OA 6-1-92

047

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.
_____/

INITIAL BRIEF OF APPELLANTS

ON CERTIFICATION FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

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STATEMENT OF THE CASE AND FACTS

A. State of Florida, etc., et al. v. Republican Party, et al., No. 79,696.

This case began when the Republican Party of Florida and the Republican State Executive Committee of Florida (collectively, the "Party") brought suit against the appellants in circuit court in Leon County. The Party challenged the constitutionality of section 106.29(1)(b), Florida Statutes (1991), arguing that the statute infringed impermissibly upon their First Amendment rights by devoting certain assessments on contributions received by the Party's executive committee to causes or candidates they do not support and with whom they may disagree.

Section 106.29(1)(b), Florida Statutes, as amended in 1991, provides:

> (b) Each state executive committee and county executive committee of each political party shall pay a 1.5 percent assessment on all contributions, excluding contributions received from political committees and committees of continuous existence and excluding in kind contributions and filing fees. The assessment shall be remitted by the political party executive committee to the filing officer at the time contribution reports are due. The filing officer shall transfer the assessment revenues to the Division of Elections for deposit into the Election Campaign Financing Trust Fund.

Ch. 91-107, § 8, Laws of Florida. As section 106.29(1)(b) states, the 1.5% assessment is deposited by the State in the Election Campaign Financing Trust Fund ("Trust Fund"). This

money is available, pursuant to section 106.34, Florida Statutes, to qualifying candidates running for certain statewide offices.

Under Florida law, the political parties' executive committees receive substantial sums of money from the State to finance election campaigns. These sums far exceed what the State assesses under section 106.29(1)(b). Pursuant to section 99.092, Florida Statutes, candidates for nomination or election to any office must pay a qualifying fee consisting of a filing fee and election assessment. The filing fee is 4.5 percent of the annual salary of the office and the election assessment is 1 percent of the annual salary of the office. Section 99.092 directs that the amount of the filing fee equal to 15 percent of the annual salary shall be transferred to the Trust Fund and the remainder distributed pursuant to section 99.103. The latter section directs that the Department of State remit 95% of all filing fees (less certain specified amounts) to the statewide executive committees that have complied with section 99.103(1).

A similar procedure exists under section 99.061 with respect to persons seeking to qualify for nomination to a county office, district or special district office. Section 99.061(2) requires the supervisor of elections to

> remit to the secretary of the state executive committee of the political party to which the candidate belongs the

> amount of the filing fee, two-thirds of which shall be used to promote the candidacy of candidates for county offices and the candidacy of members of the Legislature.

The State submitted two affidavits of Dorothy W. Joyce, Director of the Division of Elections, establishing the amount of money the Republican Party and the Democratic Party received from filing fees and party assessments (from the State and the counties) for the years 1986-1991. (R 97 et seq.) Those amounts were:

1986	
REPUBLICAN PARTY	$487,147.22
DEMOCRATIC PARTY	$790,130.78
1987	
REPUBLICAN PARTY	$24,175.28
DEMOCRATIC PARTY	$89,443.65
1988	
REPUBLICAN PARTY	$1,213,190.59
DEMOCRATIC PARTY	$2,397,534.21
1989	
REPUBLICAN PARTY	$28,523.36
DEMOCRATIC PARTY	$50,810.70
1990	
REPUBLICAN PARTY	$784,657.46
DEMOCRATIC PARTY	$916,060.35
1991	
REPUBLICAN PARTY	$0.00
DEMOCRATIC PARTY	$2,052.96
REPUBLICAN PARTY TOTAL 1986-1991	**$2,537,693.91**

The Department of State also calculated the amount of the assessment the state executive committees would have paid to the State under section 106.29(1)(b) had the 1.5% assessment been levied in 1986-1991 and submitted this information in the second affidavit. (R 100 et seq.) Based on reported contributions for those years, the Republican Party and the Democratic Party would have paid the following amounts for deposit into the Trust Fund:

1986	
REPUBLICAN PARTY	$34,925.73
DEMOCRATIC PARTY	$21,969.05
1987	
REPUBLICAN PARTY	$23,867.52
DEMOCRATIC PARTY	$15,228.73
1988	
REPUBLICAN PARTY	$49,831.40
DEMOCRATIC PARTY	$48,181.34
1989	
REPUBLICAN PARTY	$32,532.25
DEMOCRATIC PARTY	$13,762.76
1990	
REPUBLICAN PARTY	$73,773.43
DEMOCRATIC PARTY	$49,182.61
1991	
REPUBLICAN PARTY	$10,902.97
DEMOCRATIC PARTY	$13,076.59
REPUBLICAN PARTY TOTAL 1986-1991	**$225,833.30**

Thus, had the 1.5% assessment imposed by section 106.29(1)(b) been in effect during this six-year period, the State would have given the Party more than ten times the

amount it assessed under that statute. These figures were not disputed in the trial court.

