O/a 4-17-9

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

-vs- CASE NO. 75,778

JACK P. DODD,

Appellee.

APPELLANTS' REPLY BRIEF

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

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ARGUMENT

I, THE TRIAL COURT INCORRECTLY DETERMINED THAT FLORIDA STATUTE §106.08(8) IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT,

Appellee's Answer Brief does not refute the conclusion that the rights which he claims are not absolute. The Court should determine that the qualified nature of his rights permits the temporary inconvenience which §106.08(8) would cause for him and his supporters. The State is unaware of any constitutional requirement that a statute must maximize the efficiency of political action, be that action directed to political speech or fundraising. Appellee has cited no such authority.

A. THE RESTRICTION OF §106.08(8) DOES NOT BAN A CONSTITUTIONALLY RECOGNIZED AND PROTECTED FORM OF SYMBOLIC EXPRESSION

The restriction of this statute is one of time only. Its scope concerns only the solicitation and collection of money. All other First Amendment activities speaking to the merits of political issues are untouched by the statute. Those "symbolic acts" - rather than begging for funds - are at the core of the First Amendment.

Because the right to engage in political activities is not absolute, see e.g. Buckley v. Valeo, 424 U.S. 1 (1976), Austin v. Michigan Chamber of Commerce, 58 L.W. 4371 (March 27, 1990), the Court should recognize that the brief interruption of a

supporter's ability to contribute is constitutionally permissible when that interruption will serve to curtail the strategically timed campaign contributions which have perverted Florida's electorate process.

Note, for example, that §106.08(2) prohibits contributions the last five days of an election which is contested and totally bans contributions after a candidate withdraws his candidacy, after a candidate is defeated, becomes unopposed, or is elected. Section 106.08(3) contains similar prohibitions to PACs.

Appellee's statement that the Florida law would serve "to abolish" the rights of candidates and their supporters is simply inaccurate.

It may well be that Appellee should have anticipated the consequences of this law when he scheduled his campaign activities and financial needs prior to the session. His apparent failure to do so should not enable him to defeat the compelling public interest - recognized by the trial court - which this law advances on behalf of all of Florida's citizens.

B. THE PROHIBITION IS REASONABLY EFFECTIVE IN ITS APPLICATION TO THOSE WHOSE EVILS ARE SOUGHT TO BE PREVENTED AND THERE IS NO UNREASONABLE "HARDSHIP" ON THOSE WHO CLAIM TO BE NO PART OF THE EVIL.

Appellee's argument ignores the fundamental conclusion in Buckley that the actuality and appearance of corruption - whether

given to secure a political quid pro quo from the current or potential office holders - undermine the integrity of our system of a representative democrary. Buckley v. Valeo, 424 U.S. at 25 (1976).

His arguments that the potential for quid pro quo contributions exists both prior to the session and afterwards, or that such payments can be "strategically retimed", misapprehends the motivation for the statute.

Indeed, Appellee does not and cannot refute the notion that the corrupting quid pro quo influences of contribution payments proliferate during the legislative session and that the entire electorate process is most vulnerable to those influences in April and May when the votes of the people's elected representatives are to be cast. No constitutional infirmity should be found merely because the legislature has chosen to address but a part of the corruption problem "which seems most acute to the legislative mind". See Williamson v. Lee, 348 U.S. 483, 489 (1954). Indeed, any attempt to totally prohibit contributions would, most likely, be found to be unconstitutional under Buckley.

Appellee's argument that the statute precludes the right of a citizen to "speak out" about the conduct of his legislator during the term of the session is inaccurate. All §106.08(8) requires is that candidates for statewide office keep their hands in their pockets. They and their supporters are free to "speak

out" and otherwise engage in debate, dialogue, and criticism of their political adversaries. Their "need to know" is not affected and the infuriated citizen is free to engage the eye, the ear, and the mind of his favored candidate. Only his hand and his pocketbook are restrained.

Similarly, a citizen who is motivated to run for office during the session may solicit the moral, intellectual, and vocal support of his neighbors and friends and engage in political debate on the merits but must await adjournment of the session before he solicits funds. This brief inconvenience is a natural and acceptable consequence of the finding in Buckley that incumbents and office seekers are equally amenable to the quid pro quo corruptive influences of campaign contributions. It is further warranted by the recent holding in Austin which upheld the total ban on political contributions from the general treasury funds of corporations.

