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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

-vs-

CASE NO. 75,778

JACK P. DODD,

Appellee.

_____/

APPELLEE'S ANSWER BRIEF

On Certified Question from the
District Court of Appeal, First District

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STATEMENT OF THE CASE AND FACTS

Appellee Jack Dodd agrees with and accepts Appellants' statement of the case and facts.

SUMMARY OF ARGUMENT

The trial court correctly ruled that the Florida Legislature's enactment of Florida Statute Section 106.08(8) completely forbidding the solicitation or acceptance of campaign contributions by candidates for legislative or statewide office during a session of the Legislature, is an unconstitutional abridgement of fundamental First Amendment rights. As noted by the Circuit Court, the statute goes far beyond what might be justified in the exercise of the State's legitimate police power in that even though the interest sought to protected is compelling, the means chosen are not narrowly tailored to achieve that end. The statute, in an ostensible attempt to curtail "strategically timed contributions" (i.e. contributions given or solicited with a quid pro quo intent), not only fails in fact to actually remedy such, but in fact achieves the egregious result of stifling important political competition and denies completely a coveted and protected form of free and essential speech. Those prone to be corrupted simply change the timing of their ill-motivated campaign financing activities; while the legitimate and necessary political fund-raising activity of citizens and candidates who have no ulterior motives or quid pro quo potential to offer is completely shut down.

The State completely ignores the fundamental contention in Buckley vs. Valeo, 424 US 1 (1976), upon which the Circuit Court correctly premised (in part) its ruling that the statute was unconstitutional; that is, that the actual act of making a campaign contribution, undifferentiated by however small or large the dollar amount of the contribution might be, is in and of itself a form of symbolic expression protected by the First Amendment to the United States Constitution. The state also overlooks the Circuit Court's consideration of the fact explicitly recognized by the Supreme Court in Buckley that the acquisition of campaign funds is necessary for effective advocacy.

The statute is overly broad in that it subjects not only incumbent candidates such as members of the Legislature who might (hopefully only in small numbers) be subject to ill-motivated influences on their performance, but also subjects non-incumbent candidates to the ban, even those not even running for the legislature, such candidates not being prone to be influenced since at that time they have no influence over the legislative process to offer. The statute also serves to prohibit a candidate from contributing to his own campaign during session. The Buckley court explicitly recognized that the state interest in avoiding the potentials of corruption are not compelling enough where a candidate funds himself, and struck down laws limiting how much a candidate could give to his own campaign. While Florida law in one portion allows a candidate to contribute

unlimited amounts to his campaign, section 106.08(8) completely denies him of that right during the session, such having a critical effect on the self supporting candidate who can only afford to give himself small amounts of money spaced out over time to maintain his campaign efforts. Furthermore, as noted by the trial court, Supreme Court Justices, who are completely removed from the legislative process, are likewise deprived of their rights under the prohibition. The state makes no showing that vice on the part of the Court is any more likely during the term of the Legislative session than at any other time when contributions can be freely solicited and accepted. The application of this law to the Supreme Court is simply further evidence of overbreadth.

The statute suffers from a bona-fide vagueness because of its imprecision of when and how it will be enforced, and the fact that it's application can be manipulated by incumbent office holders. As noted by the trial court, the law restricts contributions whenever the Legislature is in regular session or special session; application of the statute thus producing uncertainties since there is no way to fully predict when, or how many, or for what duration sessions will be held in a given year. The statute is further vague in that it offers no definition of "solicit". A candidate in the campaign process "solicits" many different types of support. If a candidate, during the term of a Legislative session, simply asks for (solicits) "support for my campaign", this request for support may be construed by the

hearer as a solicitation for money. No doubt that this concern will have a **chilling effect** on the candidate's communications and speech as he may be deemed to run afoul of the law simply by broadly requesting "support".

The statute exempts Candidates for special election to vacant seats from its application yet espouses no reason why these candidate's potential conduct is any less of a concern than that feared from non-incumbent candidates not running for legislative office. This consideration eviscerates the State's contention that since the Legislature is at the "core of government, everyone should be "equally" restricted by the statute.

