IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, by ROBERT A. BUTTERWORTH, as Attorney General of Florida; et al.,

Appellants,

vs. CASE NO. 79,696

REPUBLICAN PARTY OF FLORIDA, and REPUBLICAN STATE EXECUTIVE COMMITTEE OF FLORIDA,

Appellees.
_____/

STATE OF FLORIDA, et al.,

Appellants,

vs. CASE NO. 79,755

NRA POLITICAL VICTORY COMMITTEE and UNIFIED SPORTSMEN OF FLORIDA GUNPAC,

Appellees.
_____/

ANSWER BRIEF OF APPELLEES

ON CERTIFICATION FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

LAW FIRM CHANGED TO:

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PRELIMINARY STATEMENT

Appellees, REPUBLICAN PARTY OF FLORIDA and REPUBLICAN STATE EXECUTIVE COMMITTEE OF FLORIDA, shall be referred to collectively as the Party. Appellees, NRA POLITICAL VICTORY COMMITTEE and UNIFIED SPORTSMEN OF FLORIDA GUNPAC, shall be referred to collectively as NRA. Appellants, in both cases, shall be referred to as the State or State of Florida.

All citations to the record on appeal in case number 79,696 shall be designated by the symbol (R) followed by a page reference. All citations to the record on appeal in case number 79,755 shall be referred to by the symbol (N) followed by a page reference.

STATEMENT OF THE CASE AND FACTS

The Party and NRA accept the State of Florida's Statement of the Case and Facts except for the following additions.

The Republican Party of Florida is a political party. The Republican State Executive Committee of Florida is a state executive committee created pursuant to Section 103.091, Florida Statutes (1991), and is headquartered in Tallahassee, Florida. (R2).

"The Party was created to foster and promote its and its members political beliefs and ideals. The Executive Committee was duly elected by the Republican voters of Florida. [The Party has] received contributions from persons of all political persuasions. The Executive Committee expends its revenue as it deems appropriate." (R5).

"There is no requirement that the money transferred by the Executive Committee will be used to support Republican Party candidates or candidates of their choice. Rather, the money is to be commingled and used for the purpose of funding the campaigns of those candidates who qualify whether they be Republican or otherwise and regardless of political persuasion." (R6).

The Party challenges the constitutionality of Section 106.29(1)(b), Florida Statutes (1991), on the grounds that this subsection violates the Party's rights of association and speech contravening the First and Fourteenth Amendments of the United States Constitution and article I, sections 4 and 5 of the Florida Constitution; that the subsection denies the Party equal protection of law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution; and that the subsection violates article VII, sections 1 and 5 of the Florida Constitution in that it impermissibly imposes an income tax upon gross income or revenue rather than upon net income or revenue as required. (R6-7).

Further, in support of its Motion for Summary Judgment (R58-61), the Party submitted an affidavit of Paul M. Davis, a registered voter and a contributor of funds to the Republican Party and Republican candidates. (R64). Mr. Davis opposed having part of his contribution, paid to the Republican Party since July 1, 1991, used to help finance causes other than as designated by the Republican Party. As noted by Mr. Davis: "Should this 1.5% 'tax' remain in effect, it will have a very negative impact on whether I ever contribute again to the party of my choice." Id.

Then, too, the Executive Director of the Republican Party also furnished an affidavit indicating that on October 10, 1991, the Party paid $4,107.31 to cover the required reporting period of July 1, 1991, through September 30, 1991, and that on January 10, 1992, the Party paid $7,898.46 to cover the required reporting period of October 1, 1991, through December 31, 1991. (R66).

The NRA is a political committee registered pursuant to Section 106.03, Florida Statutes (1991), and is headquartered in Washington, D.C. (N2). The Unified Sportsmen of Florida GUNPAC (United Sportsmen) is a committee of continuance existence created pursuant to Section 106.04, Florida Statutes (1991), and is headquartered in Tallahassee, Florida. Id.

The NRA and United Sportsmen challenged the constitutionality of Sections 106.07(3)(b) and 106.04(4)(b)2., Florida Statutes (1991), respectively, on the same grounds raised by the Party. (N1-2).