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

The statute admittedly inconveniences a candidate to the extent that it would temporarily prohibit him from committing his own funds to his campaign. This inconvenience occurs, however, only during the session and during the last five days of a contested election. The statute does not prohibit a candidate from committing his personal funds prior to the session, from obtaining loans to see him through the session, or from otherwise

soliciting and collecting funds, unabated, for all times but the brief weeks when the legislature meets.

D. THE LAW, AS A MATTER OF RESPONSIBLE PUBLIC POLICY, ALLOWS AND ENCOURAGES INCUMBENTS TO CONCENTRATE ON THEIR RESPONSIBILITIES TO THE PUBLIC *AND* THEIR LEGISLATURE DURING THE SESSION.

The legislature has appropriately determined, as a matter of public policy, that it should encourage incumbent statewide elected officers to attend to State business when the legislature meets. It is not the province of the court to question the wisdom of such legislative and public policy matters. See e.g. Richman v. Shevin, 354 So.2d 1200, at 1205 (Fla. 1978). The hardship that Appellee would require of incumbents - that incumbents abandon their personal needs during the legislative session - is an unreasonable one. That hardship would discourage responsible, competent citizens from assuming the burdens of public office. Appellee's premise that an incumbent should be required to make this sacrifice as part and parcel of his public office is untenable. To the extent there is an inherent "pre-existing inequality" arising from incumbency, this court should not reasonably require the public campaign funding law to remedy it. See Republican National Committee v. Federal Election Commission, 487 F.Supp. 280, 287 (USDC SD NY 1980), judgment affirmed 100 S.Ct. 1639. Nor should this Court adopt, to the detriment of the incumbents and their public, Appellee's laissez faire theory that would permit him to arm his political war chest

while elected officials are serving the public's needs at the legislative session.

E. THE STATUTE IS NOT UNCONSTITUTIONALLY OVERBROAD IN ITS APPLICATION TO THE SUPREME COURT.

The State stands by its previous argument that the Supreme Court is one of three parts of an integral state government and that the system should function as a whole, with each of the three branches having the same perception of integrity and the same evenhanded restrictions.

There exists a vulnerability of, even, merit retention judges to negative quid pro quo influences by forces having vested interests in the outcome of legal issues.

II. CONSISTENT WITH THE TRIAL COURT'S DETERMINATION THAT A COMPELLING STATE INTEREST EXISTS TO CURTAIL THE APPEARANCE OR REALITY OF QUID PRO QUO CONTRIBUTION INFLUENCES, THE LAW IS SUFFICIENTLY TAILORED TO RESTRICT ONLY RIGHTS AS NECESSARY TO ACCOMPLISH THE COMPELLING STATE INTEREST.

Because the corruptive influences of quid pro quo arrangements extend to both incumbents and office seekers, the statute necessarily applies to both. Because both are vulnerable to the corrupting influences, the statute extends "to the degree necessary to meet the particular problem at hand". FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 265 (1986). The problem of corruption of the electorate process is so broad and deeply rooted that "the precision of its regulation" cannot be

more narrowly achieved under the standards of either NAACP v. Button, 371 U.S. 415 (1963) or Elfbrandt v. Russell, 384 U.S. 11 (1966). Because the legislature is the branch of government which has been most visibly subject to these corrupting influences, this Court should defer to its judgment and its insight as to these influences.

The State concedes no evil has been personally attributed to Jack Dodd. The political reality is, however, that this assumption cannot be made for all incumbents, all office seekers, and all lobbyists. Because he would participate as a candidate, the legislature may, appropriately, temporarily inconvenience Mr. Dodd in the name of and on behalf of the public to protect the integrity of the electorate system of which Dodd would become a part. This exercise of the police powers simply does not require the personalized precision advocated by Appellee.

III. THE TEMPORARY INCONVENIENCE CAUSED BY THIS STATUTE IS JUSTIFIED BY THE EVIL WHICH IT WOULD CURTAIL AND BY ALTERNATIVES REMAINING TO CANDIDATES AND INCUMBENTS.

Neither the right to associate nor other rights to participate in political activities are absolute. Buckley, 424 U.S. at 25. The restriction of the statute is but one of time and is for a finite few weeks during which pure political speech activities are not abated.

