month before the election, one day before the election, one day after the election, or one month after the election -- so long as the limit on contributions is not exceeded. No one moment in this spectrum can logically be viewed as more corrupting than any other.

There is also another problem with these interests of the state. In FEC, the Court found that the applicable statute could not survive a constitutional challenge because of its overbreadth. The Court emphasized:

> We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct.

84 L.Ed.2d at 472.

So too, the present statute, by banning all post-election contributions, paints with too broad a brush. It assumes that all contributions to defray post-election deficits can be viewed as having corrupt motives. But the United States Supreme Court has explained:

> Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the first amendment. The exception relates to the perception of undue influence of large contributions to a candidate. (emphasis added).

Citizens Against Rent Conrol v. Berkley, 454 U.S. 290, 296-97 (1981).

Thus, the Buckley court permitted the regulation of large contributions because a balance could be drawn between their efficacy as speech and the governmental interest in avoiding the appearance of corruption. But, rigorous scrutiny of the balance drawn by the legislature is mandated:

> Given the important role of contributions in financing political campaigns, contribution restrictions would have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing resources necessary for effective advocacy.

Buckley v. Valeo, 424 U.S. at 21.

An across-the-board ban on post-election contributions does just this -- prevents full advocacy at critical stages -- because a candidate must budget his campaign to avoid incurring a deficit. No matter what exigencies arise in the course of political debate, the campaign must end before it is over.

These proscriptions plainly discriminate (i) against poorer candidates who cannot afford to pay campaign debts from their personal wealth, and (ii) against those with less popular views who must spend more to convince voters to support their positions on the issues. The First Amendment exists, of course, to protect less well-heeled and unpopular candidates, as well as those who are rich and popular. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964), (First Amendment protects unpopular views from suppression).

The infringement of speech here, which is justified on the ground that it will avoid the appearance of corruption, is not sufficiently compelling to bar post-election contributions. Certainly it lacks compelling force merely to prohibit a candidate in a one-week municipal run-off election from reducing a post-election deficit.

As to the asserted desire for identifying contributors before the vote, the state's authorization for political action committees makes the argument hollow. In FEC, the Court was faced with a statute limiting the amount of authorized expenditures for candidates by political action committees ("PACs"). The Court struck down the expenditure limitation. Explicit in its holding was the Court's view that the freedoms of speech and association cannot be impaired by expenditure limitations on groups comprised of numerous and undifferentiated contributors. Nor can the number of PACs be limited, even if created for a single candidate or issue.

The district court overstated the case for contributor disclosure, given the state's authorization for unlimited numbers of political action committees. Correlatively, it understated the constitutional underpinning over which a compelling state interest must prevail.

D. Narrowly drawn restrictions.

Even if the governmental interests are found to be compelling, it is still necessary to determine if the reach of

the restrictions on speech are narrowly enough drawn. The ones at issue in this case are not.

Ferre believes Florida's statutory ban on post-election contributions stands alone in the nation. Certainly the Federal Election Campaign Act, for the federal level, expressly permits post-election contributions to defray deficits. 2 U.S.C. §441(a); 11 C.F.R. §110.1(g)(1)(1983). Some states do limit the amount of contributions which can be received after a certain period in the campaign, and then limit post-election contributions for deficit retirement to the amount previously contributed by each individual. E.g., N.J. Stat. Ann. 19:44 A-18. This form of legislation adequately combats the allegedly "improper influence which a contributor gains when he is able to give a candidate a large contribution near the end of the campaign." Common Cause v. New Jersey Election Law Enforcement Commission, 377 A.2d 643 (N.J. 1977) (emphasis added). There is no need for Florida to bar all post-election contributions when models of a less restrictive nature exist. See also, Col. Rev. Stat. Ann. §1-45-109 (Supp. 1982); Ha. Rev. Stat. §11-213(c)(1982); N.Y. Elect. Laws §14-108 (McKinney 1983).

It follows that the means selected by the Florida legislature are not the least intrusive of those available. Yet they must be to withstand the close scrutiny required. See Winn-Dixie Stores, Inc. v. State, 408 So.2d 211 (Fla. 1981).