Although the Legislature should be afforded a due degree of deference and the reasonable **presumption** that their enactments are constitutional, the Circuit Court's determination that the statute is unconstitutional should be afforded great deference upon review as well, as it's determination is not based on a second guessing of the wisdom or folly of the legislative Act, but rather on its resulting unconstitutionality, an analysis within the judiciary's purview to make. The trial court's judgment of unconstitutionality should be upheld.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT FLORIDA STATUTE SECTION 106.08(8) IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

The legislative motivation in enacting section 106.08(8) Florida Statutes, was the Legislature's belief that it was being perceived by the public as a body susceptible to or appearing to be susceptible to, corruption, by being unduly influenced in its duties by the solicitation or acceptance of massive campaign contributions during the legislative session. Although the state's interest in preventing corruption, or the appearance of such, within the Legislature is important, the statute is not narrowly tailored to achieve that end. The fact that the law is effective only during a session of the Legislature, shows clearly that the state perceives the particular evils to primarily exist, for purposes of regulation, amongst those actively involved (i.e., Legislators) in the legislative process. However, in reality the law has little or no real effect on the evils sought to be guarded against, such contention having been recognized by the trial court.

There is no question that the issue at hand directly impacts upon protected rights of free speech and association. In order for speech to be **effective**, especially in the context of a political campaign, it necessarily must be amplified *so* that the message to be conveyed can be communicated to a wide audience.

This amplification requires the expenditure of money raised from contributors who wish to hear and further spread the communication. As noted by the United States Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976) at page 19:

> A restriction on the amount of money that a person or group can expend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. . . . Money is essential for effective communication in a political campaign . . . Contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.

In the instant situation the dispute is not over dollar amount limitations on contributions, which may be lawfully regulated; rather the dispute here focuses on a prohibition of any contributions of any amount for a period of time basically uncertain and unpredictable (the legislative session has been well known to extend at times beyond its designated sixty day scheduler and the Legislature could be recalled into session at any other time unknown and unscheduled and for an indefinite duration).

A. THE PROHIBITION COMPLETELY BANS A CONSTITUTIONALLY RECOGNIZED AND PROTECTED FORM OF SYMBOLIC EXPRESSION

The State contends that this total and complete ban on any contributions for a period of time is no more restrictive than, and is merely another form of, a "limitation" on campaign

contributions no different than the dollar ceilings on such already imposed and constitutionally upheld. What the state completely ignores however, and as explicitly recognized by the Circuit Court as well as the United States Supreme Court, is that a campaign contribution in and of itself, undifferentiated as to its size or lack thereof, is a constitutionally recognized and protected form of symbolic expression.

As observed by the Supreme Court in Buckley:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution . . . 424 U.S. at 21 (emphasis added)

As can be gleaned from the Supreme Court's repeated reference to the "symbolic" speech/communication component of a campaign contribution, the right to exercise of this activity is not only vested in the recipient candidate, but also quite clearly is a right of the maker of the contribution, i.e., the citizen desiring to make such a contribution to the candidate of his choice. "The 'free speech' component of a contribution lies in the 'symbolic expression of support' it evidences".

Republican National Committee v. Federal Election Commission, 487 F.Supp 280. at 286, (1980) affirmed, 445 U.S. 955 (citing Buckley). Thus the Florida law which would serve to abolish this right affects not only the candidate, but the right of the citizenry to constitutionally express themselves as well.

The potentially corrupting influences of large campaign contributions are not at issue here. The courts have given due recognition to these concerns by upholding dollar amount limitations, as such "entails only a marginal restriction upon the contributor's ability to engage in free communication" Buckley at 20. The Buckley court noted that contribution ceilings merely "require candidates and political committees to raise funds from a greater number of persons . . . rather than to reduce the total amount of money potentially available to promote political expression" at 22. The Florida law now under scrutiny would serve to prohibit even this ability, thereby undermining the basic associational rights of large numbers of individual citizens (not just large individual donors) to band together in support of a common cause.

