OA 6-1-92

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.
_____/

REPLY BRIEF OF APPELLANTS

ON CERTIFICATION FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL - SUITE 1502
TALLAHASSEE, FL 32399-1050
(904) 488-9935

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Statutes

RESPONSE TO APPELLEES' STATEMENT OF THE CASE AND FACTS

Although appellees' statement does little more than reference various allegations in their complaints and the constitutional provisions on which they rely, there is one matter of a factual nature that merits response. This point is at the heart of the Party's dispute with the State.

On p. 3 of their brief, appellees refer to an affidavit of a Mr. Paul M. Davis, a contributor of funds to the Republican Party ("Party"). Mr. Davis objects to the 1.5% assessment and the use of his money to support eligible candidates pursuant to sections 106.30, et seq., Fla. Stat. (1991). Mr. Davis complains that if the assessment remains in effect, "it will have a very negative impact on whether I ever contribute again to the party of my choice." His affidavit expresses outrage at the state's use of his money. (R 64)

The point is, of course, that given the substantial sums the State furnishes the coffers of both parties, it cannot possibly be said that the State takes one cent from the amounts Mr. Davis or any other private person, business, corporation, political action committee, etc., contributes to the Party. The State contributes to the Party ten times the amount of money it assesses. See Appellants' Initial Brief at 3-5. Hence, it cannot be concluded as a matter of fact or logic that the Party's contributors are compelled to support candidates qualifying

for Trust Fund money. Nor, as the State maintains, infra, can the Party make such a claim.[1] Moreover, as a factual matter, the laws in question do not restrain a contributor's use of his own money to further his own political speech.

SUMMARY OF THE ARGUMENT

1. Considering Florida's election laws as a whole and the way in which they provide for campaign financing, including financial assistance to the political parties for their campaigns, it cannot be said that the 1.5% assessment causes any net loss of private funds to the parties or to their contributors. The assessment therefore has no impact on the parties' associational and advocacy rights and does not compel them to support political adversaries. Public financing of campaigns serves a compelling state interest and the parties are not compelled to associate with any candidate's message.

2. The 1.5% assessment on PCs and CCEs neither equalizes the ability of groups to influence an election nor significantly restricts the political speech and associational rights of PCs and CCEs. The quantum of political speech is not diminished because individuals

---

[1] As an illustration, the Party complains that it paid $73,773.43 to the State in 1990 and $12,005.77 in 1991, a year in which it received no State money. (Brief, p. 15, n. 4) It does not mention that in 1990 the State gave the Party $784,657.46. (See appellants' Initial Brief at 3)

remain free to use their money to support their own speech or to contribute directly to candidates. Because it is clear that limitations on campaign contributions do not stem influence buying, the assessment furthers the compelling interest in supporting candidates who are free of the influence of special interest money.

ARGUMENT

I. SECTION 106.29(1)(b), FLORIDA STATUTES (1991), IS CONSTITUTIONAL.

Appellees' arguments do not distinguish the assessment on Party funds from that on political committees ("PCs") and committees of continuing existence ("CCEs"). Nor does the Party attach any significance, in the constitutional equation, to the substantial sums it receives from the State for campaign activities.

But the focus of this case is on campaign financing, and therefore all relevant statutes must be considered. Anderson v. Celebrezze, 460 U.S. 780, 788-790 (1983). (Court must identify and evaluate all of the interests put forth by the State in an election laws challenge.) As one federal court has stated with respect to a constitutional challenge to candidates' filing fees:

> 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) (relying on Williams v. Rhodes, 393 U.S. 23 (1968)).

Because different considerations apply to the Party, as opposed to PCs and CCEs, they will be considered in separate arguments.

A. The 1.5% Assessment Does Not Burden The Party's First Amendment Rights As There Is No Net Loss Of Private Contributions.

For purposes of this case, it can be said that the Party receives money from two sources for its political and campaign activities. One is the State and the other includes all "private" contributors, i.e., individuals and organizations of every sort. The 1.5% assessment imposed by section 106.29(1)(b), Fla. Stat. (1991), on contributions the Party receives only determines an amount the Party must pay to the State, an amount that is far less than what it receives. Thus, neither a contributor nor the Party can claim it is "being compelled to finance the election campaign of candidates not of their choosing." Appellees' brief at 10.

When the campaign financing statutes are read in their totality, it is simply apparent that there is a string on the State money and the State may pull that string and take back a small portion of what it has given. This does not impair the First Amendment rights of the Party or its contributors.

Most recently, in Rust v. Sullivan, ___ U.S. ___, 111 S.Ct. 1759 (1991), the Supreme Court rejected a First Amendment challenge to regulations implementing a federal program providing funds for family planning services. The federal law forbade use of the funds in programs where abortion was a method of family planning and the regulations prohibited recipient programs from engaging in abortion counseling or referral. The Court stated:

> Within far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program.

