

DA 12-3-96

SUPREME COURT OF FLORIDA

CASE NO: 88,677
1st DCA Case No: 96-630

JOHN DOE, a citizen of the Palm Beach County,
State of Florida,

and

JANE DOE, a citizen of Palm Beach County,
State of Florida

v.

HONORABLE SANDRA MORTHAM
in her official capacity **as** Secretary of State
of the State of Florida;

and

THE STATE OF FLORIDA

FILED

SID J. WHITE

SEP 26 1996

CLERK, SUPREME COURT

By _____
Clerk/Deputy Clerk

APPELLANT'S BRIEF ON THE MERITS

✓
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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellant John Doe and Jane Doe certifies that the following persons and entities have or may have an interest in the outcome of this **case**.

1. John Doe and Jane Doe
(Appellants)
2. Hon. Sandra Mortham, Secretary of State
and State of Florida
(Appellees)
3. Philip G. Butler, Jr.
Butler & Brown, P.A.
(Counsel for Appellant John Doe and Jane Doe)
4. George Waas, Esq.
Assistant Attorney General
5. Honorable Nikki Clark
Circuit Court Judge, Third Judicial Circuit

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preliminary Statement

The present case is a direct appeal from the Final Judgment entered in the Third Judicial Circuit in and for Leon County, the Honorable Nikki Clark presiding.

In the trial Court the Appellants were the Plaintiffs and the Appellees were the Defendants in an action seeking a declaration that three specified Florida statutes were unconstitutional as violative of the Plaintiff's rights to freedom of speech and freedom of association under the First Amendment to the United States Constitution **and** the right to instruct their representatives and petition for redress of their grievances under Article 1, §5 of the Florida Constitution.

The parties will be referred to **as** they appear before this Court.

The record had not been prepared by the lower court at the time that the Appellant's Brief on the Merits was to be filed with this Court. For this reason the portion of the record necessary for this Court to review the lower court's decision are included in the Appendix filed with the present Brief on the Merits. Portions of the Appendix will be designated by "**App.**" followed by the appropriate page number.

Statement of the Case and the Facts

On February 2, 1996 the Appellants filed a Complaint for Declaratory Relief pursuant to Fla. Stat. 83.021 seeking a declaration that several specified statutes were in violation of the right to freedom of speech and freedom of association protected by the First Amendment to the United States Constitution and Article 1, §4 of the Florida Constitution and the right to instruct their representatives and petition for redress of their grievances protected by Article 1, §5. (App. 1)

The Complaint for Declaratory Relief was based on the Appellant's stated intent and desire to engage in political advocacy in various forms in coming elections. The Complaint for Declaratory Relief also set forth the Appellant's intent and desire to engage in the specified political advocacy without disclosing their identities.

On February 29, 1996 the Appellees filed their answer to the Complaint for Declaratory Relief. The answer filed on behalf of the Appellees did not dispute the factual allegations set forth in the Complaint for Declaratory Relief. (App. 2)

On February 28, 1996 the Appellants filed their Motion for Summary Judgment. (App. 3) The Appellants also filed a Motion to Dismiss Party Defendant seeking to remove Attorney General Robert Butterworth as a party to the Complaint for Declaratory Relief. The Motion to Dismiss Party Defendant **was** later granted by the trial

court upon the stipulation of the parties.

On February 29, 1996 the Appellees filed their Motion for Summary Judgment.

On May 10, 1996 the trial court denied the Appellant's Motion for Summary Judgment based upon a finding that the specified statutes were not unconstitutional. The Court stated,

"The plaintiffs have failed to show how a prohibition against anonymous campaign or political expenditures improperly infringes upon their freedom of speech or their freedom of association guaranteed by the United States Constitution. There is a valid, compelling state interest in informing the electorate as to who is involved in raising and spending money for elections, which the challenged laws are intended to do." (App. 4)

On June 18, 1996 the trial entered a Final Order Denying the Complaint for Declaratory Relief based on the reasons set forth in the Order Denying Summary Judgment. (App. 5)

On June 21, 1996 the Appellants filed their Notice of Appeal. (App. 6)

On July 10, 1996 the Appellants filed their Suggestion of Certification with the District Court of Appeals,

On August 6, 1996 the District Court of Appeals entered its order certifying to this Court that the present case involved *.

On September 5, 1996 this Court entered its order accepting jurisdiction.

Summary of the Argument

Point One

Fla. Stat. 106.071 Violates the Appellant's Right to Freedom of Speech and the Right to Instruct Their Representatives and to Petition for Redress of Grievances.

Fla. Stat. 106.071 regulates independent expenditures made for the purpose of distributing or communicating "political advertisements" which are defined as "...any paid expression in any communication media ... which shall support or oppose any candidate, elected public official, or issue."