The State argues that the statute does not restrain communication on substantive political matters, criticism of incumbents, or other political debate; but it virtually ignores the crucial factor that it requires funds to effectively engage in such activities. If a candidate cannot seek or accept the contributions necessary to effectively express himself (as noted by Justice Marshall in his concurring in part and dissenting in

part in the Buckley case at 288 "one of the points in which all members of the court agree is that money is essential for effective communication in a political campaign"), then it "is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system". F. E. C. v. National Conservative Pac, 470 U.S. 480 at 493. Without the ability to raise even small amounts of money through even the symbolic acts of communication represented thereby, the necessary amplification cannot be had.

B. THE PROHIBITION IS INEFFECTIVE IN ITS APPLICATION TO THOSE WHOSE EVILS ARE SOUGHT TO BE SAFEGUARDED AGAINST AND ONLY SERVES TO WORK A HARDSHIP ON THOSE NOT A PART OF THE PROBLEM

In reality, the inability to access contributions during the term of the prohibition is only a real problem for the less monied candidate, who might usually be the challenger or the political newcomer, collecting small contributions as he goes in order to pay for next day's expenses on the campaign trail, and who can only afford to slowly disseminate his message; it may not be a problem at all for the already well financed incumbent candidate who has previously bankrolled large contributions, having perhaps been astute enough to "strategically re-time" his receipt of funds to arrive prior to the session.

The potential of the quid pro quo contribution is every bit as great immediately prior to the session, or when it is promised to be given immediately thereafter, as such contribution being

made during the time of session. To think that such tainted contributions won't have the same effect if given immediately before or promised to be given immediately after session, as any which might have been made during the session, is nothing short of naive. Those who are already susceptible to being influenced by these contributions simply alter their timing. Meanwhile, the "outsider" candidate who has no influence to be bought, and therefor has not attracted such tainted money, gets no such type of "pre-session" funding to tide him through the prohibition period.

The State seems to suggest that the "inconvenience" caused by not being able to collect funds during the session can be easily remedied by a candidate obtaining an "arms - length loan" such as from a bank, prior to the session which could be used to fund advocacy of the candidate's political position during the session. This may be a fine alternative for the candidate who already has substantial financial resources or potential with which to secure such a loan, but it is certainly not a viable or acceptable alternative for the average citizen candidate who must rely on the day-to-day voluntary contributions from ordinary citizens to finance his campaign. It is very doubtful that many institutions would loan a grass-roots candidate any reasonable sum on the security that such a loan might be paid back through door-to-door campaign fundraising, especially when such can't even be done for at least a sixty day period.

In the meantime, the incumbent Legislator will also have

abundant and free media access to the populace, such media being concentrated on that incumbent by virtue of his legislative position, whether or not that media is used to discuss legislative matters or for other political purposes. Jack Dodd and those like him do not request nor expect to receive that same degree of media exposure which naturally comes to incumbents with the legislative session; however, by depriving him of the otherwise constitutional right to raise money in order to pay for at least some media communication during this time works only to further disadvantage his cause and results in an obviously discriminatory impact. Without the capability of raising money during that time to pay for disseminating the message, both Jack Dodd and the citizenry will be deprived of the opportunity to effectively speak out about the issues of the day at a time when they are most crucially important, that is, during the time the Legislature will be defining and addressing those issues.

The statute critically affects the right of any citizen to effectively speak out about the conduct of his Legislator during the term of the session, when the desire and the guarantee to speak out would have its most critical impact. "[T]here is practically universal agreement that a major purpose of the [First] Amendment was to protect the free discussion of governmental affairs" First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)). As noted in Sadowski v. Shevin, 345 So.2d. 330 (Fla. 1977) at 337, "The public's need to know is most critical

during an election campaign." A citizen who becomes infuriated at the activities of his Legislator and who desires to make even his constitutionally protected symbolic act of communication by contributing to that Legislator's opponent in order to better able that non-incumbent opponent to get the message out to others at the critical time, cannot do *so.* The law also stymies such a citizen who might then and there decide to become a candidate himself, as neither he nor others similarly sympathetic will be able to freely associate themselves in contributing towards a campaign at that point designed to bring to light the conduct then occurring in the Legislature.

C. THE STATUTE UNCONSTITUTIONALLY PROHIBITS A CANDIDATE FROM EVEN COMMITTING HIS OWN PERSONAL FUNDS TO HIS CAMPAIGN DURING THE SESSION.