As of the filing of the Verified Complaint on March 30, 1992, the NRA received Florida contributions, less in-kind contributions, in the approximate amount of $34,246.62 from July 1, 1991, through September 30, 1991, and remitted approximately $513.70 to the Division of Elections. (N4). Unified Sportsmen has received contributions, less in-kind contributions, in the approximate amount of $185.00 since January 1, 1992. Id.

The NRA and Unified Sportsmen "were created to foster and promote its members political beliefs and ideals". Both have "received contributions from persons of all political persuasions.

Their contributions are welcome." They "expend their revenue as they deem appropriate." (N5). The NRA and Unified Sportsmen "object to the use of their money for purposes other than as they deem politically appropriate." (N6).

SUMMARY OF ARGUMENT

The State of Florida cannot compel the Party and the NRA to contribute money to a state supported program, the public financing of campaigns, to help fund the political campaigns of persons whom the Party and NRA do not choose to support. These candidates for statewide office who elect to participate in the program may be of different political or philosophical persuasions from Appellees or different party affiliation from that of the Party. Appellees have the constitutional right to refuse to support these candidates. It is the element of compulsion which invalidates this statutory scheme. Further, the State can finance its program using less restrictive alternatives. There is no compelling State interest which justifies this intrusion. Sections 106.29(1)(b), 106.07(3)(b), and 106.04(4)(b)2. are unconstitutional as they deprive Appellees of their First Amendment rights of free speech and association.

ARGUMENT

I. Sections 106.29(1)(b), 106.07(3)(b), AND 106.04(4)(b)2., FLORIDA STATUTES (1991), ARE UNCONSTITUTIONAL BECAUSE THEY DEPRIVE THE PARTY AND THE NRA OF THEIR RIGHTS OF SPEECH AND ASSOCIATION GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.[1]

(Restated)

Introduction

Thomas Jefferson recognized that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Abood v. Detroit Board of Education, 431 U.S. 209, 234-35 n.31, 97 S.Ct. 1782, 52 L.Ed.2d 261, 284 n.31 (1977) (quoting I. Brant, James Madison: The Nationalist 354 (1948)); see also Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1991). The congressional mechanism or scheme for the public financing of elections discussed in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) involved voluntary contributions consented to by the taxpayer when filing their federal income tax returns. Unlike this scheme, the Florida legislative scheme involves the tyrannical "compulsion upon

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[1] The State of Florida, under point I, raises two issues at pages 10 and 17 of its Initial Brief. The State argues first, in subsection A., that the 1.5% assessment viz section 106.29(1)(b) does not impair First Amendment rights and in Subsection B. that section 106.29(1)(b) is constitutional under the strict scrutiny test insofar as the subsection impairs the Party's First Amendment interest. Under point II, the State claims that the 1.5% assessment viz all subsections "is no more than a nominal infringement on First Amendment rights" and that "the assessment is used for content neutral purposes that serve a compelling State interest." Initial Brief at 22. Appellees will address these issues under this portion of its Argument since the issues are interrelated.

individuals to finance the dissemination of ideas with which they disagree." Buckley, 424 U.S. at 91, 46 L.Ed.2d at 729 n. 124. The statutory scheme compels the Party and the NRA to contribute money to support candidates not of their choosing who may espouse political or philosophical positions different from theirs. This is what offends the Party and the NRA. There is no compelling state interest which justifies this treatment. In the alternative, even if there were a compelling state interest, the means used to accomplish this interest are not the least restrictive alternatives available. See (R 141-145).

"[T]he term 'political party' may be generally defined as an unincorporated association of persons which sponsors certain ideas of government or maintains certain political principles or beliefs in the public policies of the government, and which is formed for the purpose of urging the adoption and execution of such principles and governmental affairs through officers of like beliefs." 25 Am.Jur. 2d Elections §116. The Party was formed to promote its ideals and those of its members. Pursuant to section 103.091(1), Florida Statutes, the Republican voters of Florida elected a state executive committee to facilitate the orderly conduct of its affairs.

The Party includes persons of diverse persuasions. Money is given to the Party to promote the ideals of the Party. In turn, the Executive Committee expends money as it deems appropriate.

Likewise, the NRA and the Unified Sportsmen "were created to foster and promote its members political beliefs and ideals."

(N5). "They receive contributions from persons of all political persuasions" and they "expend their revenue as they deem appropriate." (N5).