The statute provides that anyone making an independent contribution in excess of \$100 for the purpose of distributing a political advertisement must file a form with the Division of Elections. The statute further provides that any political advertisement paid for with an independent expenditure must contain a statement of the identity of the person distributing the political advertisement.

The Appellants submit that both provisions of Fla. Stat. 106.071 burden speech that is at the core of the First Amendment by requiring any person who distributes a "political advertisement" to disclose information that the individual may wish to withhold.

Fla. Stat. 106.071 does not serve any overriding state interest. The state's interest in informational accuracy during the election process does not justify the forced disclosure of information in political advertisements that are in no way tied to the election process. Further, the statute does not serve to avoid

corruption or the appearance of corruption where the expenditures are, by definition, independent of any candidate or issue.

Fla. Stat. 106.071 is overbroad and in violation of Article 1, §5 of the Florida Constitution where the statute requires the disclosure of the identity of an individual supporting or opposing any elective official regardless of whether the officials is up for reelection or even eligible for reelection. Further, the statute is overbroad where the statute makes no distinction between political advocacy directed toward referendum issues and candidates and fails to distinguish between words of "express advocacy" as opposed to discussions and comments supporting a candidate,

Point Two

Fla. Stat. 106.143 Violates the Appellant's Right to Freedom of Speech and the Right to Petition for Redress of Grievances.

Fla. Stat. 106.143 is almost identical to Fla. Stat. 106.071 and requires that all political advertisements identify the person or organization sponsoring the advertisement.

Fla. Stat. 106.143 burdens speech which is at the core of the First Amendment and is not narrowly tailored to meet an overriding state interest for the same reasons as Fla. Stat. 106.017 discussed in Point One.

Point Three

Fla. Stat. 106.144 Violates the Appellant's Right to Freedom of Speech, the Right to Freedom of Association protected by the First Amendment to United States Constitution and the Right to Instruct Representatives and Petition for Redress of Grievances protected by Article 1, §5 of the Florida Constitution.

Fla. Stat. 106.144 regulates political advertisements disseminated by individuals associated together and acting collectively rather than by an individual and provides that "any group, club, association, or other organization" which either endorses or opposes any candidate or issue must file a report with the Division of Elections. The report must disclose the name of the organization, the date it was formed, a list of the directors or officers and the procedures used to select which candidates or issues the organization will endorse or oppose.

Fla. Stat. 106.144 burdens the right to freedom of speech and freedom of association by requiring members of an organization to disclose their identity, their association with the organization and other information about the organization.

Fla. Stat. 106.144 serves no overriding state interest. The statute cannot be said to prevent corruption or the appearance of corruption since the statute in no way is restricted to the expenditure of funds on behalf of a candidate or issue. Further, the state's interest in informational accuracy does not justify the forced disclosure of the details of the internal operations of the organization.

Fla. Stat. 106.144 is overbroad where the statute applies not only to groups organized for a political purpose but to every "group, club, association, or other organization" and requires the organization to reveal information about the internal operations of the organization that has no reasonable relationship to avoiding corruption or the appearance of corruption.

Point One

Fla. Stat. 106.071 Violates the Appellant's Right to Freedom of Speech and the Right to Instruct Their Representatives and to Petition for Redress of Grievances.

Fla. Stat. 106.071 regulates independent expenditures made for the purpose of distributing or communicating "political advertisements". "Political Advertisements" are defined by Fla. Stat. 106.011(17) as "...any paid expression in any communication media . . . which shall support or oppose any candidate, elected public official, or issue."

Although contained within a single paragraph Fla. Stat. 106.071 contains two separate provisions:

1. Anyone making an independent expenditure in excess of \$100 must file a report with the Division of elections. The report shall contain the full name and address of each person to whom and for whom each such expenditure has been made; the amount, date, and purpose of each such expenditure; a description of the services or goods obtained by each such expenditure; and the name and address of, and office sought by, each candidate on whose behalf such

expenditure was made. ("Filing Requirement" herein)

2. Any political advertisement paid for by an independent expenditure must contain a disclosure of the name and address of the person paying for the advertisement. ("Disclaimer Requirement" herein) . The statute provides that any person failing to comply with the "Disclaimer Requirement" is subject to a year in jail and a fine in the amount of \$1000.

The "Disclaimer Requirement" of Fla. Stat. 106.071 is identical in its effect **as** the Ohio state statute struck down in ***McIntyre v. Ohio Elections Commission _U.S._***, 115 ***S.Ct.*** 1511 (1995).