The law further unconstitutionally prohibits a candidate from contributing to his own campaign efforts, out of his own personal funds, during a legislative session. Florida law, as noted by the trial court, holds that the deposit of monies by a candidate in his own campaign account constitutes a contribution and must be reported as such, and that all personal monies used by a candidate must be first "contributed" to his campaign account. While perhaps the wealthy candidate will not be hampered, as he can front himself substantial monies to help carry him through the session, a citizen candidate not *so* financially fortunate, who is already on a tight personal budget while campaigning, cannot *so* circumvent the law by contributing

to himself large funds in advance. He cannot even buy himself a tank of gasoline out of his own pocket to get to his next campaign stop, as such would be a "contribution". The **Buckley** court, at 53 noted that

> The core problem of avoiding [undisclosed and] undue influence from outside interests has lesser application when the monies involved come from the candidate himself . . . the use of personal funds reduces the candidates dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which [The Act's] contribution limitations are directed.

In fact, a candidate's contribution to his own campaign may even work to stem the flow of outside contributions to him as people may feel that he does not need their support and those with questionable intentions may feel that their contributions would not buy them any influence. Consideration of the law's application to prohibit a candidate from even giving basic expense money to his own campaign during the session, as he is able to financially manager shows once again the clear overbreadth of the statute.

The **Buckley** court squarely held that restrictions on a candidate's use of his own personal monies in his campaign efforts were unconstitutional, and that no limits could be placed thereon. The present Florida Statutes seem to recognize this provision and expressly does not impose any **ceilings** on a candidate's maximum contributions to his own campaign. Yet, except for the already wealthy candidate who can place his own

contribution up front, Florida Statute Section 106.08(8) will not allow a candidate to utilize his own money during the session even though the corrupting influences simply don't exist in those circumstances. Other than a lack of careful thought as to how this statute would apply, what other reason can there be to support this clearly unconstitutional result?

D. THE FACT THAT THE LAW MIGHT ALLOW INCUMBENTS TO CONCENTRATE ON THE JOB THEY ARE SUPPOSED TO DO ANYWAY DOES NOT MAKE IT CONSTITUTIONAL

The contention has been raised by the State early on, in further support of the statute, that imposition of the law allowed a dedication and refocusing of a Legislator's time and resources to the legislative matters during the session rather than to campaign activities. The State makes further note to this contention at page ten of its brief in reference to why the law should apply to cabinet members, stating that "time spent on the campaign trail in pursuit of personal political contributions is time lost for the achievement of legislative support for their respective statutory responsibilities" and "both the Florida public and its Legislature are entitled to the undivided attention of the Governor and Cabinet members during the few weeks when the Legislature meets."

While the law might seem laudable in its attempted effect to require incumbents to give greater concentration to their tasks at hand, such does not make it constitutional, and it must be noted that the law only stops fund raising; the incumbent who has

already banked his money is not at all restricted from other distracting campaign activities during session. These office holders are already elected, sworn, and paid to do their work; the citizenry is entitled to expect that from them without having to give up their own constitutional rights in an effort to make these officials do their jobs. The challenger, meanwhile, who has no legislative duties to perform and from which to be distracted, is further relegated to the sidelines because his effective competition for the incumbent's job is crippled for lack of funds, all the while the incumbent is building on his advantage through the naturally occurring free media spotlight. The outsider of course, unless already well financed, can't even raise money to gain his own exposure.

B. THE STATUTE'S MOST GLARING EXAMPLE OF UNJUSTIFIED, UNCONSTITUTIONALLY OVERBROAD APPLICATION, IS IN ITS APPLICATION TO THE SUPREME COURT

Perhaps the statute's most egregious showing of overbreadth is the fact of its application to Florida Supreme Court Justices. The State sets forth an admittedly weak argument that this Court must not be exempted from the statute for the "fundamental reason that the Supreme Court is one of three parts of integral state government during the legislative session," and that "if the system is to function as a whole, each of the three branches should have the same integrity and be subject to the same even handed restrictions". The State contends that Justices who are up for retention, like Legislative and Cabinet candidates, may be

subject to lobbying pressures and special interests for which quid pro quo contributions might be offered or threatened. There is no showing whatsoever that the potential for corruption on the Supreme Court is any more likely during a legislative session than at any other time. While official legislative acts are focused within the time frames of the session, such is not at all the case with the Supreme Court. The mere happenstance of a legislative session has absolutely no bearing on the conduct and activities of the Supreme Court which occur year round. There is no evidence alleged, nor could there be, that the great and weighty decisions the Supreme Court is called upon to make are any more or less substantive or important during the term of the Legislature than at any other time.