The terms "contribution" and "expenditure" are defined by statute. See §§ 106.011(3) and (4), Fla. Stat. The assessments levied by the State pursuant to sections 106.29(1)(b), 106.07(2)(b), and 106.04(4)(b)2. are the State's attempt to directly control how the Party and NRA spend contributions and for purposes which may or may not be supported by the Party, the NRA, and their members. Once the money is transferred to the Division of Elections, Appellees have no control as to how the money is expended.

"Freedom of association means not only that an individual voter has the right to associate with the political party of her choice . . . , but also that a political party has right to "'identify the people who constitute the association,'" . . . and to select a standard bearer who best represents the party's ideologies and preferences. Eu v. San Francisco Democratic Committee, 489 U.S. 214, 224, 109 S.Ct. 1013, 103 L.Ed.2d 271, 283 (1989)[2] (citations omitted). "The freedom of association protected by the First and Fourteenth Amendments includes partisan

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[2] "If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, (citations omitted), and is narrowly tailored to serve that interest, (citations omitted)." Eu, 489 U.S. at 222, 103 L.Ed.2d at 281. See also In re Estate of Greenberg, 390 So.2d 40, 42-43 (Fla. 1980), appeal dismissed, 450 U.S. 961 (1981).

political organization." Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214, 107 S.Ct. 544, 93 L.Ed.2d 514, 523 (1986) (citations omitted). "As [the Court has] said, the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify people who constitute the association.'" Tashjian, 479 U.S. at 214, 93 L.Ed.2d at 523-24 (citation omitted).

The Court has also "affirmed the right 'to engage in association for the advancement of beliefs and ideas.'" N.A.A.C.P. v. Button, 371 U.S. 415, 430, 83 S.Ct. 328, 9 L.Ed.2d 405, 416 (1963) (citation omitted). "The First Amendment freedom of association is squarely implicated in this case." FEC v. National Conservative Political Action Committee, 470 U.S. 480, 494, 105 S.Ct. 1459, 84 L.Ed.2d 455, 468 (1985).

This court further reminds us:

> [t]here is no question that "the use of funds to support a political candidate is 'speech'; [and] independent campaign expenditures constitute 'political expression "at the core of our electoral process and the First Amendment freedoms."'"

State v. Dodd, 561 So.2d 263, 264 (Fla. 1990) citing Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S.Ct. 1391, 1396, 108 L.Ed.2d 652, 662-63 (1990); see also FEC v. Massachusetts Citizens for Life. Inc., 479 U.S. 238, 251, 107 S.Ct. 616, 93 L.Ed. 2d 539, 552 (1986).

Further, "[p]olitical "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." FEC, 479 U.S. at 256, 93 L.Ed.2d at

556 (citations omitted). "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'"." Buckley, 424 U.S. at 48-49, 46 L.Ed.2d at 704-05 (citations omitted).

Appellants argue that no constitutional infirmity exists with respect to sections 106.29(1)(b), 106.07(3)(b), and 106.04(4)(b)2. and applaud the concept of public financing of campaigns. Appellees, however, complain about being compelled to finance the election campaigns of candidates not of their choosing. Unlike the situation addressed in Buckley, the legislative scheme at issue in this case involves the tyrannical element of compulsion.

In Abood, supra, Justice Powell, concurring in the judgment stated:

> That Buckley dealt with a contribution limitation rather than a contribution requirement does not alter its importance for this case. An individual can no more be required to affiliate with a candidate by making a contribution than he can be prohibited from such affiliation. The only question after Buckley is whether a union in the public sector is sufficiently distinguishable from a political candidate or committee to remove the withholding of financial contributions from First Amendment protection. In my view no principled distinction exists.

431 U.S. at 256, 52 L.Ed.2d at 298 (emphasis added).

Then too, Chief Justice Burger, delivering the opinion of the Court in Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), stated in part:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

430 U.S. at 714, 51 L.Ed.2d at 762 (citations omitted). Chief Justice Burger also stated, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), that this principle is illustrated by Tornillo "where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit." Wooley, 430 U.S. at 714, 51 L.Ed.2d at 762.