A regulation of time or manner of protected speech must be narrowly tailored to serve the government's legitimate content

neutral interests, but it need not be the least restrictive or least intrusive means of doing so. The requirement is met "so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation". Ward v. Rock Against Racism, 105 L.Ed.2d 639, 660 (1989). The State contends the regulation is narrowly tailored because the statute, in 1990, can only be applicable to 140 legislative races and eight (8) statewide elections or retention campaigns. The State asks the Court to note the hundreds of other campaigns and elections which are not limited by §106.08(8).

If this Court gives appropriate deference to the legislature's determination that the problem of corruption is deep seated and pervasive, then it should honor the respite required by this law.

IV. THE STATUTE PRESENTS NO UNCONSTITUTIONAL VAGUENESS IN DEFINITION OR APPLICATION.

A. THE STATUTE SUFFERS FOR NO UNCONSTITUTINAL VAGUENESS.

This Court need not follow Appellee's sophistic detour to Webster's Dictionary. The object of the verb "solicit" is "campaign contribution"; the object is not "support". In terms that the ordinary person exercising ordinary common sense can sufficiently understand, the statute prohibits the solicitation or collection of funds. In the context in which the statute is

written, it cannot be responsibly construed to prohibit the solicitation of "moral support" or political dialogue. In Grayned v. City of Rockford, 408 U.S. 104, 110 (1972), the Supreme Court eschewed the semantic rabbit hole that Appellee here advocates.

* * *

> Condemned to the use of words, we can never expect mathematical certainty from our language.
>
> * * *
>
> It will always be true that the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.

In fact, this Court can dispell any future doubt about a contextually reasonable interpretation of this statute by determining, in its opinion, that the appropriate interpretation to be here applied, prohibits solicitation and collection of funds rather than collection of support, friendship, dialogue, or other non-financial benefits.

B. THERE IS NO VAGUENESS AS TO CERTAINTY OF TIMING OF THE STATUTE.

Nor should this Court dwell long on Appellee's timing argument. Adequate notice as to the timing of the qualified restriction of the statute is provided when the Governor or majority of both houses of the legislature determine that a special session is to be called. At the precise minute, hour,

and day when the session begins, the proscription begins. At the precise minute, hour, and day when the session adjourns, the proscription ends.

Given present day telecommunications and technology, Appellee's concern for "uncertainty" should be summarily rejected. The "boundaries of the forbidden areas'' will be clearly demarcated by the same calls which summon and adjourn the meeting of Florida's 160 legislators.

V. THE STATUTE'S EXCEPTION FOR CANDIDATES FOR SPECIAL ELECTION TO VACANT OFFICES IS APPROPRIATE.

The statute does not apply to candidates in a special election seeking a vacant office. Although there may well be potential risk of corruption for such candidates, the legislature has appropriately determined that the exigent public necessity of filling a vacant office outweights that risk. The democratic process is more adequately accomplished by the uninterrupted consummation of an expedited special election than by the perpetuation of an unoccupied office. To not exempt special elections could disenfranchise a portion of the electorate. This public policy determination is an inappropriate subject for judicial review.

CONCLUSION

The burden which Appllee would require of the State to accomplish its compelling public interest is not reasonably

rooted in case law. Nor is the burden justified given the exigent need to curtail strategically timed quid pro quo contributions. The entitlement of Florida voters to a corruption free electorate process far outweighs the minor inconveniences caused by this law. Because the legislature has identified a pervasive critical problem and has narrowly tailored a partial remedy to the problem, the constitutionality of its remedy should be affirmed.

Respectfully submitted,

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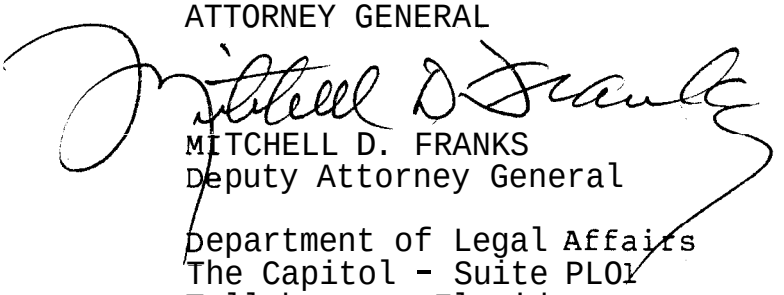
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copy of the foregoing has been served on TERRELL C. MADIGAN, Esquire, P.O. Box 1761, Tallahassee, Florida 32302, by hand delivery, this 16 of April 1990.

MITCHELL D. FRANKS