Sections 106.30 - 106.36, Florida Statutes, constitute the Florida Election Campaign Financing Act. Pursuant to this Act, qualifying candidates for Governor or for a Cabinet office who agree to abide by the expenditure limits of section 106.34 are entitled to receive contributions from the Trust Fund, which is financed in part by the 1.5% assessment. Section 106.31 states the intent and purpose of the Act:

> The Legislature finds that the costs of running an effective campaign for statewide office have reached a level which tends to discourage persons from becoming candidates and to limit the persons who run for such office to those who are independently wealthy, who are supported by political committees representing special interests which are able to generate substantial campaign contributions, or who must appeal to special interest groups for campaign contributions. The Legislature further finds that campaign contributions generated by such political committees are having a disproportionate impact vis-a-vis contributions from unaffiliated individuals, which leads to the misperception of government officials unduly influenced by those special interests to the detriment of the public interest. The Legislature intends ss. 106.30-106.33 to alleviate these factors, dispel the misperception, and encourage qualified persons to seek statewide elective office who would not, or could not, otherwise do so.

The trial court declared section 106.29(1)(b) unconstitutional in a written order entered March 3, 1992. The court did not explain its reasoning in the order.

The State timely filed its notice of appeal on March 16, 1992. Pursuant to the State's suggestion, the First District Court of Appeal certified the judgment pursuant to Rule 9.125, Fla.R.App.P., as one requiring immediate resolution by this Court.

B. State of Florida, etc., et al. v. NRA Political Victory Fund and Unified Sportsmen Of Florida GUNPAC, No. 79,755

Section 106.07(3)(b), Florida Statutes (1991), imposes a 1.5% assessment on all contributions, excluding in-kind contributions, received by political committees ("PCs"). Section 106.04(4)(b)2., Florida Statutes (1991), imposes the same assessment on contributions received by committees of continuous existence ("CCEs"). The amounts assessed are deposited in the Trust Fund.

PCs are defined in section 106.011. They are organizations that may support or oppose any candidate, issue or political party. CCEs are defined in section 106.011(2) and section 106.04. CCEs are membership organizations that derive at least 25 percent of their income from regular dues. Under section 106.04(5), a CCE may not expend funds on behalf of a candidate except as a contribution. Nor may it expend money in support of or in opposition to an issue unless it registers as a PC. A CCE may make limited contributions to a PC in an amount not to exceed 25 percent of its aggregate income. Contributions of both PCs and CCEs to candidates and other PCs are subject to the limitations of section 106.08.

Appellees, the NRA Political Victory Fund (a PC) and the Unified Sportsmen of Florida GUNPAC (a CCE), attacked the 1.5% assessment as violating their rights under the First and Fourteenth Amendment of the United States Constitution and article I, sections 4 and 5 of the Florida Constitution.

The trial court, relying on the final judgment in Republican Party, et al. v. State of Florida, etc., et al., Case No. 91-3775, Leon County Circuit Court, held the statutes invalid under the First and Fourteenth Amendments.

A notice of appeal was timely filed, and the District Court of Appeal, First District, at the suggestion of the State, certified the final judgment pursuant to Rule 9.125, Fla.R.App.P., for immediate resolution by this Court.

SUMMARY OF THE ARGUMENT

1. In determining the constitutionality of the 1.5% assessment on party executive committees, Florida's election laws must be considered as a whole, not as fragmented and unrelated parts. Considering how the various laws effect the distribution of campaign money, it is clear that the parties receive far more from the State to finance their candidates' campaigns than is assessed by the State to aid those other candidates qualifying for Trust Fund assistance. The First Amendment impact is therefore negligible, if it can even be said to exist.

