OA 10-9-96

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IN THE SUPREME COURT OF FLORIDA

Case No. 87,342

FILED
SID J. WHITE
JUN 20 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

the LIBERTARIAN PARTY OF FLORIDA; the LIBERTARIAN PARTY OF FLORIDA EXECUTIVE COMMITTEE; and ROBERT WILSON,

Petitioners

v.

JIM SMITH, in his official capacity as Secretary of State; and DOROTHY JOYCE, in her official capacity as Director of the Division of Elections,

Respondents

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On Discretionary Review from the First District Court of Appeal

PETITIONERS' REPLY BRIEF

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INTRODUCTION

In the recent decision of the U.S. Supreme Court in Romer, et al. v. Evans et al., 64 U.S.L.W. 4353 (1996), at the end of the majority decision the statement was made that,

> ***"We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. . . . A State cannot so deem a a class of persons a stranger to its laws. . . ."***

Even though the voters of Colorado wished to amend their state constitution, and did so through the democratic process, such was not sufficient to allow the state to make a certain class of persons "unequal to everyone else."

In the case on review, the State has classified minor parties and their ballot-qualified candidates in such a way as to make them unequal to major parties and their similarly-situated, ballot-qualified candidates for state and federal office. The challenged statutory provision classifies eligibility for filing fee monies only to "foster party support" of *some*, not *all*, parties with ballot-qualified candidates, and as such penalizes those who affiliate beyond the bounds of the two major parties, and who exercise their political associative rights by qualifying for ballot placement.

With regard to alleged concerns about factionalism, the petitioners direct the attention of the court to Number 10 of the Federalist Papers, in which James Madison wrote,

> ***"Liberty is to faction what air is to fire, an ailment, without which it instantly expires. But it would not be a less folly to abolish liberty, which is essential to political life because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."***

James Madison, "Factions: Their Cause and Control," The Federalist Papers (Number 10).

Summary of Argument

While the legislature has exclusive control over allocation of public funds, nothing in State v. Fla. Police Benevolent Assoc., 613 So.2d 415 (Fla. 1992) provides that any decision by the legislature is plenary to the point of being beyond constitutional scrutiny. For example, the legislature could not camouflage the funding of a church or sectarian group as an "allocation of public funds" and thus avoid constitutional scrutiny; likewise, the legislature cannot illegitimately burden the exercise of political association rights -- even if that burden is camouflaged as an "allocation" of public funds, supported by "compelling interests."

Petitioner Robert Wilson did not have the ability to avoid paying the fee. Obviously, since the fee was paid, he had sufficient, available financial resources to pay the fee. To have had sufficient resources to pay the fee and *not* pay it, instead opting to file an affidavit of undue hardship, would be tantamount to an act of false swearing, in violation of Florida law. One can hardly call that a legitimate option sufficient to prop up the challenged statutory provision.

The State continues to ignore, as did the court below, the issue of a fee-paying minor party candidate having his fee offset far more election administration costs than does the fee paid by a similarly situated major-party candidate. None of the cases cited by the State -- Little, Boudreau, McNamee, or Buckley v. Valeo -- nor do any of the litany of ballot-access cases cited -- justify the imposition of that particular burden on minor parties and their fee-paying candidates as a condition of exercising

their rights of political participation. The trio of Florida-related cases are considerably distinguishable from this case.

The funds at issue in Buckley v. Valeo were *not* funds (1) paid by a candidate (2) as a condition of ballot placement, resulting in (3) one candidate offsetting more election-administration costs than similarly-situated opponents. These distinguishing factual factors considerably weaken the precedential relevance of Buckley to this case. Furthermore, the funding scheme in Buckley imposed burdens upon those parties eligible to receive the benefits of public funding; in the case sub judice, the parties enjoying the benefits of their candidates' filing fees need not satisfy any additional burden or condition for use of the funds generated by the filing fees.

If s. 99.103(1)'s disparate fee-distribution provision is declared unconstitutional, insofar as it affects minor parties and their candidates for state and federal office, the remainder of the statute would constitute a valid, coherent, workable statute in the absence of the unconstitutional provision. One illegitimate attribute within an otherwise legitimate funding scheme could be excised without doing harm to the primary purpose of the statute, namely, providing funds to political parties from their state and federal candidates' filing fees.

ARGUMENT

ISSUE 1

THE DISPARATE FEE-DISTRIBUTION ATTRIBUTE OF SECTION 99.103 IS AN IMPROPER EXERCISE OF LEGISLATIVE POWER, IMPOSING UNCONSTITUTIONAL

BURDENS AND CONDITIONS UPON THE RIGHT OF EXERCISE OF POLITICAL ASSOCIATION BY MINOR PARTIES AND THEIR CANDIDATES.

