OA 4-17-90

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

-vs- CASE NO. 75,778

JACK P. DODD,

Appellee.
_____/

APPELLANTS' INITIAL BRIEF

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

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STATEMENT OF THE CASE AND FACTS

This is an appeal by Defendants/Appellants, State of Florida, by and through Bob Butterworth, in his official capacity as Attorney General: Jim Smith, in his official capacity as Secretary of State; and William Meggs, in his official capacity as State Attorney, Second Judicial Circuit, of the trial court's Order finding Florida Statute §106.08(8) unconstitutional as violative of the First Amendment to the United States Constitution. The Plaintiff/Appellee, Jack P. Dodd, is a candidate for Republican nomination for Commissioner of Agriculture.

Argument was heard before the trial court, without testimony, on the petition for declaratory judgment, the parties' joint stipulation expediting the case for final hearing, and Defendants' Answer.

The case is before this court upon Defendants' Suggestion for Certification of Order Appealed to the Florida Supreme Court and the March 30, 1990 Order of the First District Court of Appeal certifying the case.

SUMMARY OF ARGUMENT

The Florida Legislature may constitutionally restrict the fund raising component of campaign activities for candidates for the legislature or statewide office during the legislative session to curtail strategically timed campaign contributions to both incumbents and office seekers. Florida Statute §106.08(8)

does not impermissibly curtail First Amendment activities but, for a two month period, qualifies those activities only to the extent that campaign contributions may be neither solicited or accepted. Nothing prevents an arms length "loan", such as from a bank, prior to the session which could be used to advocate a political position. Substantive First Amendment discussion on the merits of political, legal, and social issues may continue unabated for that interval.

The trial court too narrowly interpreted Buckley v. Valeo, 424 U.S. 1 (1976) and Sadowski v. Shevin, 345 So.2d 330 (Fla. 1977) when it determined Florida Statute §106.08(8) was not narrowly drafted to prevent alleged corruption in Florida government. The trial court did not fully appreciate the interrelationship between the three branches of Florida government, the vulnerability of incumbents and candidates alike to the corruptive influence of financial quid pro quo arrangements, and the crisis in public confidence in the electorate process.

The trial court erred when it determined that Florida Statute §106.08(8) fails to give adequate notice of conduct which is prohibited. The statute prescribes in plain language what is required by it. Legislature or statewide candidates may not solicit or accept contributions during the session.

The trial court erred when it determined that Florida Statute §106.08(8) produces unconstitutional uncertainty as to its timing. The legal notice required to call a special session provides reasonable notice to a candidate of the time at which certain of his campaign activities are to be limited.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT FLORIDA STATUTE §106.08(8) WAS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

The trial court relied extensively on Buckley v. Valeo, 424 U.S. 1 (1976) when it determined that Florida Statute §106.08(8) was unconstitutional. The state respectfully submits that the presumption of constitutionality which this law carries to this Court should be honored, Department of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So.2d 879 (Fla. 1983), and that Buckley does not require the broad brush result reached by the trial court.

The trial court did not fully weigh the finite restraints of this law and its limited application. The trial court's finding that the statute is a "prohibition" or ban on First Amendment freedoms is erroneous. Rather, it is merely (or more equal to) a "limitation" of a campaign contribution, no different from the $3,000. or $1,000. limit already imposed and upheld. It is in effect for little more than two months of the year. Even then, the statute does not restrain communication on substantive political matters, criticism of incumbents, or other political debate. All it requires is that candidates and incumbents "keep their hands in their pockets". The restriction of §106.08(8), Florida Statutes, is a qualified one. It is akin to existing

ceilings on contributions of third parties of the type which have been upheld. See e.g. 2 U.S.C. §431 et. seq.; 18 U.S.C. §591 et. seq.; (Buckley, supra.); S169.255 Michigan Comp. Laws (Austin v. Michigan Chamber of Commerce, 58 L.W. 4371, March 27, 1990). See also §106.08(1) and (2), Florida Statutes.

In Buckley the Supreme Court held that provisions of the Federal Election Campaign Act limiting individual contributions to campaigns were constitutional despite First Amendment objections. In applying the traditional three part test for First Amendment challenges, the Court found a "basic constitutional freedom" for which "even a significant interference" would be tolerated "if the state demonstrates a sufficiently important interest and employs means ,closely drawn to avoid unnecessary abridgement of associational freedoms". The interference was tolerated because "It is clear that neither the right to associate nor the right to participate in political activities is absolute". 424 U.S. at 25.