Indeed, the prohibition on acceptance of contributions by a Justice of this court seeking retention, during a term of the Legislature, without any rational basis for such prohibition, may work one of the worst injustices of the law of all. By example, the Legislature while in present session will very likely be called upon to once again consider legislation on highly controversial social/moral issues, such as abortion, an issue upon which this court was recently called to address. While attention is focused on the Legislature pertaining to this issue, there may be those persons who feel aggrieved by this court's previous opinions on such where past legislative efforts on the subject matter were ruled upon as to their legality by the court. A Justice currently up for retention may find himself to be

specifically targeted for defeat during this time period by those persons who object to that Justice's or the court's past legal opinions; those persons may solicit and contribute all the funds they may desire towards the discrediting and ouster of that Justice since there is no "candidate" running in opposition. Yet the particular Justice will be prohibited from raising money even in his own defense to counter such pernicious activity, at the very time when the attacks upon him (or her) are *so* magnified.

II. THE LEGISLATURE MAY ONLY IMPOSE RESTRICTIONS ON CONSTITUTIONAL RIGHTS WHERE A COMPELLING STATE INTEREST EXISTS, AND THE IMPOSITION MUST BE NARROWLY TAILORED SO AS TO NOT RESTRICT RIGHTS WHERE THE INTEREST DOES NOT IN FACT CLEARLY EXIST

Appellee Jack Dodd does not dispute that the Legislature may permissibly impose restrictions on political activities even where such restrictions might interfere with otherwise basic constitutional freedoms, where a compellingly important state interest is at stake and the means are closely drawn to avoid unnecessary abridgment of such freedoms. The key, however, is that the means must in fact be the least intrusive available and adequate for the purpose when it comes to such rights, and that the means, while perhaps well intended, are not ***so*** broad as to sweep away those rights that do not pose the danger that has prompted regulation.

The fact that an evil may exist somewhere does not justify the imposition of a counteractive measure which applies broadly

into areas where the evil and the interest do not exist. Especially in the area of First Amendment rights,

> Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand and must avoid infringing on speech that does not pose the danger that has prompted regulation. F. E. C. v. Massachusetts Citizens For Life, 479 U.S. 238 (1986) at 265.

In the First Amendment area, government may regulate with narrow specificity. See, Hines v. Mayor and Council of Borough of Oradell, 48 L.Ed.2d. 243 (1976) "Legitimate legislative goals cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Elfbrandt v. Russell, 384 U.S. 11 (1966). "Precision of regulation must be the touchstone in an area so touching on our most precious freedoms" NAACP v. Button, 371 U.S. 415 (1963) at 438.

As noted by the Supreme Court in Lamont v. Postmaster General, 381 U.S. 301 (1965)

> In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose. (Emphasis added)

Given the foregoing basic tests and considerations, the court must scrutinize the specific evil thought to generally exist and then determine if it exists in the situation of a citizen such as Jack Dodd (who is not an incumbent Legislator, does not intend to become one, and who presently has no bearing at all upon, nor influence to wield over, the legislative

process) to a degree sufficiently compelling to justify the abridgment of his rights. The existence of the evil some place else does not, itself, justify the restrictions of everyone's rights. Where the concerns underlying the regulation are simply absent,

> The rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the compelling state interest to justify any infringement on First Amendment freedoms. F. E. C. v. Massachusetts Citizens for Life, supra at 263.

The evil sought to be eliminated is the actuality or appearance of corruption in the Legislature. This contention is supported by the fact that the prohibition applies only during sessions of that body. Therefore the legitimate governmental purpose in regulating that evil exists only as pertains to the Legislative arena. Applying the restriction broadly to someone such as Jack Dodd not related to that process is unconstitutionally overbroad. It is clear that Jack Dodd's conduct is otherwise constitutionally protected, and it is clearly allowed to exist at any time other than the legislative session. It should be further evident that Jack Dodd's conduct and the mere happenstance of a legislative session have nothing whatsoever to do with each other. Legislation is unconstitutionally broad where it is susceptible of application to conduct protected by the First Amendment. Dandridge v. Williams, 397 U.S. 471 (1970).