The Trust Fund money is distributed to candidates on a content neutral basis. The money is used by the State to assist candidates who do not obligate themselves to special interests. The State does not endorse such candidates or the positions they espouse. If the distribution of Trust Fund money is content neutral for the State, it is also content neutral for the party executive committees. They are not, therefore, forced to endorse candidates whose positions they may abhor.

2. The 1.5% assessment is nominal even as it affects PCs and CCEs, which of course do not receive state funds. These entities likewise are not forced to endorse candidacies or positions with which they disagree, given that Trust Fund money is distributed on a content neutral basis. Therefore, the First Amendment impact is slight.

The Supreme Court has considered preventing corruption or the appearance of corruption in the electoral process to be a state interest of the highest order. PCs and CCEs are special interest or single-issue organizations that have a corrosive and sometimes corrupting influence on office seekers and office holders. It is appropriate therefore that these organizations contribute to a fund intended to restore balance and integrity to the electoral system by assisting those who reject special interest support. The statutes are narrowly drawn to achieve this goal with only a minor impact on PCs and CCEs.

3. The 1.5% assessment is not based on the appellees' net income but only on one category of contributions. It has none of the indicia of a tax on income. Moreover, because the appellees' did not prove that the assessments exceeded 5% of their net income, they failed to show a violation of article VII, § 5(b), Florida Constitution.

ARGUMENT

I. THE LOWER COURT ERRED IN RULING SECTION 106.29(1)(b), FLORIDA STATUTES (1991), UNCONSTITUTIONAL BECAUSE NO INFRINGEMENT OF FIRST AMENDMENT RIGHTS EXISTS IN VIEW OF THE AMOUNT OF MONEY GIVEN THE PARTY BY THE STATE; ANY IMPAIRMENT THAT MAY BE SAID TO EXIST, HOWEVER, IS NOMINAL, AND THE STATUTE MEETS THE STRICT SCRUTINY TEST.

The Party assailed section 106.29(1)(b) on a number of grounds, arguing in particular that the statute infringes impermissibly on its First, Fifth and Fourteenth Amendment rights and corresponding rights under article 1, sections 4 and 5 of the Florida Constitution, by devoting certain assessments on contributions received by the Party's Executive Committee to causes or candidates they do not support and with whom they may disagree. It argued that strict scrutiny analysis must be applied, and that under such analysis the statute serves no compelling state interest and is not the least restrictive means for accomplishing the public financing of elections.[1]

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[1] The trial court's written order did not state the reasons

The State submits that focusing exclusively on section 106.29(1)(b), ignores the purpose and effect of the election laws as a whole. Seen in this larger perspective, which case authority mandates, it is clear that the financial support the political parties receive from the State far outweighs the nominal amounts assessed under section 106.29(1)(b), and therefore the 1.5% assessment has no impact on First Amendment rights. Moreover, the money is used to broaden participation in the elections process, thus achieving a First Amendment objective, and neither the State nor the Party is compelled to endorse the political ideology or objectives of any candidate receiving money from the Trust Fund.

A. Because The State's Election Laws Must Be Considered As A Whole, The 1.5% Assessment, When Balanced Against The State's Contributions To The Party, Does Not Impair First Amendment Rights

Most, and probably all, state election codes necessarily contain some restrictions or impairments on First Amendment interests, most often those relating to ballot access. Such impairments, which affect the interests of candidates, parties and the voters, do not always render

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for invalidating the statute. At the hearing, the court observed that it believed that the state was pursuing a compelling interest but that it should have withheld the money to begin with rather than taken it back under section 106.29(1)(b). The court's oral remarks (R 143) and the final judgment (R 137) are included in the appendix to this brief.

a statute unconstitutional nor do they invariably merit strict scrutiny. For example, in Clements v. Fashing, 457 U.S. 957 (1982), the plaintiffs were state office holders who were contesting the "resign to run" provision of the Texas Constitution. Under that law, various office holders were required to resign their offices before running for the state legislature. As applied to one plaintiff, a justice of the peace, the law imposed a maximum two-year waiting period before he could be eligible to run for the legislature.

The Court, referring to this two-year waiting period as a "de minimis burden," 457 U.S. at 967, rejected a First Amendment challenge to the law, acknowledging that elections require substantial regulation and that it is not up to the Court to review what are basic, governmental decisions.