The trial court found that certain limitations on political activity are permissible (paragraphs 5 and 7). However, the trial court's reliance on Buckley and Sadowski is erroneous. Section 106.08(8) is not a "prohibition" on protected First Amendment expression but a permissible "limitation" on conduct. Sadowski dealt with "expenditures'' which is not the same as a "contribution". Clearly, "expenditures", as a form of political expression, have more First Amendment protection than

"contributions", but even that extra protection may be reduced when public policy requires.

In Buckley the compelling state interest was the limitation on the actuality and appearance of corruption. The Court noted that

> to the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. (Emphasis supplied.)

The court noted that the scope of such "pernicous practices" can never be reliably ascertained but that nevertheless the problem is not an illusory one.

> Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. (Emphasis supplied.)

424 U.S. 25. The court found that Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical if confidence in the system of representative government is not to be eroded to a disasterous extent. **424** U.S. 29, citing C.S.C. v. Letter Carriers, 413 U.S.

548, at 565 (1973).[1] §106.08(8) would not have been enacted if Florida was not experiencing a comparative crisis in confidence at this time.[2]

The legality of the statute is buttressed by Buckley's holdings that campaign activities like solicitation and collection of funds are not rooted in an absolute right. The statute's scope is warranted by Buckley's observation that the dangers or perception of political "quid pro quo arrangements" with current and potential office holders poses dangers for which a remedial compelling public interest may be asserted.

It is particularly timely that the United States Supreme Court, on March 27, 1990, (again) determined in Austin v. Michigan Chamber of Commerce, 58 L.W. 4371 (1990) that preventing corruption or the appearance of corruption are legitimate and

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The court's holding in Letter Carriers is significant. Letter Carriers upheld limitations on campaign participation imposed by the Hatch Act which did not restrict an employee's right to express his views on political issues and candidates. "The management, financing and conduct of political campaigns are not wholly free from governmental regulation". The distinction should be carried over to this case. Florida Statute §106.08(8) does not restrict a candidate's ability to express his views on political issues and candidates. Rather, its limitation is on "financing and conduct of political campaigns" and even that limitation is imposed only for a limited number of weeks.

See, for example: the March 15, 1990 editorial of the St. Petersburg Times opining that the trial court's ruling was "a victory for corruption"; the March 16, 1990 editorial of the Gainesville Sun labeling the collection of campaign contributions "the dollar chase"; the March 15, 1990 editorial of the Orlando Sentinel observing that "politicians were putting government up for sale" and that the issue is one of "backbone v. big bucks".

compelling government interests for restricting campaign financing. The court in Austin permitted a limitation on political contributions because that limitation did not impose an "across the board prohibition on political contributions. . .". 14 US L.W. 4376. Likewise, §106.08(8) does not impose an absolute ban on contributions but merely limits the time when they may be solicited and accepted.

Further inquiry should be focused on the means by which Florida would effect its compelling public interest through §106.08(8) on all candidates for statewide office.

A. THE LEGISLATIVE SESSION IS AT THE CORE OF STATE GOVERNMENT

The trial court failed to appreciate both the actual and symbolic significance of the annual legislative session on state government and the interdependence of the three branches of government - Legislative, Executive, and Judicial - on that session. The operation of all of the three branches revolves around that annual session that is at the core of their existence and productivity.

Appropriate judicial deference to that significance and to that interdependence would eviscerate the heart of the court's opinion - that §106.08(8), Florida Statutes, "is not narrowly tailored to achieve a compelling state interest".

The Legislative branch of government is the focal point of state government activity for the months of April and May from the public, executive, and judicial perspectives. Exclusively at

that time, new laws are enacted and annual budgets for all departments and the judiciary are determined. Agencies and their missions may be sunsetted. Inadequate budgets can doom agency effectiveness. At that time, more than any other, "the state store is open for business" and policy decisions are made which will endure through (at least) the fiscal year.

During the session, more than at any other time, the hazards of campaign "quid pro quo arrangements" are immense because of the concentration of competing (and moneyed) interests. The consequences of strategically timed political payments can reverberate in the legislative chambers while the collective voice of the people languishes silent in the Capitol hall. Those hazards are particularly present during campaign years when the personal political agendas of incumbents and potential office holders may overwhelm their more benevolent public interest priorities.

It is an unfortunate political reality that an incumbent may be subjected to a "quid pro quo" wherein his vote is compelled not only by a promised contribution to his campaign but simultaneously by a threatened contribution to his adversary should a vote not be cast for the special interest. The political and social polarization which marked the October 1989 special session on abortions, and the overt political threats generated by that session, are graphic immediate examples of this quid pro quo scenario. Its ramifications will be more fully observable in November of this election year.