While election law reforms are the province of the

Legislature, the Legislature may not without sufficient compelling justification, abridge constitutional rights in the process. While the state is correct in its reference to Holley v. Adams, 238 So.2d. 401 (Fla. 1970) that the judiciary will not nullify legislative acts on grounds of policy or wisdom no matter how wise or unpolitic they might be; it neglects to point out the remainder of that truism that such is correct "so long as such legislation squares with the Constitution". As further noted in Holley, at 405,

> . . . to the extent, however, that such an act violates expressly or clearly implied mandates of the Constitution, the act must fall, not merely because the Courts so decree, but because of the dominant force of the Constitution, an authority superior to both the Legislature and the Judiciary. (citing to Amos v. Matthews, 126 So. 308 (1930)

Unreasonable or unnecessary restraints upon the elective process are prohibited by the Florida Constitution. Treiman v. Malmquist, 342 So.2d. 972 (Fla. 1977).

The State makes no showing of any bona - fide connection between any perceived or potential evil on the part of Jack Dodd or those similarly situated (non-incumbents) and the law alleged to prevent such, and the happenstance of the legislative session. The fact that the prohibited activities can take place at any time other than the session only goes to show that the problem is perceived to be with those integrally involved in the legislative process during the session, the Legislators. The State misapplies the observations in Buckley that "the dangers of

corruption and the appearance of corruption apply with equal force to challengers and incumbents". The **Buckley** case, as heretofore previously emphasized, recognized the Constitutionally protected act of symbolic speech evidenced by a campaign contribution, an act which the Florida Legislature would outlaw for a period of time. The **Buckley** court in pertinent part was concerned with the law placing a maximum amount on individual dollar contributions, not one completely outlawing the contribution itself for any period of time. The court correctly recognized the potentially corrupting impact of large single donor contributions being given to incumbents or challengers, and allowed that such was a reasonable restriction given that it would only require candidates to seek out more sources of funding, i.e., associate more people to their political causer accepting smaller contributions from this wider spectrum rather than being beholden to a lesser number of potentially more influential large amount contributors. The Florida law, at least for a period of time, prohibits this aspect of associational rights.

Not being able to specifically say why the concern should be so compelling solely at the time of a legislative session in its application to non-incumbents not even involved (or even intending to be involved) in the Legislature; the State alludes to some sort of a public-policy "fairness" argument that **incumbents** should not suffer the funding deficit which would result if their challengers are permitted to actively solicit and

collect campaign funds while they (incumbents) attend to state business; that incumbents are especially tied to their public offices in the Capitol during the legislative session while non-incumbents may dedicate themselves to enhancing their "war chests", and that the statute therefor reasonably withholds the unfair advantage that would be given to those office seekers whose public commitments are not in the Capitol with the incumbents. In almost the same breath, in down playing Jack Dodd's plea that incumbents have an "unfair advantage", the State notes that the Constitution does not require that state law "level the playing field", and that as long as it has a legitimate public purpose, a campaign law should not be required to remedy pre-existing inequalities between candidates. It bears noting that the pre-existing inequalities when to the disadvantage of the non-incumbent are evidently taken to be of a much lesser concern than the "unfairness" that might result to a well known incumbent if he had to do the job he was paid for and elected to do while his challenger is out trying to gather support. Fairness and equality, it appears, is only an important consideration where it looks like the incumbent might be at a disadvantage.