> We have concluded that the burden on appellees' First Amendment interests in candidacy are so insignificant that the classifications of § 17 and § 65 [of the Texas Constitution] may be upheld with traditional equal protection principles. The State's interests in this regard are sufficient to warrant the de minimis interference with appellees' interests in candidacy.
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> * * * *
>
> Neither the Equal Protection Clause nor the First Amendment authorizes this Court to review in cases such as this the manner in which a State has decided to govern itself. Constitutional limitations arise only if the

> classification scheme is invidious or if the challenged provision significantly impairs interests protected by the First Amendment. Our view of the wisdom of a state constitutional provision may not color our task of constitutional adjudication.

Id. at 971 and 973 (emphasis added).

In the term that followed Clements, the Supreme Court turned its attention to an Ohio election law that required an independent candidate for President to file a statement of candidacy and a nominating petition in March in order to appear on the general election ballot in November. Although the Court ruled the Ohio law placed an unconstitutional burden on the voting and associational rights of supporters of independent candidates, as in Clements, it declined to apply strict scrutiny analysis. Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564 (1983).

Because the Supreme Court analyzed the First Amendment issue presented in Anderson in the context of the "complex and comprehensive" nature of election codes rather than focusing narrowly on the restriction, it is worth quoting the Court's analysis at some length.

> Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates. We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos,

is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. See Storer, supra, 415 U.S., at 730, 94 S.Ct., at 1279. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See Williams v. Rhodes, supra, 393 U.S., at 30-31, 89 S.Ct., at 10; Bullock v. Carter, 405

> U.S., at 142-143, 92 S.Ct., at 855; American Party of Texas v. White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979). The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made." Storer v. Brown, supra, 415 U.S., at 730, 94 S.Ct. at 1279.

Anderson, 460 U.S. at 788-790 (emphasis added). In Williams v. Rhodes, 393 U.S. 23, 30 (1968), the Court had said with respect to the election law there at issue that "we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged. . . ." See also, Munro v. Socialist Workers Party, 479 U.S. 189, 193, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) ("[First Amendment] associational . . . rights are not absolute and are necessarily subject to qualification if elections are to be run fairly and effectively"),[2] and Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982) (state election laws entitled to substantial deference).

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[2] In Munro, the Supreme Court upheld a Washington State statute that required that a minor party candidate receive over 1 percent of all primary votes cast for the office sought before the candidate's name could be placed on the general election ballot. Justice Marshall dissented because the court did not apply the strict scrutiny test. See 479 U.S. at 200.

The foregoing cases recognize that election codes necessarily entail some restrictions on First Amendment rights; such codes are comprehensive and complex and are generally justified by important state interests; there is no "litmus-paper test" to separate the valid from the invalid restrictions; a court must carefully weigh the State's interests against those asserted under the First and Fourteenth Amendments and the degree to which those interests may be impaired. Constitutional limitations arise only if a First Amendment interest is significantly impaired. Decisions that are simply about how a state chooses to govern itself are not subject to constitutional challenge.

The State therefore submits that its election statutes cannot properly be viewed as so many isolated, piecemeal components. If the "restrictions" and the "interests" are to be properly weighed and assessed, this Court must accept those statutes as a "comprehensive and complex" code and not as unrelated parts that may be separately considered, one to the exclusion of another. "In considering the facts and circumstances of the filing fee requirements, this Court must consider the Florida election laws in their totality." Wetherington v. Adams, 309 F.Supp. 318, 321 (N.D. Fla. 1970) (citing Williams v. Rhodes, 393 U.S. 23).

The trial court's ruling that section 106.29(1)(b), which imposes the 1.5% assessment, must be considered in isolation from sections 99.092, 99.103 and 99.061(2), pursuant to which the Party receives large sums from the State, is not supported by the case law or any sort of logical analysis. Tellingly the trial court offered none, except to observe that the State could have withheld money from the filing fees to begin with rather than impose the assessment. But the statutes in question concern one subject only which is campaign financing, where the money comes from and where it goes. In this process, the Party receives far more from the State for campaign financing than the State assesses to aid candidates who are willing to accept the expenditure limits of section 106.34, Florida Statutes.