Id. at 1773. There was, accordingly, no intrusion on the recipients' First Amendment rights because they were not permitted to discuss certain family planning options. Any limitation on employees' speech was a consequence of their decision to accept employment. Id. at 1775.

Pertinently, the Court also rejected the argument that the First Amendment rights of program recipients were violated because they were also compelled to contribute their own matching funds as a condition of receiving the federal funds. The recipients contended their privately funded speech was penalized by the restrictions. As to this, the Court stated:

> We find this argument flawed for several reasons. First, Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the

> regulations, it can simply decline the subsidy. See Grove City College v. Bell, 465 U.S. 555, 575, 104 S.Ct. 1211, 1222, 79 L.Ed.2d 516 (1984) (petitioner's First Amendment rights not violated because it "may terminate its participation in the [federal] program and thus avoid the requirements of [the federal program]"). By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds -- subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project -- or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice.

Id. at 1775, n. 5.

Of course, should the Party wish to preserve the purity of its principles, it could reject the State money. Should the 1.5% assessment remain in effect, the Party would then, perhaps, have a more credible claim that it was being "compelled" to contribute its own money to the Trust Fund. So far, the Party has not chosen that course of action.

The Party cites a voluminous number of First Amendment cases in support of the contention that it is being compelled to support candidates not of its choosing. None of these cases is apposite. For example, in Wooley v. Maynard, 430 U.S. 705 (1977), the Supreme Court ruled that New Hampshire could not compel a driver to bear the slogan "Live Free or Die" on his license plates. Here, however,

the Party is not forced to bear a message from the State or any candidate aided by the Trust Fund. In Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986), the utility was forced to disseminate the messages of a major political adversary to its own customers, thus enhancing the voice of its opponent. Such "forced association" and the consequent necessity to respond to the opponent understandably burdened the utility's First Amendment rights. In Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Court found that compelled political contributions from non-union members in the context of an agency shop arrangement violated the First Amendment. Considering the money the Party receives as a whole, however, neither the Party nor its contributors can claim there is any net loss of private contributions to the Trust Fund or that the State has coerced a contribution to the Trust Fund. Money is nothing if not fungible.

Buckley v. Valeo, 424 U.S. 1 (1976), offers no support to the Party even though the Supreme Court there struck down a limitation on the amount individuals and groups could spend to advocate the election or defeat of a candidate. The Court reasoned that the expenditure limitation of $1,000 per year relative to a clearly identified candidate significantly reduced the quantity of political speech, id. at 39, and restricted the speech of some in order to enhance the voice of others. Id. at 48.

Such a purpose was wholly foreign to the First Amendment, which was designed to assure the unfettered interchange of ideas and their widest possible discrimination. Id. at 49. The State has no quarrel with these principles at all. It simply believes that the Party cannot assert them until it refuses to accept State money or the assessment exceeds what the State gives the Party.

B. The Election Campaign Financing Trust Fund Serves A Compelling State Interest.

To the extent the 1.5% assessment on the appellees is subject to strict scrutiny, the use to which the money is put serves a compelling state interest. The appellees' brief at p. 14 quotes from a Supreme Court decision, FEC v. National Conservative Political Action Committee, 470 U.S. 480, 497 (1985), stating that:

> Corruption is a subversion of the electoral 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 quid pro quo: dollars for political favors.

The appellees insist, however, the assessment they pay "bears no relationship to preventing corruption or the appearance of corruption." (Brief at 14) They offer no explanation as to why this is so.

Money from the Trust Fund is available to candidates for Governor, Lieutenant Governor or Cabinet

office only if they agree to limit their expenditures to the amounts prescribed by section 106.34, Fla. Stat. Those candidates who accept these limitations necessarily accept less, if anything, from special interests. They are, accordingly, under far less compulsion to consider any contribution as a quid pro quo, "dollars for political favors." Preventing corruption or the appearance of corruption through regulation of campaign financing serves a compelling state interest. See Appellants' Initial Brief at 18-20 and cases cited. See also State v. Dodd, 561 So.2d 263, 265 (Fla. 1990). All assessments, including that imposed on the Party, serve that compelling interest.

Finally, as should be obvious from point A, supra, the statute, section 106.29(1)(b), is narrowly tailored as long as the assessment does not exceed the amounts the State gives the Party. As the laws are presently structured, that cannot occur.

II. SECTIONS 106.07(3)(b) AND 106.04(4)(b)2. FLORIDA STATUTES (1991), ARE CONSTITUTIONAL.

The First Amendment protects the right to support candidates for office and to advocate the pros or cons of the political issues of the day. It does not protect the right to buy influence by amassing and directing large amounts of money called "campaign contributions" to those candidates or elected officeholders deemed most sympathetic

or, more bluntly, most susceptible. "Neither the right to associate nor the right to participate in political activities is absolute." Buckley v. Valeo, 424 U.S. at 25. The question here is what measures may the State take when limitations on contributions fail to stem influence buying and limitations on expenditures are unconstitutional. See Buckley v. Valeo and FEC v. National Conservative PAC, 470 U.S. 480 (1985).