A. Robert Wilson could not avoid payment of the filing fee.

The State asserts that "[t]he ability to avoid the fee weighs heavily in favor of the constitutionality of [s.] 99.103." *(Answer Brief of Respondents, p. 11)* On the contrary, no genuine alternative to payment of the filing fee existed for petitioner Robert Wilson. The Libertarian Party had submitted a sufficient number of valid petition signatures to place Wilson on the general election ballot. Wilson, in good faith, determined he had sufficient funds to pay the filing fee; obviously, he did so.

Wilson could do nothing else, could invoke no alternative route to the ballot without paying the filing fee and yet remain what he was: the Libertarian nominee for the State House of Representatives, District 4.

The *only* alternative for Wilson, as a minor party candidate, would have been for him to swear an oath (and file it with the Department of State), under s. 99.096(5), Fla. Stat. (1995), that he was "unable to pay such fee without imposing an undue burden on his personal resources or upon resources otherwise available to him[.]" For Wilson to have had sufficient funds to pay the filing fee -- which he did -- and yet *not pay the fee and instead file the oath* -- would have placed Wilson in the position of committing an act of false swearing, in violation of s. 104.011, Fla. Stat. (1995).

The "ability to avoid the fee" assertion put forward by the State is an illusory option for the minor party candidate with sufficient funds to in fact pay the fee.

B. *Little, Boudreau,* and *McNamee* are significantly distinguishable from this case and they do not offer persuasive precedent against the petitioners' claims.

Nothing in Little v. Florida Dept. of State, 19 F.3d 4 (11th Cir. 1994), Boudreau v. Winchester, 642 So.2d 1 (Fla. 4th DCA 1994), or McNamee v. Smith, 647 So.2d 162 (Fla. 1st DCA 1994) went to nor even addressed the issue of one ballot-qualified candidate, on a partisan ticket, offsetting more election-administration costs than similarly situated opponents for the same office. In the case on review, the State retained one hundred per cent of the filing fee paid by Robert Wilson because he was affiliated with a minor party. The State, however, retains only a small portion (15% of two-thirds) of the filing fees paid by major-party candidates. Wilson, as a minor party candidate qualified to be on the ballot by virtue of sufficient petition signatures having been submitted for his ballot placement, encountered a condition on the exercise of his political association rights *not* faced by *any* of the challengers in Little, Boudreau, or McNamee.

Furthermore, in none of these three Florida fee cases was there an issue of some political parties financially benefiting from their respective candidates' filing fees while other parties with ballot-qualified candidates were *denied* the same statutory benefit from the filing fees of their respective candidates. Despite having jumped the hurdle of ballot access petitioning requirements, the Libertarian Party -- the party with which Wilson was affiliated -- received no financial support from Wilson's filing fee, though the two major parties by statute benefited from the filing fees paid by their respective nominees who opposed Wilson on the general election

ballot. This scenario did not exist in the trio of recent Florida filing-fee cases cited by the State.

Unlike the challengers in the cited Florida cases, Wilson had ***no alternative route*** to the ballot which he, as a minor party candidate with sufficient funds to pay the filing fee, could exploit ***without paying*** the fee. In Little, a judicial candidate could obtain ballot access for this ***non-partisan office*** without paying a fee by collecting and submitting a sufficient number of valid petition signatures ***in lieu of*** paying the fee, under s. 105.035(3), Fla. Stat. (1995). In Boudreau, a Republican candidate who did ***not*** want a portion of his filing fee transmitted to the party with which he was affiliated ***did*** have an alternative route of ballot access which he could exploit without paying the fee and still remain a Republican, for he could qualify for the ballot by satisfying the petitioning requirements of s. 99.095(3), Fla. Stat. (1995); the same features applied in the McNamee case.

Finally, unlike the plaintiffs in Boudreau and McNamee, Robert Wilson ***sought*** to have his filing fee shared with the party with which he was affiliated -- to "foster party activity." The plaintiffs in Boudreau and Winchester did ***not*** want to "foster party activity." The factual situations and the issues addressed in Little, Boudreau, and McNamee are, upon closer scrutiny, significantly different than the issues on review in this case.

C. *Buckley v. Valeo* is only of incidental relevance to this case on review.

Nothing in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976) was concerned

with the issue of payment of a filing fee ***as a condition of access to the ballot***, particularly not a filing fee with an inherent attribute of forcing one ballot-qualified candidate's filing fee to offset more election administration costs than the fees paid by similarly situated candidates of other political parties.