In the context of protected speech, "the First Amendment guarantees "freedom of speech," a term necessarily comprised in the decision of both what to say and what not to say." Riley v. National Federation of Blind, 487 U.S. 781, 796-97, 108 S.Ct. 2667, 101 L.Ed.2d 669, 689 (1988).

These principles were applied by the United States Supreme Court in Pacific Gas Electric Company v. Public Utilities Commission of California, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986). In Pacific Gas, the Court held that the California

Public Utilities Commission order requiring a utility to allow a consumer group to use extra space in the utility's billing statement to raise funds and to communicate with rate payers violated the utility's First Amendment rights. The Court noted that Pacific Gas did "not, of course, have the right to be free from vigorous debate. But it does have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." 475 U.S. at 14, 89 L.Ed.2d at 11, citing to Buckley, 424 U.S. at 49 and n. 55 (emphasis in original). The Court further noted that "[t]he Commission's order requires appellant to assist in disseminating TURN's views; it does not equally constrain both sides of the debate about utility regulation. This kind of favoritism goes well beyond the fundamentally content-neutral subsidies that we sustained in Buckley and in Regan v. Taxation With Representation of Washington, ..." 475 U.S. at 14-15, 89 L.Ed.2d at 11. Chief Justice Burger, concurring in Justice Powell's opinion stated: "To compel Pacific to mail messages for others cannot be distinguished from compelling it to carry the messages of others on its trucks, its buildings, or other property used in the conduct of its business. For purposes of this case, those properties cannot be distinguished from property like the mailing envelopes acquired by Pacific from its income and resources." Pacific Gas, 475 U.S. at 21, 89 L.Ed.2d at 16. Chief Justice Burger also said that the Court "need not go beyond the authority of Wooley v. Maynard, . . . to decide this case." Chief Justice

Burger "would not go beyond the central question presented by this case, which is the infringement of Pacific's right to be free from forced association with views with which it disagrees." Pacific Gas, 475 U.S. at 241, 89 L.Ed.2d at 15-16.

The Legislature, in enacting Chapter 91-107, stated in part that "the Legislature seeks to serve that compelling state interest through campaign finance reform and by establishing public funding of political campaigns" and "that the measures set forth are narrowly tailored to serve the compelling state interest in public confidence in the electoral process, and that they are the least restrictive alternatives for," in part, "[t]hey do not compel political speech from individuals who wish to refrain from such speech (e.g., apolitical taxpayers), or otherwise unduly burden the public treasury." The Legislature further provided that "[t]hey do not significantly burden any individual's right to political expression or symbolic political communication." But, sections 106.29(1)(b), 106.07(3)(b), and 106.04(4)(b)2. impermissibly burden Appellees right to choose the purposes for which their money is to be spent. The legislation "compels" Appellees to help finance the campaigns of certain persons seeking certain office.

Appellants argue that the State of Florida has a compelling interest in enacting this legislation. However, as noted by this court, and quoting from precedent from the United States Supreme Court, "preventing corruption or the appearance of corruption are the only legitimate compelling government interests thus far

identified for restricting campaign finances." State v. Dodd, 561 So.2d at 265 (emphasis in original), citing FEC v. National Conservative Political Action Committee, 470 U.S. at 496-497, 105 S.Ct. 1459, 84 L.Ed.2d at 469-70 (1985). The Court has explained that "[c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." 470 U.S. at 497, 84 L.Ed.2d at 471. (In FEC, supra, the Court invalidated a congressional act which made it illegal for a PAC to expend more than $1,000 to further the campaign of a presidential candidate receiving public financing. 470 U.S. at 501, 84 L.Ed.2d at 472). The requirement that the Appellees contribute to the Fund bears no relationship to preventing corruption or the appearance of corruption. If the State of Florida wants to have public financing of campaigns, then it should provide that funds other than those of political associations be used. To this end, sections 106.29(1)(b), 106.07(3)(b), and 106.04(4)(b)2. are unconstitutional.