Sections 106.30 et seq., Fla. Stats., provides for public financing of the campaigns of candidates for Governor, Lieutenant Governor and Cabinet offices who agree to limit their campaign expenditures. The trust fund established for this purpose includes money from the 1.5% assessment on contributions received by political committees ("PCs") and committees of continuous existence ("CCEs").

In Buckley the Supreme Court struck down the $1,000 annual expenditure limitation, reasoning in part that the governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections" could not be met by restricting the speech of some in order to enhance the relative voice of others. 424 U.S. a 48-49. It must be noted that the federal law sought to achieve this "equalization" by a severe limitation on PAC expenditures.

Florida's laws, however, have no such effect. The 1.5% assessment can hardly be termed a significant reduction

in appellees' speech. Nor does the public financing scheme begin to equalize the ability to influence elections, although it may tend to equalize the voices of those who voluntarily accept its limits. (Even this is unlikely because section 106.35 provides funds on a matching basis.) Other candidates remain free to accept and expend whatever they can. Individuals remain free to contribute directly to candidates or use their own money to further their own speech, not that of a PC. Therefore, the 1.5% assessment does not reduce the potential quantum of speech. Moreover, limitations on the amount individuals may contribute to PCs are constitutional. California Medical Ass'n v. FEC, 453 U.S. 182 (1981).

The interest here, therefore, is not the more limited one of "equalizing influence" but the more compelling one of providing assistance to candidates who reject the quid pro quo of dollars for political favors. Because they do not have to please special interest contributors, candidates qualifying for Trust Fund money are freer both in the range of issues they may address and in the decisions they may ultimately be called to make.

It cannot be disputed that too many elected office holders are far too influenced by campaign contributions. While contributions may provide comfort for those who accept them, too often stagnation can be the result for the state or nation. It is not disputed that much of the money comes

from PCs and CCEs, the proliferation of which has negated the effect of limitations on contributions. See FEC v. National Conservative PAC, 470 U.S. at 510 (White, J., dissenting). The State therefore submits that a small assessment that has only the most minor affect on their ability to espouse their own interests is appropriate and that it serves a compelling state interest in broadening of debate. Buckley, 424 U.S. 92-93. See also Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992) (state university students in New York could be assessed an activity fee used to support NYPIRG, a political organization advocating positions with which plaintiff students disagreed, because of overall educational opportunities and benefits NYPIRG provided).

Additionally, it may be noted that precisely because of the effect special interest money has on candidates, the Supreme Court upheld in Buckley detailed reporting and disclosure requirements, including the names of contributors to political committees and the amounts they contributed. Recognizing the requirements were "not insignificant burdens on individual rights" and that they could serve to deter contributions, the Court upheld them stating, "Congress could *reasonably conclude* that full disclosure during an election campaign tends 'to prevent the corrupt use of money to affect elections.'" 424 U.S. at 67-68. In retrospect, the Court appears to have been overly

optimistic about the prophylactic effect of disclosure. Nevertheless, the Court countenanced a significant burden on First Amendment rights.

In Buckley, public financing of election campaigns was viewed and approved as an effort to "facilitate and enlarge public discussion and participation in the electoral process." Id. at 92-93. Such measures seem the only possible counterbalance to special interest money. No diminution in a PC's ability to engage in political advocacy comparable to the $1,000 expenditure limitation in Buckley is at issue here. The 1.5% assessment may serve to ameliorate in some measure the manifest distortions in our electoral system caused by special interest money and single issue advocacy.

Finally, analogizing to cases involving licensure and other state regulations, the appellees suggest that 1.5% assessment is invalid because the fee exacted from them cannot constitutionally exceed the administrative costs of regulating the First Amendment activity. See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941) (broadcasting license), and Moffett v. Killian, 360 F.Supp. 228 (D. Conn. 1973) (administration of financial disclosure requirements imposed on lobbyists). The point is problematic because appellees did not allege or attempt to prove that the administrative costs the State incurs in regulating the parties, PCs and CCEs under Chapter 106 are less than the amounts derived

from the assessments. The trial courts made no such finding. It is thus impossible to conclude that an imbalance exists with respect to PCs and CCEs. For the Party, given the money it receives from the State, no imbalance could conceivably exist.

CONCLUSION

Sections 106.29(1)(b), 106.07(3)(b) and 106.04(4)(b)2., Florida Statutes are constitutional. The judgments of the trial court should be reversed in both cases.

ROBERT A. BUTTERWORTH

Attorney General

LOUIS F. HUBENER
Assistant Attorney General
Florida Bar No. 140084
Department of Legal Affairs
The Capitol - Suite 1502
Tallahassee, FL 32399-1050
(904) 488-9935

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **REPLY 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 22nd day of May, 1992.

Louis F. Hubener
Assistant Attorney General