In ***McIntyre*** the Petitioner distributed leaflets expressing her opposition to a tax levy proposed by the local school board and urged the reader of the leaflet to vote in opposition to the proposed levy. The leaflets did not contain a statement identifying the Petitioner as the individual responsible for the distribution of the leaflets.

Thereafter, the Petitioner was found guilty of violating Ohio State Statute Section 3599(A), which required any person distributing political literature to disclose their identity, and was assessed a fine in the amount of \$100. The conviction was upheld by the Ohio State Supreme Court.

The United States Supreme Court reversed the Petitioner's conviction.

The Court first held that the First Amendment protects speech regardless of whether the author chooses to disclose his identity.

The Court stated,

"(A)n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." (115 S.Ct. at 1516)

The Court next held that the statute did not "control the mechanics of the electoral process" but, rather, was a regulation of pure speech. (115 S.Ct. at 1518) This holding was based, *inter alia*, on the fact that the operation of the statute depended solely on the content of the speech ("speech designed to influence voters") and did not depend on whether the issues addressed in the publication were the subject of an upcoming election.

The Court then held that the Ohio Statute affected speech that is at the "core" of the First Amendment, and then stated,

"When a law burdens core political speech, we apply 'exacting scrutiny' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." (115 S.Ct. at 1519)

The Court then reviewed the interest allegedly protected by the statute: that the statute provided the electorate with relevant information, and the statute prevented fraudulent and libelous statements from being disseminated.

The Court rejected the first asserted interest by stating,

"The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader's ability to evaluate the document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its

disclosure requirements." (115 S.Ct. at 1520)

The Court did not dispute that Ohio had a legitimate interest in protecting the public from fraudulent and libelous statements during election campaigns "...when false statements, if credited, may have adverse consequences for the public at large." (115 S.Ct. at 1520) However, the Court held that these this interest did not justify the "extremely broad prohibition" contained in the Ohio statute.

"As this case demonstrates the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to activities of candidates and their organized supporters, but also to individuals acting independently and using their own modest resources. It applies not only to leaflets distributed on the eve of an election when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity." (115 S.Ct. at 1521-2)

The Court concluded by recognizing that Ohio's interest in protecting the electorate from false statements might justify a more limited identification requirement, but that statute before the Court was not sufficiently narrowly drawn to pass constitutional muster.

The Appellants submit that the "Disclaimer Requirement" of Fla. 106.071 is unconstitutional for the reasons enunciated in **McIntyre**.

First, the "Disclaimer Requirement" of the statute burdens the right to freedom of speech by requiring that the individual divulge information in a political advertisement that the individual may otherwise wish to withhold.

Second, the "Disclaimer Requirement" of the statute serves no

overriding state interest and is not narrowly tailored to meet the asserted state interest.

In **State v. Dodd 561 So.2d. 263 (Fla. 1990)** this Court struck down the provision of Fla. Stat. 106.08(8) which prohibited a candidate from soliciting or accepting any contribution during a session of the legislature. This Court first held that expenditures for the purpose of political advocacy were protected by the First Amendment. This Court then discussed the nature of the "compelling interest" the state must demonstrate in order to justify a statute that burdens First Amendment rights.

"(P)reventing corruption or the appearance of corruption are the only legitimate and compelling government interest thus far identified for restricting campaign financing." (561 So.2d. at 265) (Original emphasis).

The "Disclaimer Requirement" of Fla. 106.071 does not serve to prevent corruption or the appearance of corruption where the statute by definition deals with expenditure that are independent and unconnected to any candidate. [Cf. Fla. Stat. 106.011(5)] Further, the "Disclaimer Requirement" applies to all "expression ...other than the spoken word in direct conversation...which shall support or oppose any candidate, elected public, or issue." [Fla. Stat. 106.011(17)] Thus, the statute applies not only to political expression uttered on the eve of an election, but to political advocacy at any time regardless of whether an election is imminent or even scheduled.

The "Disclaimer Requirement" of Fla. 106.071 is

unconstitutionally overly broad for a number of reasons. First, the statute requires an individual to disclose his identity in any political advertisement supporting or opposing any elected official regardless of whether the official is facing reelection or even eligible for reelection. [Fla. Stat. 106.011(17)] In so doing the statute burdens the right of citizens to "...instruct their representatives and petition for redress of grievances" protected by Article 1, §5 of the Florida Constitution. It is in this area that the need for anonymity is particularly important since a citizen may have a legitimate fear of reprisal for criticism directed at an elected official.