Despite Appellants' allegations to the contrary, strict scrutiny is the proper analysis in this case. Sections 106.29(1)(b), 106.07(3)(b), and 106.04(4)(b)2. directly infringe on Appellees' freedoms of association and speech by requiring the party to provide funds to support campaigns whose political beliefs or affiliations Appellees do not support. Appellants

claim that the 1.5% assessment[3] on contributions Appellees receive (excluding contributions from political committees, committees of continuous existence and in-kind contributions and filing fees for the Party and excluding in-kind contributions for the NRA) is nominal and de minimis,[4], [5] and, therefore, strict

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[3] The assessment is a tax. A tax has been defined "as an enforced pecuniary burden laid on individuals or property to support government." Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 17 F.L.W. S104 (Fla. Feb. 13, 1992).

[4] In the 1990 election year which included elections for state-wide office, the Party would have paid $73,773.43 to the Fund. This is based on reported paid contributions. This amount is not de minimis by anyone's definition! "De minimis non curat lex " means: "The law does not care for, or take notice of, every small or trifling matters." Black's Law Dictionary 431 (6th ed. 1990). In 1991, the Party did not receive any filing fees and party assessments yet paid $12,005.77 to the Fund for the July 1-December, 1991 reporting period. (R66).

[5] Appellants argue that the Party cannot complain about the 1.5% assessment because the amount of funding the Party receives from the State far outweighs the amount the Party must pay pursuant to section 106.29(1)(b). (This de minimis argument, however attractive, cannot be applied to the NRA since the NRA does not receive filing fees from the State. See Initial Brief at 21)). This is false logic. The cornerstone of Freedom of Association is the principle that no one be compelled to support political causes which they do not favor. See Wooley, supra; Abood, 431 U.S. at 256, 97 S.Ct. 1782, 52 L.Ed.2d at 298 ("An individual can no more be required to affiliate with a candidate by making a contribution than he can be prohibited from such affiliation") (emphasis added). The sources of an individual's, or party's, wealth or income is irrelevant when considering First Amendment violations. The only relevant consideration is whether the assessment itself violates the First Amendment and, if so, whether there is a compelling state interest that justifies the intrusion, along with a showing that the State used the least restrictive means to achieve the interest. Moreover, section 106.29(1)(b) is not tied to the amount of funding the State provides the Party. If this section were declared constitutional, the State could just as easily stop funding the Party at all, while still assessing the 1.5% tax on the Party as a charge for exercising its First Amendment rights. Finally, the courts "must be as vigilant against the modest diminution of speech as [they] are against its sweeping restriction. When at all

scrutiny is unnecessary. Although the Court has held that under certain circumstances involving the regulation of election campaigns the strict scrutiny analysis will not be applied, the instant case is dissimilar from that line of cases.

The cases cited by Appellants involve incidental infringements on First Amendment rights; the regulations themselves do not directly infringe on First Amendment rights, but instead regulate activities which are properly subject to regulation. See generally, Service Employees v. Fair Political Practices, 747 F.Supp. 580, 583-84 (E.D. Cal. 1991). For example, in Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983),[6] the Court did not apply the strict scrutiny analysis when interpreting an Ohio law that required an independent candidate for president to file a statement of candidacy in a nominating petition in March in order to appear on the general election ballot in November. However, the Ohio law did not directly impinge an any First Amendment right. It set

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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." FEC, 479 U.S. at 264, 93 L.Ed.2d at 561.

[6] The other cases relied upon by Appellants, Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2936, 73 L.Ed.2d 508 (1982) and Monro v. Socialist Workers Party, 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) are inapplicable in this case. Both of these cases involve barriers to ballot access. The Court applied a lesser standard and concluded that no fundamental rights existed to candidate ballot access as restricted in these cases. Neither case implies that the First Amendment infringements at issue here are governed by anything less than strict scrutiny.

deadlines for the filing of documents related to an individual's desire to run. There is no First Amendment right for an individual to obtain easy access to presidential ballots. The Ohio law was a regulatory scheme directed at facilitating the operational function of the election process.[7]

Conversely, Appellees have First Amendment right to decide who to associate with, or who not to associate with. See Wooley v. Maynard, supra.[8] But, the only effect of sections 106.29(1)(b), 106.07(3)(b), and 106.04(4)(b)2. is to take money from Appellees and give it to candidates whom the Appellees have consciously chosen not to support. This is not an indirect infringement that deserves any less than strict scrutiny; it is a direct violation of Appellees freedoms of association and speech and must be subjected to strict scrutiny.