In fact, the election laws of Florida already contain a less restrictive means of averting corruption and the appearance of corruption. They require periodic reports, both before and after elections, regarding campaign finance committee activities. See section 106.07(5), Florida Statutes (1981). Thus, even if the goals are assumed to be compelling, the legislature may not constitutionally advance its goal of identifying contributors and reducing corrupting influences of contributions by banning, and criminally penalizing, all post-election contributions regardless of their size.

Instructive on this issue is this court's recent decision in Winn-Dixie Stores, Inc. v. State, supra. There the court considered a constitutional challenge to a provision of the campaign finance law which limited the amount of contributions to any political committee supporting or opposing an issue referendum. The court agreed with the state that two compelling interests (the same as those here) were promoted by the statute. When the statute was given rigorous scrutiny, however, it was found unconstitutional because it was not closely enough drawn to avoid an unnecessary abridgment of associational freedoms.

In Winn-Dixie, the court emphasized the practicalities of politics by observing that, in light of the freedom given PACs, the public would see "only the innocuous names of the different committees, and not the identities of the underlying

contributors." Id. at 213. That truism is no less telling in a candidate selection process than a referendum vote. The reasoning of the court is universal. Political action committees do exist, with state approval, and the absolute ban on post-election contributions ignores that reality. While these statutes severely impact First Amendment speech, at best they can increase pre-election disclosure of contributors only to a marginal, non-compelling degree.

III. Ferre's post-election receipts were not "contributions."

Section 106.011(3)(a), Florida Statutes (1981), defines the term "contribution" for purposes of the election finance law as a "[transfer] made for the purpose of influencing the results of an election." A post-election contribution, by its nature, can not influence the result of an election. The election is over.

The district court rejected this plain reading of the law for its intended purpose. The court shuffled words in this statutory section to arrive at a conclusion that "contribution" means monetary transfers used for the purpose of influencing a "candidate," rather than an election. Of course, putting this gloss on the statute begs the question and assumes the answer.

The statute calls for internal inconsistency, for the Constitution will not tolerate imprecise regulation in an area so closely touching the most precious of all First Amendment freedoms. See N.A.A.C.P. v. Button, 371 U.S. 415 (1963). To be internally consistent, a contribution to influence the result of an election must occur before the election takes place. (We are not here dealing with a pledge for later contributions, of course.)

Yet another consideration intrudes on the analysis, however, making even more impermissible the mere shifting of statutory verbiage. This statute imposes criminal penalties in

an area permeated by First Amendment interests. For that reason, its provisions may not be unconstitutionally vague or overbroad in the course of restricting those First Amendment freedoms. See Buckley v. Valeo, 424 U.S. at 41-42. These policy concerns, in fact, led the Court in Buckley to determine that expenditures, as defined by the statute in that case, must be viewed as limited to those "advocating the election or defeat of" a candidate, in order to be constitutionally certain. 424 U.S. at 43. See also, United States v. National Committee for Impeachment, 469 F.2d 1135 (2d Cir. 1972).

By making criminal all post-election contributions, regardless of motivation, the statutes here penalize conduct through civil and criminal sanctions without reference to the limiting principals of intent or motive. It is easy to see how a mayoral candidate in a one-week municipal election, with only two or three days to raise funds, could inadvertently incur a campaign deficit. Compare, Johnson v. Harris, 188 So.2d 888 (Fla. 1st DCA 1966), where the court explained that deficit financing under a prior Florida campaign finance act was not an infraction calling for the imposition of statutory penalties without proof of a knowing violation of the act.

The campaign finance law can not be used to avoid the requirements of proof necessary to establish criminal conduct. See, United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974). By automatically defining all post-election contributions as

meaning "to corruptly influence a candidate," the district court has created a general intent crime in an area impregnated by First Amendment concerns. This does violence to the general rule that penal sanctions must be strictly interpreted, and in this context it is simply not constitutionally permissible.