III. A "TEMPORARY" DEPRIVATION OF CONSTITUTIONAL EXERCISE OF A RIGHT IS NOT JUSTIFIED BY THE CONTENTION THAT IT MAY BE EXERCISED AT ANOTHER TIME

The state's attempt to justify the statute's prohibition on fundraising during the session with the contention that it is

only temporary and that the solicitation and acceptance of the contribution can be made at another time, fails to cure the deprivation of the right to the exercise of the symbolic act of the contribution which will have already taken place. One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. Schneider v. State, 308 U.S. 147 (1939), Grayned v. City of Rockford, 408 U.S. 104 (1972). The Florida Supreme Court, in Sadowski v. Shevin, 345 So.2d. 330 (1977), in striking down an analogous provision restricting expenditures for certain forms of speech to a set time period, noted:

> The statute, as it is before us, denies to candidates their fundamental right to speak to political issues and to advocate their candidacy by making use of advertising and various effective media and in rented halls until they are within the described political season. The fact that they may spend unlimited amounts for such purposes in the designated time period does not cure the infirmity nor make the speech restraints any more acceptable. at 332.

The Sadowski court clearly viewed the restraint on a form of protected communication at any time to be unconstitutional; no distinction exists between the communication of the type addressed in Sadowski and the communication which is made by way of the undifferentiated symbolic act of a contribution.

"Careful consideration must also be given to whether the challenged regulation is either more inclusive or more burdensome than necessary to further legitimate governmental purposes." Baldwin v. Redwood City, 540 F.2d. 1360 (1976) at 1367, cert.

denied 431 U.S. 913. There is no evidence that Jack Dodd or persons similarly situated are part of the "problem at hand" as related to the Legislature or that Dodd and those like him pose the danger that has prompted the regulation. Failing such, the law seems only to desire the "bright-line rule", already rejected by the Supreme Court. The question should not be whether some support for the regulations may be adduced, by reference to evidence in the record and a claim of reasonable inferences or concerns, but whether the regulations at issue are unnecessarily restrictive for the purpose they were designed to serve. A Quaker Action Group v. Morton, 516 F.2d. 717, 723 (1975) (U.S. App. D.C.)

IV. THE STATUTE SUFFERS FROM UNCONSTITUTIONAL, VAGUENESS IN BOTH DEFINITION AND APPLICATION

Florida Statutes Section 106.08(8) is vague in definition and application and thus unconstitutional on this basis as well.

A. THE STATUTE'S VAGUENESS IN TERMINOLOGY INHIBITS FREE SPEECH AS CERTAIN SPEECH MIGHT BE MISUNDERSTOOD

The Statute suffers from vagueness in its use of the term "solicit". The term may be generally understood to mean "to ask" or "request"; the first definition in Webster's is "to ask or seek earnestly or pleadingly; to beg, to entreat; as "we solicit your support", "he solicited them for help". A candidate in the campaign process seeks and solicits many different types of support, including financial support, such as the support of a

voter support for his issues, moral support, and personal/voluntary labor support, etc.. If a candidate, during the time of a session simply asks for "support for my campaign" this request might be received and understood in any of these different contexts. A request for **"support"** might very logically be taken by the hearer to be a solicitation for money as such is a form of support. Has the candidate then violated the law since his request for help with his campaign has been understood to be a solicitation for monetary help? Such concerns no doubt have a **chilling effect** on the candidate's speech as he may unintentionally run afoul of the law by broadly requesting **"support"**, if some persons hearing the request take it to mean money support. Violation of the law can subject a candidate to both financial as well as criminal penalties. Due process requires that criminal statutes provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal. Where First Amendment rights are involved, an even greater degree of specificity is required.

The **Buckley** court, at **43**, in citing to **Thomas v. Collins**, **323 U.S. 516 (1945)** noted:

> Whether words intended and designed to fall short of invitation would miss that mark is a question of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and **solicitation** puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and

> consequently of whatever inference may be drawn as to his intent and meaning. Such distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels to hedge and trim. (Emphasis added)

The Buckley court further noted, in footnote 48:

> In such circumstances, vague laws may not only "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory application" but also operate to inhibit protected expression by inducing "citizens to steer far wider of the unlawful zone . . .than if the boundaries of the forbidden areas were clearly marked" (other citations omitted). And further "because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity" (citing NAACP v. Button, 371 U.S. 415.

Is it strictly unlawful and forbidden for a candidate, during a session of the Legislature, to solicit someone's financial support to be given at a later time such as in mid to late summer? Is a contribution mailed to a candidate prior to the legislative session but received during the session, through the vagaries of the U.S. mail, unlawful if then accepted by the candidate even though it was lawful when given? If a contribution is offered during the session but rejected by the candidate can that candidate lawfully at that time suggest that the contribution be re-given after the session? Such questions highlight the potential pitfalls of the statute's construction and how the statute might be arbitrarily or discriminatorily applied.