The relationship between direct and indirect infringements on First Amendment rights may be better understood by considering

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[7] The Supreme Court has expressly distinguished between laws which regulate elections and those laws which infringe upon First Amendment rights. See Eu v. San Francisco Democratic Committee, supra ("None of [the restrictions upheld by the Court], however, involved direct regulation of a party's leaders. Rather, the infringement on the associational rights of the parties and their members was the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections.") 489 U.S. at 231-232, 103 L.Ed. at 288.

[8] In Wooley, the Court refused to accept the dissent's claim that the Maynards' First Amendment rights were not implicated because they were not forced to expressly affirm or reject the New Hampshire matter. Id. at 720, 51 L.Ed.2d at 766 (Rehnquist, J. dissenting). Similarly, Appellants claims that statute is constitutional because the Appellees are not required to expressly support other candidates must fail.

the reasoning behind several licensure cases. In those cases, the courts have reasoned that assessments against persons for asserting their First Amendment rights are indirect only where the assessments are used to cover the reasonable costs associated with the activity. See, e.g., Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941)[9] But, the assessment must be limited to these circumstances. "In each of the cases sustaining licensing fees against first amendment attack, the licensing authority had been able to demonstrate that the fees were necessary to cover the reasonable costs of the licensing system, and that the fees were used for no other purpose than to meet those costs." Bayside Enterprises. Inc. v. Carson, 450 F.Supp. 696, 705 (M.D. Fla. 1978) (emphasis added). See also The Nationalist Movement v. The City of Cuming, Forsyth County, Georgia, 913 F.2d 885 (11th Cir. 1990) reinstated en banc, 934 F.2d 1482, cert. granted. Any assessment which is used for other purposes is improper because the "[e]xaction of fees for the privilege of exercising First Amendment rights has been condemned

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[9] Two years after Cox, the Court held that a tax on the exercise of First Amendment rights is unconstitutional even if there is no proof that the tax actually restrains the exercise of those freedoms. Murdock v. Pennsylvania, 319 U.S. 105, 114, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the federal constitution."). This holding weakens Appellants "de minimis" argument because it is irrelevant that sections 106.29(1)(b), 106.07(3)(b), and 106.04(4)(b)2. may have only a minor effect on the Appellees.

by the Supreme Court."[10] Fernandes v. Limmer, 663 F.2d 619, 632 (5th Cir. 1981) cert. dismissed, 458 U.S. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982), citing Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Jones v. City of Opelika, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943): Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). As these cases indicate, the 1.5% assessment may only be proper if the funds are utilized for general election maintenance costs, and then, only if reasonable. Cf. Moffett v. Killian, 360 F.Supp. 228, 231-32 (D. Conn. 1973) (three-judge district court invalidating fee imposed for legislative lobbying when in excess of costs of administration). As this is not the case, the statute unconstitutionally impinges on Appellee's freedoms of association and speech.

Then too, Appellants rely heavily on their assertion that "preserving the integrity of its election process" is a compelling interest that justifies the legislative mandate that the Party provide financing for other parties. Appellees do not dispute the fact that preserving the integrity of the election process is an interest the State may protect. But, a state's broad power to regulate elections "does not extinguish the State's responsibility to observe the limits established by the

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[10] Sections 106.29(1)(b), 106.07(3)(b), and 106.04(4)(b)2. assess only those parties or groups who wish to take full advantage of their First Amendment rights and participate in the political process. Such an assessment is based on the Appellees' decision to exercise their First Amendment rights. As such, Appellees are being taxed for exercising their rights.

First Amendment rights of the State's citizens." Eu, 489 U.S. at 222, 103 L.Ed.2d at 281 (quoting Tashjian, supra.) However, in this case, the method by which the state is attempting to do so conflicts head-on with Appellees' right not to endorse candidates or parties not of their choosing. In this manner, it is similar to Eu, in which the Supreme Court held that a California law forbidding official governing bodies of political parties from endorsing or opposing candidates in primary elections was unconstitutional. The Court specifically rejected the state's claim that the burden on the parties was "minuscule," reasoning that "[t]he ban directly affects speech which 'is at the core of our electoral process and of the first amendment freedoms'." Eu, 489 U.S.at 222-23, 103 L.Ed.2d at 282. Similarly, the 1.5% tax affects core election-based First Amendment rights of Appellees not to provide means of support for candidates whom they choose not to consciously endorse.