When these statutes are considered as a whole, therefore, it is plain that there is no financial impact on the Party as long as the money the State gives the Party exceeds the amount it assesses. Because the State's contributions to the Party vastly exceed the amount assessed on certain private contributions, there is no real impact at all on the Party's First Amendment rights. Hence, to argue that the State is assessing contributions that are received by the Party and specifically intended by private entities to support their preferred political activities is simply to elevate First Amendment "form" over substance. If there is

a First Amendment impact, it is hardly one that can be deemed constitutionally suspect under the case law set forth above. The assessment is significantly less a burden than the restriction of Texas' resign to run law that the Supreme Court declined to even accord First Amendment consideration in Clements. See 457 U.S. at 971-972. The trial court thus erred in finding section 106.29(1)(b) unconstitutional as violative of the Party's First Amendment rights.

B. To The Extent Section 106.29(1)(b) Impairs The Party's First Amendment Interests, It Is Constitutional Under The Strict Scrutiny Test.

The thrust of the Party's argument has been that strict scrutiny is mandated whenever a First Amendment interest is impaired or restricted, no matter how slight the degree. Case law, particularly in the area of elections regulation, does not support such an argument. In fact, the Supreme Court rejected application of strict scrutiny in Clements v. Fashing and did not apply it in Anderson v. Celebrezze. See discussion supra, pp. 12-14. The State submits that section 106.29(1)(b) passes constitutional muster under the "weighing of interests" criteria set forth in those cases. To the extent, however, the 1.5% assessment significantly burdens the rights of the Party, it can still survive constitutional scrutiny

> if the State shows that it advances a compelling state interest [citations omitted] and is narrowly tailored to serve that interest.

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 109 S.Ct. 1019-1020 (1989).

There can be no doubt that section 106.29(1)(b) promotes a number of important State interests that have been recognized as "compelling." Specifically, "[a] State indisputably has a compelling interest in preserving the integrity of its election process." Eu, 489 U.S. 214, 109 S.Ct. 1013, 1024 (1989). The express purpose of public financing of political campaigns is to offer alternatives to candidates who are captives of special interests, or are perceived as such, to the detriment of voter participation; and to enable credible candidates who are not independently wealthy to conduct a meaningful campaign. See section 106.31, Florida Statutes, quoted supra, p. 5. Preventing corruption and the appearance of corruption in the electoral process are legitimate and compelling state interests that the Supreme Court has recognized as warranting restrictions on campaign financing. See Austin v. Michigan Chamber of Commerce, 494 U.S. ____, 110 S.Ct. 1391, 1397 (1990), citing Federal Election Comm'n v. National Conservation Political Action Committee, 470 U.S. 480, 105 S.Ct. 1459 (1985).

Even more apposite, the Supreme Court has recognized that public funding of presidential campaigns is an

> effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public

> discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the federal law] furthers, not abridges, pertinent First Amendment values.

Buckley v. Valeo, 424 U.S. 1, 92-93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam).

Furthermore, if enlarging public discussion and participation in the electoral process through public financing of election campaigns serves a "goal vital to a self-governing people," Buckley, 424 U.S. 93, section 106.29 serves precisely that and other compelling interests:

> Preserving the integrity of the electoral process, preventing corruption, and "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" are interests of the highest importance. [Citations omitted.] Preservation of the individual citizen's confidence in government is equally important.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 788-789, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (citing Buckley).

In Buckley, the Supreme Court ruled, inter alia, that the federal law requiring the disclosure of services and political contributions seriously infringed First Amendment associational interests.[3] Nevertheless, the Court

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[3] The Federal Election Campaign Act of 1971, 18 U.S.C. §§591 et seq., mandated, inter alia, that candidates divulge the source of all contributions in excess of ten dollars; and that individuals who contributed in excess of $100 for political candidates in any year itemize such actions.

found that the disclosure provisions advanced three compelling interests. See Buckley, 424 U.S. at 64-67. These provisions appeared to be the least restrictive means of curbing the corruption Congress found to exist and thus survived strict scrutiny. Id. at 68.