IV. The mandatory double fine of section 106.08(5) is unconstitutionally excessive.

The district court developed two justifications to impose on Ferre a $70,000 fine under section 106.08(5), Florida Statutes (1981). First, because the statute reads that a violator "shall" pay to the state a sum equal to twice the amount contributed, the district court read the statutory language literally to mean the penalty was mandatory.

The word "shall," however, does not mandate a non-discretionary penalty under the test which is appropriate here:

> It is well established that whether 'shall' is mandatory or discretionary will depend upon the context in which it is used and the legislative intent expressed in the statute.

Bermudez v. Florida Power & Light Co., 433 So.2d 565, 566-67 (Fla. 3d DCA 1983), rev. denied, 444 So.2d 416 (Fla. 1984). When the word "shall" is used by the legislature to proscribe the action of a court,

> [it] is usually a grant of authority and means 'may' and even if it be intended to be mandatory it must be subject to the necessary limitation that a proper case has been made out for the exercise of the power.

Fagan v. Robbins, 96 Fla. 91, 117 So. 863, 866 (1928). While the use of the word "shall" may be indicative of legislative intent, it is not an impregnable barrier to judicial modification if the circumstances so warrant. The courts have discretion to evaluate this penalty provision in terms of its purpose and reasonableness.

Second, the district court found that the penalty was reasonable, not excessively harsh as the trial court had ruled, because it merely doubled the amount of contributions received and this court had previously sustained a treble, or greater, sanction.

The test of a fine's reasonableness or excessiveness under Article I, Section 17 of the Florida Constitution, is found in Amos v. Gunn, 84 Fla. 285, 364, 94 So. 615, 641 (1922). A fine is not

> excessive in violation of the Constitution unless it is plainly and undoubtedly in excess of any reasonable requirements for redressing the wrong.

This is not a mathematical test in which twice and thrice the sum is reasonable but more is not. The issue is whether the penalty is reasonable when measured by the purpose for its enactment. The Amos prescription requires a threshold recognition that, unlike penalties found reasonable in a commercial context (such as that identified below), what is involved here is First Amendment political speech.

In considering the possible goals for this speech-penalizing provision, it is obvious the legislature did not (and could not) intend a minimization of speech. It can not be consonant with the purpose of the penalty, therefore, to create a direct relationship (as the district court suggested) between the amount of the fine and the amount of speech made possible by unrefunded contributions.

Nor could the legislature have intended to put teeth into Florida's no-deficit campaign finance law by the intimidation factor which this penalty imposes. The legislature had already created a mechanism to punish all campaign violations through a series of penalties, and those proscriptions deal with offenders more rationally by taking into account a host of factors going to intent, gravity of the offense, the offender's prior history, and the like. See section 106.265(1), Florida Statutes (1981).

Finally, of course, there can be no rationale for the penalty in terms of assuring repayment of funds not actually utilized by the candidate. Repayment to contributors would resolve that goal without, as here, rewarding the state's general revenue fund for the candidate's accumulation of an excess.

In sum, this provision of the law serves no purpose but to chill the exercise of political expression. The use of improperly-accepted funds to amplify speech may be wrong, but the end product, the amplification of speech, is not harmful. A penalty of this magnitude should not be sanctioned.

Conclusion

Abstract idealism for a pay-as-you-go election system is praiseworthy, but the state's ban on deficit campaign financing has very practical limitations. When that goal is overladen with financial penalties for inadvertent accounting, and when it cuts into the heart of the First Amendment freedom to engage in political expression at the most critical time in an election campaign, the mechanisms adopted become excessive and must be stricken. This is particularly true in the context of a municipal run-off election, where the finalist candidates have virtually no time to have their say.

Maurice Ferre was impermissibly fined under statutes which lack sufficiently compelling interests to impinge on his freedom of expression. By curtailing the season for the presentation of his views and penalizing an inadvertent campaign overrun, these statutes violate the tenets announced and re-announced by this court and by the United States Supreme Court. The decision of the district court should be reversed, and the statutes at issue here should be declared unconstitutional.

Respectfully submitted,

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