Appellants' attempt to minimize the effect that taking money from Appellees and giving it to candidates has on the Appellees' free association rights. Appellants have asserted that the Party, and implicitly the NRA, "is not forced to endorse the candidacies or message of those qualifying for public financing [pursuant to section 106.29(1)(b)]." (R84). Then, Appellants assert that the money is not given to qualifiers as a means of endorsement, but only as a means of financial support. However, the fact that the State may disburse the money to candidates on a content neutral basis, a point not conceded by Appellees, does

not affect the fact that the State is utilizing Appellees' funds to support individuals or groups whom the Appellees do not consciously support. Pacific Gas & Electric v. Public Utilities Comm'n. of California, supra, is controlling in this regard because Appellees are being penalized for exercising their rights of free association and speech. The State is forcing Appellees to use part of their funds (received contributions) to support individuals or groups with whom they disagree. That the trust fund money is not available only to their adversaries is irrelevant. At least some, if not most or all, of the trust fund money will be available to their adversaries, and in those cases the Appellees will have been forced to privately subsidize those other parties and candidates, as well as their political and philosophical persuasions.

Based upon the foregoing, it is clear that the 1.5% assessments are invalid.

II. CONSIDERATION OF WHETHER THE 1.5% ASSESSMENT IMPOSED BY SECTIONS 106.29(1)(b), 106.07(3)(b), 106.04(4)(b)2. IS AN INVALID INCOME TAX IS NOT RIPE FOR THIS COURT'S CONSIDERATION.

It is true that the Party and NRA argued that the 1.5% assessment was an invalid tax or special assessment in violation of article VII, sections 1 and 5 of the Florida Constitution. However, in light of Judge Steinmeyer's ruling, as adopted by Judge Davey by Stipulation, there was no need to develop the issue further as the statutory assessments were found to be unconstitutional on an independent basis. Therefore, this issue

would only be ripe for consideration if this court rejects the Party and NRA's position and remands the case to the trial court for proceedings not inconsistent therewith, including but not limited, to the consideration of this issue as well as the equal protection issue raised by the parties.[11]

Notwithstanding, as argued in this Brief, the assessment is a tax. See generally, Coy v. Florida Birth and Related Neurological Compensation Plan, supra. The issue is whether the assessment is a tax in excess of 5% of the Party's and NRA's net income, as defined by law.

The concept of income is broad. See generally, State ex rel. McKay v. Keller, 191 So. 542, 545 (1939); See also DuBois Farms, Inc. v. Paul, 566 So.2d 923 (Fla. 1st DCA 1990). There is room for argument as to whether contributions received by a political party, political committee, or committee of continuous

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[11] The cited sections are also unconstitutional as they deprive Appellees of their right to equal protection of law. See generally, Williams v. Rhodes, 393 U.S. 23, 34, 89 S.Ct. 5, 21 L.Ed.2d 24, 33 (1968). The Legislature says that it "seeks to serve that compelling state interest through campaign finance reform and by establishing public funding of political campaigns," Chapter 91-107, Florida Session Law Service. But all members of the public are not compelled to contribute to the Fund. And, while it is true that the Legislature has provided, in part, that "[i]f necessary, each year in which a general election is to be held for the election of the Governor and Cabinet, additional funds shall be transferred to the Election Campaign Financing Trust Fund from general revenue in an amount sufficient to fund qualifying candidates pursuant to the provisions of ss. 106.30-106.36," § 106.32(1), Fla. Stat. (1991), there is no requirement that all persons in this State contribute to the fund from their own personal income or revenues other than taxes paid and ultimately remitted to the treasury of the State of Florida. The proposed assessment is discriminatory and constitutionally impermissible.

existence are income to them within the meaning of the Florida Constitution. However, the facts related to this issue would need to be developed in detail before an appropriate adjudication on the merits should be entertained.

CONCLUSION

The Party and NRA request this court to affirm the Final Judgments rendered below.

Respectfully submitted this 18th day of May, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by Hand Delivery, to Louis F. Hubener, Assistant Attorney General, Plaza Level, The Capitol, Suite 1502, Tallahassee, Florida 32399-1050, this 18th day of May, 1992.

Charles A. Stampelos

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