B. THE CABINET MEMBERS ARE DEPENDENT ON AND NECESSARY PARTICIPANTS IN THE LEGISLATIVE SESSION

The Governor and the Cabinet are not so removed from the legislative session as to responsibly spare its members from the qualified prohibition of §106.08(8). During the session, the attention of the Governor and cabinet members – including the Defendants Attorney General and Secretary of State – should be devoted to the budgetary needs and statutory responsibilities of their respective departments and to the Legislature's demands upon them rather than to their personal political agendas and campaign fund needs. 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.

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. Fundamental good public policy requires that the Governor and all members of the Cabinet should attend to legislative matters during the session and that none should be distracted by political fundraising conflicts. The "dollar chase" should recess. Good public policy requires that incumbents should not suffer the funding deficit which would result if their challengers are permitted to actively solicit and collect campaign funds in April and May while they attend to state business.

The Governor and cabinet members are, like their legislative counterparts, subject to political quid pro quo influences should they fail to adopt the positions of special interests on high profile matters pending before the Legislature. Gun control, the environment, taxes and, most recently, abortion are among the issues for which any candidate is vulnerable and for which strategically timed payments might be tendered under the guise of a campaign contribution.

Dodd's plea that incumbents have an "unfair advantage" should be taken at less than face value. His plea is belied by Buckley. ". . .The danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents". Buckley, 424 U.S. 33. Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which, on its face, imposes even handed restrictions. Buckley, 424 U.S. 33. Nor does the Constitution require that state law "level the playing field" because of the "under dog" perception of non-incumbent candidates. As long as it has a legitimate public purpose, a public campaign funding law should not be required to remedy pre-existing inequalities between candidates. Republican National Committee v. Federal Election Commission, 487 F.Supp. 280, 287 (U.S. DC SD NY 1980), judgment affirmed 100 S.Ct. 1639.

Indeed, incumbents are especially tied to their public offices in the Capitol during the legislative session while non-incumbents would have a relatively free rein, but for §106.08(8),

during the same months to dedicate themselves exclusively to enhancing their campaign war chests. Responsible public policy dictates that we should applaud the respite contemplated by §106.08(8), Florida Statutes, in order to dedicate executive, judicial, and legislative resources to state business before the Legislature. The statute reasonably withholds the unfair advantage that would be given to those office seekers whose public commitments are not in the Capitol with the incumbents.3

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[3] Buckley otherwise dispells the notion that incumbents have a political advantage which a challenger cannot overcome.

> There is no such evidence to support the claim that the contribution limitations in themselves discriminate against major-party challengers to incumbents. Challengers can and often do defeat incumbents in federal elections. Major-party challengers in federal elections are usually men and women who are well known and influential in their community or State. Often such challengers are themselves incumbents in important local, state, or federal offices. . . To be sure, the limitations may have a significant effect on particular challengers or incumbents, but the record provides no basis for predicting that such adventitious factors will invariably and invidiously benefit incumbents as a class. 424 U.S. 33.

This court may take judicial notice of the political reality in Florida in which (former Senator) Dempsey Barron, (former Senator) Wayne Hollingsworth, (former Representative) Sam Bell were all defeated in a single election year by "under dog" office seekers.

C. INCUMBENTS MIGRATE BETWEEN THE BRANCHES OF GOVERNMENT

The migration of incumbents between the three branches of government should be considered. Three (Commissioner Castor, Commissioner Connor, and Comptroller Lewis) of the present members of the Cabinet came from the Legislature. Governors Askew and Graham were in the Legislature. Former Senate Presidents have looked to the Governor's office or the Cabinet to advance their public service careers as has the current President. As incumbent legislators seek cabinet offices during their incumbencies, their vulnerability to quid pro quo influences increases.

By enacting §106.08(8), the legislature has determined, and there is no evidence to the contrary, that each branch is equally amenable to the appearance or reality of a "financial quid pro quo". Its determination has a rebuttable presumption of correctness, State v. Bales, 343 So.2d 9 (Fla. 1977). State legislatures are presumed to have acted within their constitutional power. McGowan v. Maryland, 366 U.S. 4201. Accordingly, the Legislature's determination should not be set aside.

D. THE JUDICIAL BRANCH IS VULNERABLE TO QUID PRO QUO PRESSURES

The statute's proscription does not apply to the entire Judicial branch of government but only to Supreme Court Justices seeking retention as the limitation applies only to "statewide candidates". However, the limitation applied to the Supreme

Court Justices is, admittedly, more difficult to reconcile under Buckley's least restrictive means standard. But the limitation can be reconciled. The Supreme 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. Its 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.

No part of the campaign playing field should be scarred by political quid pro quo influences. 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". This court should be as constrained as was the Supreme Court in Buckley. "Absent record evidence of discrimination against challengers as a class, a court should be hesitant to invalidate legislation which, on its face, imposes even handed restrictions." This is because, as noted above, "the dangers of corruption and the appearance of corruption apply with equal force to challengers and incumbents." Buckley, 424 U.S. 33.