The petitioners also note that the funding scheme attacked as being invidiously discriminatory to minor party presidential candidates was upheld in Buckley, in part, because those major presidential candidates who qualified to receive tax-funding of their campaigns ***had to accept a burden not placed upon those who were ineligible for public funding***; eligible recipients had (and have) to stay within certain spending limits. Those who were (or are) not eligible for public funding do not have to abide by spending limitations. The court itself noted that "the acceptance of public financing entails voluntary acceptance of an expenditure ceiling. Non-eligible candidates are not subject to that limitation." Buckley, 242 U.S. at 95. By analogy to s. 99.103(1), major party state executive committees are ***not*** required to satisfy any condition, such as an expenditure ceiling, in order to receive a percentage of their candidates' filing fees. Minor party executive committees and their candidates enjoy no exemption from statutory requirements because of their ineligibility to reap any benefit from s. 99.103.

The precedent of Buckley cuts both ways, to whatever extent it is relevant at all. That should be taken into consideration when the State attempts to invoke Buckley as a shield protecting any "allocation of funds" which infringes upon the

exercise of political association rights.

ISSUE 2

IF THE DISPARATE FEE-DISTRIBUTION PROVISION OF s. 99.103(1) IS DECLARED UNCONSTITUTIONAL, THE REMAINDER WILL CONSTITUTE A VALID, COHERENT, WORKABLE STATUTE IN THE ABSENCE OF THE UNCONSTITUTIONAL SECTION.

The petitioners agree with the State that the analysis of Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828, 830 (Fla. 1962) is appropriate to apply concerning severance of unconstitutional language from a statute.

In this case, the unconstitutional section could be separated, and a complete act would remain if the challenged provision was deleted.

If the challenged 5% voter-registration standard for party eligibility for filing fee monies was deleted from s. 99.103(1), the amount of fee monies to be received by the major parties would be exactly the same as with the 5% standard. The governmental interest in "fostering party support" would not be harmed. It defies credulity to believe the legislature would *not* have enacted s. 99.103, providing filing-fee funding for major-party candidates, merely because minor parties *also* would enjoy a similar statutory benefit from their candidates' filing fees. Minor party eligibility for filing-fee funds would not diminish the "fostering of support" of the major parties.

In Cramp v. Board of Public Instruction of Orange County, the court determined a portion of a loyalty oath to be unconstitutional, but did *not* strike the

oath in its entirety. Severance was appropriate. The court said there was "little doubt" the legislature "would have enacted into law the remainder of the statute." Cramp at 831. Deleting the unconstitutional language "would leave intact a valid, coherent, workable statute," because the deleted language "did not permeate or saturate the remainder of the act and make it impossible to enforce the remainder." Cramp at 831. The same can be said of the provision challenged in the case on review.

The legitimate general purpose of s. 99.103, fostering party activities and support, would be left intact if the 5% voter registration standard for party eligibility for filing-fee monies was declared unconstitutional. The major parties *still* would be statutorily entitled to the same percentage of their candidates' filing fees which they now enjoy. A coherent, workable statute would remain. The remaining statute could be enforced.

CONCLUSION

The legislature does not enjoy plenary power, even through appropriations, to unduly burden the exercise of political association rights. It is a novel and thoroughly disturbing concept to contemplate that the legislature could be empowered to promulgate financially competitively punitive election laws such as the one challenged in this case, a law which does nothing to assess whether a party's candidate merits ballot placement, nor prevents "voter confusion," nor provides easier administration of the electoral machinery.

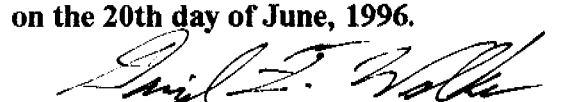
Skewing the distribution of candidate filing fees based upon the size of the political party with which a candidate is affiliated is an inherently discriminatory attribute which has nothing to do with preventing "party-splintering" or "factionalism" -- that is amply addressed by laws protecting a party's name (e.g., s. 103.08, Fla. Stat. (1995)), imposing the closed primary system (thus preventing one party's voters from influencing another party's nominee selection), and preventing "sore loser" candidates from party-jumping (e.g., s. 99.021(1)(b), Fla. Stat. (1995)).

The challenged statutory provision goes beyond the point of preventing factionalism; it is electoral protectionism. It's one thing to have to qualify to run the race; it's entirely another, once qualified to run, to have to run with a mandated handicap.

We urge this court to strike down this legal handicap which has no reasonable relation to a legitimate governmental interest, and which has a distorted relation to two non-compelling government interests of fostering party support and offsetting electoral administration costs.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by U.S. Mail (First Class) to Charlie McCoy, Esq. on the 20th day of June, 1996.



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