Moreover, contrary to what the Party has argued, it is not forced to endorse the candidacies or message of those qualifying for public financing. The 1.5% assessment goes into the Trust Fund, from which money is disbursed to all qualifiers. Neither the State nor the Party is placed in a position of endorsing, or even appearing to endorse, the alternative candidates or their messages. The public financing is available on a content neutral basis to any qualifying candidate. The Supreme Court has, in fact, characterized the subsidies available to qualifying candidates under the federal campaign financing act as "fundamentally content neutral," see Pacific Gas & Electric v. Public Utilities Comm'n of California, 475 U.S. 1, 14-15, 106 S.Ct. 903 (1986), citing Buckley and Regan v. Taxation With Representation, 461 U.S. 540 (1983), and has viewed public financing of election campaigns as furthering "pertinent First Amendment values." Buckley, 424 U.S. at 92-93.

The Party's only conceivable argument under the strict scrutiny test is that the State should finance the Trust Fund solely through general revenue money or

assessments and taxes on other groups or individuals. If the Party received no money from the State to support its candidates, or if the State took from the Party more than it gave, this argument might possibly merit consideration. Here, however, the Party argues for an entirely result-oriented test since in theory at least it is always possible to assess or tax someone else, or perhaps even to withhold a percentage of the filing fees in the first instance instead of sending the money to the party executive committees (although, no doubt, some candidates would then complain about that amount being directed to the Trust Fund). The fact is that the party executive committees are players in the elections process and much of the influence they command is directly attributable to the substantial sums received from the State. They are therefore a logical and reasonable target for the rather nominal 1.5% assessment used to fund alternative candidacies that broaden the playing field and further First Amendment values. That the 1.5% is levied on the contributions rather than the state money the Party receives is a matter of form, not substance.

That the First Amendment impact of the assessment is de minimis, if it can be said to exist at all, is further underscored by the fact that the parties have no constitutional claim to the funds they receive from the State. The Supreme Court has recognized that filing fees can be used to limit the ballot so as to ensure serious

candidates or to defray election costs. Lubin v. Panish, 415 U.S. 709 (1974). There is no requirement that such fees be turned over to the parties. Florida has chosen to do that in order to encourage and strengthen the parties. Wetherington v. Adams, 309 F.Supp. 318, 321 (N.D. Fla. 1970). Imposing a small assessment on the parties in order to strengthen the elections process and give voice to those who are not financially tied to special interests does not offend the requirement that the statute be narrowly drawn. Section 106.29(1)(b) therefore passes muster under the strict scrutiny test.

II. THE 1.5% ASSESSMENT IMPOSED BY SECTIONS 106.29(1)(b), 106.07(3)(b) AND 106.04(4)(b)2., FLORIDA STATUTES, IS NO MORE THAN A NOMINAL INFRINGEMENT ON FIRST AMENDMENT RIGHTS; THE ASSESSMENT IS USED FOR CONTENT NEUTRAL PURPOSES THAT SERVE A COMPELLING STATE INTEREST.

The appellees did not contend below, and cannot seriously contend here, that the 1.5% assessment is an onerous burden that impedes their ability to support issues or candidates of their own choosing. In Buckley v. Valeo, 424 U.S. 1, the Court upheld limitations on contributions to candidates but struck down a provision of the federal law that limited individuals and groups to expenditures of no more than $1,000 a calendar year in advocating the election or defeat of an identified candidate. The Court found this limitation "heavily burdened" the right to expression and,

because it could be easily avoided, the limitation did not serve a substantial governmental interest in stemming the reality or appearance of corruption. Id. at 39-48. The appellees have not contended the 1.5% assessment is unconstitutional because it is an onerous restriction on their ability to advocate issues or the election or defeat of candidates. Rather, the thrust of the complaints and argument below was that the appellees were being compelled to support ideas with which they might disagree because Trust Fund money can go to candidates across the political spectrum.

With respect to the Party, such an argument fails for the reasons stated in Point I: the assessment can be most realistically viewed as merely the redirection of state money.

NRA and GUNPAC of course, do not receive state funds. However, neither they nor the Party are compelled to endorse or support any particular candidate or the views and message of any candidate. Money from the Trust Fund is distributed to qualifying candidates without regard to the ideas they express. In this sense, Florida's Campaign Financing Act is exactly like the federal campaign financing scheme the Supreme Court has characterized as "fundamentally content neutral." Pacific Gas & Electric v. California P.U.C., 475 U.S. 1, 14-15 (1986) (citing Buckley and Regan v. Taxation With Representation, 461 U.S. 540 (1983)).