B. THE STATUTE'S VAGUENESS IN THE UNCERTAIN TIMING OF ITS APPLICABILITY HINDERS FREE EXERCISE OF CONSTITUTIONAL RIGHTS

The vagueness problems with the statute were also correctly noted by the trial court in regards to the application of the law whenever the Legislature is in session. "A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement." Southeastern Fisheries, Assoc. Inc. v. Department of Natural Resources, 453 So.2d. 1351, 1353 (Fla. 1984). Because of the uncertainty of how long a regular legislative session might actually last, the great possibility that it could be extended, and the complete uncertainty of when and for what duration special sessions could be called and manipulated, actions which were clearly lawful and constitutional when planned and executed may all of a sudden become unlawful due to the happenstance of a session being specially called or extended. Thus great uncertainty will exist on the part of those wishing to plan for and exercise their rights, as those rights allowed on one day may dissipate the following week. Subjecting these rights to the whim of a Legislative session will doubtless cause people to exercise their formerly fundamental rights in a more hesitating and chilled manner for fear of unintentional violation of the law. As noted in Buckley, such circumstances operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas where clearly marked. In the instant case,

the "clearly marked" boundaries may be subject to change at any timer thus providing little fair warning of when otherwise lawful acts become illegal.

V. THE STATUTE'S OWN EXCEPTION THAT CANDIDATES FOR SPECIAL ELECTION TO VACANT OFFICE ARE NOT SUBJECT TO THE PROHIBITION BELIES THE CONTENTION THAT THE LAW MUST APPLY "EQUALLY" TO ALL IN ORDER TO BE EFFECTIVE

The statute does not apply to candidates in a special election seeking a vacant office. Why are the potential risks of corruption considered any less in such a circumstance? A campaign for special election to a vacant office may involve incumbent and/or non-incumbent candidates. Clearly, any perceived risk of abuse is equally present, and perhaps even more so given the usually expedited special election process. Perhaps the argument is that there is an urgency to fill the vacant position; however is that position any different at all from those positions now subject to the prohibition? Surely if this exception is acceptable in the face of the targeted vices, then exception should clearly be had where the vices do not exist to a compelling degree, such as to non-incumbent candidates running for a non-legislative position. The state's argument that all candidates subject to the ban must be treated equally, since everything allegedly evolves around the "core" of the legislative session, must therefor fall, as clearly some exception and unequal treatment applicable to the same offices already exists. As the trial judge has now ruled the statute to be

unconstitutional and the burden is upon the State to show this Court otherwise, the State should be compelled to explain this exception to its own position.

CONCLUSION

It is clear that the situation at hand deals with an infringement upon the rights of free and effective speech, among others. The question is, does the regulation, when subjected to the close scrutiny required, achieve the ends sought by the most narrow and least intrusive means effectively available, without broadly stifling the fundamental rights and liberties of those not a part of the problem? The law quite obviously is aimed at a problem with the legislative process and not really the elective process, yet its effect on the elective process is substantial. As noted by the trial court, not only does Section 106.08(8) disrupt and hamper the election process, it also disintegrates the same. The constitutionally recognized symbolic form of speech represented by even a small contribution is completely denied.

The broad sweep and overbreadth of the statute is clearly evident when its application is considered on those removed from the legislative process. The law chills fundamentally protected and safeguarded Constitutional rights. The statute goes far beyond what might be justified in the exercise of the State's legitimate police power and is not drawn sufficiently narrow enough so as to avoid infringing upon the rights of those who should not be affected. In the interests of our vital Constitutional rights and privileges, this Court should adopt and uphold the ruling of the Circuit Judge, and strike down Florida Statute Section 106.08(8) as unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served by hand delivery on MITCHELL D. FRANKS! Esquire, Deputy Attorney General, Department of Legal Affairs, The Capitol - Suite PL01, Tallahasseer Florida 32399-1050 this 12th day of April, 1990.

TERRELL C. MADIGAN