II. THE COURT ERRED IN FINDING VAGUENESS AND OVERBREADTH

The text of the qualified prohibition of §106.08(8) is not vague. Nor do its terms fail to give adequate definition of the conduct that is prohibited. See e.g. Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1982). A candidate who is running for a legislative office or a statewide office (i.e., a limited number of candidates) may not accept or solicit any campaign contribution during a regular or special session of the legislature. All that is required is that candidates and incumbents keep their hands in their pockets. A candidate is not restrained in advocating a political viewpoint or criticizing his opponent. Rather, he may not "accept or solicit any campaign contribution". Debate, discussion, and other protected First Amendment expression on the merits of issues are neither limited nor prohibited. Collections and solicitations are only (temporarily) curtailed. The statute states the conduct required by it, "in the plainest language", "in terms that the ordinary person exercising ordinary common sense can sufficiently understand", Broaderick v. Oklahoma, 413 U.S. 601, 607 (1973).

The court erred when it determined the statute produces unconstitutional uncertainty as to its timing. Although it is difficult to predict in advance when or how many special sessions may be held, as a matter of law, special sessions are subject to call by the consent of two-thirds of the membership of each house

of the Legislature or by proclamation of the Governor. Advance notice must be given to the membership for them to participate. See Article 111, §3(c) of the Florida Constitution and Florida Statute $11.012. That notice will adequately inform a candidate of the time for commencement of the fund raising brief respite. Because the trial court's ruling on this issue is otherwise based on conjecture and would ascribe unethical "political manipulation" upon the Legislature or Governor, its rationale should be rejected and its finding of vagueness set aside.

Nor does the statute suffer from overbreadth. Buckley and Austin confirm that the type of conduct which it restricts - solicitations and acceptance - are not rooted in an absolute right.

Even behavior which at first blush seems fully protected may be restricted when the conduct produces lawless action. To avoid overbreadth the constitution merely requires there be no infringement on an absolute right, that persons of common intelligence have notice of the proscribed conduct, and that the law not be worded so loosely as to vest undue discretion in those who prosecute it. McKenney v. State, 388 So.2d 1232 (Fla. 1980). Section §106.08(8) passes muster under this review if construed to accomplish the compelling interest which begat the statute.

III. ELECTION LAW REFORMS ARE THE PROVINCE OF THE LEGISLATURE

Both the state and federal courts have acknowledged the responsibility of their respective legislative bodies to enact elections laws. Sadowski, 345 So.2d 330 (Fla. 1977), Treiman v. Malmquist, 342 So.2d 972 (Fla. 1977). The Florida legislature, on behalf of the people of Florida, may enact a law which

> places restraints upon all of its citizens in the exercise of their rights and liberties under a republican form of government. Such restraints have been found to be necessary in the development of a democratic province to preserve the very liberties which we exercise. Such restraints may lawfully be imposed upon individual candidates for public office.

Richman v. Shevin, 354 So.2d at 1204, citing Bodner v. Gray, 129 So.2d 419 (Fla. 1961). Indeed, this court has squarely held that

> The legislature, not private individuals, determines what reasonable regulations should be enacted to avoid evil and corruption in the election process. This court likewise does not legislate by determining wisdom of legislative policy, but, rather, decides whether legislative regulation comports with the Constitution.

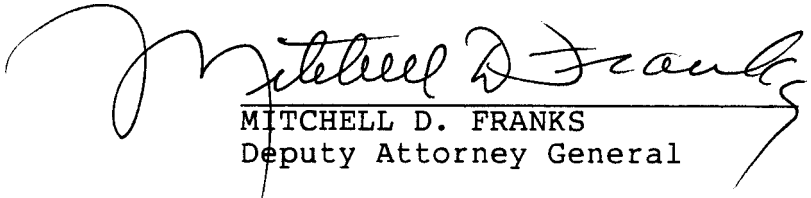
Richman, at 354 So.2d 1205. The judiciary will not nullify legislative acts on grounds of policy or wisdom no matter how unwise or unpolitic they might be. Holley v. Adams, 238 So.2d 401 (Fla. 1970). §106.08(8) is an appropriate exercise of legislative power under relevant case law in light of the evil and corruption now perceived in the election process. Buckley, Austin.

CONCLUSION

Section 106.08(8) is narrowly tailored in "plain language" to curtail corrupting "quid pro quo" influences during the most vulnerable weeks of the annual life cycle of state government operation. The trial court's ruling to the contrary should be reversed.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served on TERRELL G. MADIGAN, Esquire, P. O. Box 1761, Tallahassee, Florida 32302, by mail, this 6th day of April, 1990.

MITCHELL D. FRANKS
Deputy Attorney General