Public financing of campaigns does not "abridge, restrict or censor speech, but rather . . . use[s] public money to facilitate and enlarge public discussion and participation in the electoral process" and thus "furthers . . . First Amendment values." Buckley, 424 U.S. 92-93.

Even under the cases appellees have relied upon, any injury to their First Amendment interests is slight. In Pacific Gas & Electric, by order of the state Public Utilities Commission, the utility was forced to place the newsletter of a third party, a political adversary, in the billing envelopes sent to its customers. The Supreme Court ruled such compelled access was not content neutral because it was limited to those who politically opposed the utility; and, further, the order penalized the expression of the utility, forcing it to respond to the adversarial positions espoused against it in the newsletter. The Court distinguished this compulsion from the content neutral funding of campaign expenses. See 475 U.S. at 14-15. Here, no appellee is forced to disseminate speech with which it disagrees, nor is access to Trust Fund money available only to political adversaries.

Eu v. San Francisco Democratic Central Committee, 489 U.S. 214, 109 S.Ct. 1013 (1989), is likewise inapposite. In Eu, the Court struck down a California law forbidding the official governing bodies of political parties to endorse or oppose candidates in primary elections. The Court could

find no compelling state interest that would support a law that "directly hampers the ability of the party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues." Id. at 1020. The appellees have not contended that the de minimis 1.5% assessment hampers their ability to spread their own messages.

The Party also relied on Abood v. Detroit Board of Education, 431 U.S. 209 (1977), in which, under an agency shop agreement, non-union employees were compelled to pay dues to a teachers union, a portion of which the union used to support particular candidates and ideologies. The Court found the use of such employees' dues for partisan political purposes constitutionally impermissible. The position of the Party here is in no way analogous to that of the objecting non-union employees in Abood. Those employees did not receive substantial cash benefits from the union from which there was a nominal "take back" to finance political activity. The money the union took came from compulsory dues and was devoted to partisan political purposes strictly of the union's choosing and as to which the non-union employees had no say. The money was not used to "enlarge public discussion and participation in the electoral process," as is the case with federal and state campaign financing.

Moreover, the Supreme Court has recognized that the very requirement of a union or agency shop is itself "a significant impingement on First Amendment rights [for] the dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." Ellis v. Railway Clerks, 466 U.S. 435, 455 (1984). This interference with First Amendment rights "is justified by the governmental interest in industrial peace." Id. at 456. See also Lehnert v. Ferris Faculty Ass'n, 500 U.S. ___, 114 L.Ed.2d 572, 590 (1991). Such compelled association (or membership) and compelled payment of dues is a far greater intrusion on an individual's First Amendment rights than is a nominal 1.5% assessment that is ultimately used to enhance debate across the political spectrum.

To the extent therefore that the State need show a compelling interest for the small assessment on PCs and CCEs, it is this: Organizations such as PCs and CCEs largely engage in the advocacy of single issues or the promotion of special interests. In the case of the NRA, for example, it is to oppose gun control in any form and at all costs. Others, such as taxpayer organizations, may oppose any increase in taxes, no matter the purpose, no matter the need. Still others who benefit from various government programs organize to oppose reductions in program benefits or, perhaps equally likely, to insist on increases. Those linked to regulated businesses, such as banking and

insurance, will seek favorable regulatory treatment. It is naive to think that candidates who accept contributions or support from these groups do not, if only through inaction, look after their special interests. Section 106.31 presumes otherwise, and rightly so. See generally Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality? 82 Colum. L.Rev. 609 (1982); Lowenstein, On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted, 18 Hofstra L.Rev. 301 (1989); Comment, Independent Spending, Political Committees, and the Need for Further Campaign Finance Reform, 37 DePaul L.Rev. 611 (1988).

The article by Wright succintly states the use and effect of PAC money:

> First, PAC money, like money from any source, allows a candidate to spend more on his campaign and statistically enhances his chances of winning. Second, once a candidate has been elected, he knows that if he wants to be re-elected it is important to give attention and deference to the views of those who helped him financially. One chairman of a large corporation has said that dialogue with politicians "is a fine thing, but with a little money they hear you better."

82 Colum. L.Rev. 617. Since the Buckley decision, the number of PACs has increased exponentially, a phenomenon that negates the effect of limitations on contributions to candidates. See Comment supra, 37 DePaul L.Rev. 611-613, 628-629, 631 et seq. Moreover, PAC expenditures on behalf

of candidates, unlimited in amount after Buckley, can actually function as contributions, thus making limitations on contributions even more meaningless. Id. at 611-613, 628. See also Wright, supra, at 614-615.

This special interest or single-issue orientation backed by large war chests has not only grossly distorted political discourse in this country but has resulted in what is now commonly referred to as "political gridlock," an inability of government to intelligently discuss, much less act on, many pressing needs and problems, whether national or state-level. The paralysis affects not only those who accept PAC contributions while holding office but those non-incumbent candidates who also avail themselves of PAC money.

The State thus submits that the need to take action to redress the imbalance and dysfunction of our electoral system is even more compelling now than it was when Buckley was decided. The Trust Fund money is not used to support partisan purposes of the State's choosing but simply to restore some degree of balance and integrity. The intrusion on First Amendment rights is slight, a mere 1.5% of contributions received. This is an insignificant burden for two reasons: (1) the PC or CCE can increase their fund-raising to make up this amount; and (2) any individual who is seriously concerned about the 1.5% going to the Trust Fund can give directly to a candidate rather than to the PC or CCE. The individual has a choice that the non-union member did not have in Abood.

Finally, because the 1.5% assessment is imposed on organizations that are one of the primary causes of our political paralysis, the statutes, as applied to them, are narrowly drawn and therefore pass strict scrutiny. The State points out that the Trust Fund receives public money both from general revenue and from voluntary contributions from taxpayers. See Ch. 91-107 §§ 22 and 25, Laws of Florida, amending sections 106.32, 199.052, 390.02 and 322.08, Florida Statutes. But given the corrosive effects of special interest money, it is entirely appropriate that PCs and CCEs contribute too.

III. THE 1.5% ASSESSMENT IMPOSED BY SECTION 106.29(1)(b) IS AN ELECTION ASSESSMENT, NOT AN INVALID INCOME TAX.

The Party argued the assessment was also an invalid tax or special assessment in violation of article VII, §§ 1 and 5 of the Florida Constitution. Very little argument was offered in clarification of this assertion. The Party simply contended that article VII, § 5(b) limits a tax on the income of non-natural persons to 5% of net income, not gross income, and that section 106.29(1)(b) imposes an assessment or tax on the gross income of the Executive Committee. The trial court did not rule on this point. Because the court can be right for any reason appearing in the record, the State argues this point as a precaution.

Even if the Party were correct in arguing that the election assessment is a tax, not an assessment, the Florida Supreme Court has held that a tax on gross receipts is not an income tax. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950). Here, the assessment is only imposed on one category of contributions, not on "gross contributions." The Gaulden ruling was reaffirmed in In re Advisory Opinion to the Governor, 509 So.2d 292, 309-310 (Fla. 1987), wherein this Court decided that a tax on the selling of various services based on gross receipts was not an income tax. Like the gross receipts tax at issue in those two cases, the election assessment has none of the indicia of a tax on income. It does not tax services employees perform for employers; it does not tax wages or salaries; it is "transactional" in nature, i.e., based on certain contributions, making no reference to profit or net income. See 509 So.2d at 309-310. The assessment, therefore, is not a tax on income under article VII, § 5(b).

Furthermore, even if the assessment were a tax on income, it would be impossible to conclude it exceeds 5% of the Executive Committee's net income. The Party offered no evidence whatsoever on this point. Given that the assessment is 1.5% of all contributions excluding those from organized committees and excluding in-kind contributions and filing fees, it would be impossible to conclude from the face of the statute that the assessment exceeds 5% of net

income. It was the Party's burden to make the law's invalidity clearly apparent, Gaulden, 47 So.2d at 72, and it failed to meet that burden.

CONCLUSION

Sections 106.29(1)(b), 106.07(3)(b) and 106.04(b)(2), Florida Statutes, are constitutional. The judgments of the trial c ourt must therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **INITIAL BRIEF OF APPELLANTS** has been furnished by U.S. Mail to **CHARLES A. STAMPELOS, Esquire**, McFarlain, Sternstein, Wiley & Cassedy, P.A., 600 First Florida Bank Building, Tallahassee, Florida 32301 this 7th day of May, 1992.

Louis F. Hubener
Assistant Attorney General

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