Second, the statute makes no distinction between political advocacy directed at a candidate as opposed to a referendum issue. The importance of the distinction between expenditures for candidate elections and referendum elections was recognized by this Court in *Winn-Dixie v. State* 408 So.2d. 211 (Fla. 1982). In *Winn-Dixie* this Court struck down former Fla. Stat. 106.08(1)(d) which restricted the amount that a person or committee could contribute in support of any issue to be voted on in a countywide election. In so doing the Court held the statute unconstitutional for failing to distinguish between candidate elections and referendum elections. The holding of the Court was based on the fact that there was no compelling state interest demonstrated that justified the imposition of the limit with respect to elections involving referendum issues since the opportunity for corruption or the appearance of corruption does not exist in elections involving

referendum issues.

Third, the statute is overly broad with respect to political advertisements made in support or opposition to candidates. First in *Buckley v. Valeo* 96 S. Ct. 612 (1976) and later in *FEC v. Mass. Citizens for Life* 107 S.Ct. 616 (1984) the Court held that the government had a compelling state interest in regulating political advocacy directed at a candidate only where the speech contained words of "express advocacy". In *Mass. Citizens for Life* the Court stated,

"In *Buckley* we adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concludes in that case that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support'...." (479 U.S. at 249, 107 at 623)

The "Disclaimer Requirement" of Fla. 106.071 is applicable to all "political advertisements" which contain an "expression" which "supports or opposes" a candidate [Fla. Stat. 106.011(17)], and thus fails to distinguish between discussions of candidates from words of "express advocacy" as mandated by the Supreme Court,

Based on the foregoing the Appellants submit that the "Disclaimer Requirement" of Fla. 106.071 burdens speech which is at the "core" of the First Amendment; does not serve an overriding state interest; and is not narrowly tailored to meet any compelling state interest.

The "Filing Requirement" of Fla. Stat. 106.071 requires an individual making an independent expenditure in excess of \$100 supporting or opposing either a candidate or issue to file reports disclosing their identity and detailing the amount, nature and

purpose with the Division of Elections.

There can be no question that an expenditure for the purpose of political advocacy is a form of expression protected by the First Amendment. In **State by Butterworth v. Republican Party** 604 So.2d. 477 (Fla. 1992) this Court stated,

"It is well established that supporting a political candidate financially is speech and represents political expression at the core of the electoral process." (604 So.2d. at 479)

The Plaintiffs submit the "Filing Requirement" of Fla. Stat. 106.071 burdens political expression in two ways. First, reports filed with the Division of Elections are "public records" within the contemplation of Fla. Stat. 119.07 and thus, the "Filing Requirement" of the statute is but another way to force an individual to disclose his identity as well **as** other information that the individual may not wish to disclose. For the reasons identified in **McIntyre** this is a burden on the exercise of free speech.

The second way that the "Filing Requirement" of the statute burdens political expression is that it requires an individual to register with the State before engaging in activity which is clearly protected by the First Amendment. While this burden may appear minimal, political advocacy is at its best when it is spontaneous and unbridled. The thought that an individual must refrain from engaging in constitutionally protected speech until he has first registered with the Government is clearly contrary and repugnant to our form of government.

The "Filing Requirement" of Fla. Stat. 106.071 fails to serve an overriding state interest for the same reasons set forth with respect to the "Disclaimer Requirement".

The "Filing Requirement" of Fla. Stat. 106.071 is not narrowly tailored to meet a compelling state interest. First, the statute applies to political expression directed at elected officials regardless of whether the official is up for reelection or even eligible for reelection. Second, the statute fails to make a distinction between expenditures on behalf of a candidate as opposed to an issue, Third, the statute also fails to make a distinction between general discussions relating to a candidate **as** opposed to words of "express advocacy". Thus, for the reasons set forth under the "Disclosure Requirement" of the statute, the "Filing Requirement" of Fla. Stat. 106.071 is equally unconstitutional.

Point Two

Fla. Stat. 106.143 Violates the Appellant's Right to Freedom of Speech and the Right to Petition for Redress of Grievances.

Fla. Stat. 106.143 provides:

"1) Any political advertisement and any campaign literature published, displayed, or circulated prior to, or on the day of, any election shall:

(a) Be marked "paid political advertisement" or with the abbreviation "pd. pol. adv."

(b) Identify the persons or organizations sponsoring the advertisement.

Much of what has been said concerning the "Disclaimer Requirement" of Fla. Stat. 106.017 applies to Fla. Stat. 106,143.

Specifically, Fla. Stat. 106.143 burdens the right to freedom of expression by requiring the individual to disclose his identity and affiliation with an organization where the individual may wish to withhold the required information.

Fla. Stat. 106.143 does not serve an overriding state interest. While the statute appears to be tied to elections by covering only political advocacy "circulated **prior to**, or on the day of, elections", the state's interest in insuring informational accuracy is not sufficient to justify a broad requirement that applies to statements regardless of when the statement is made and whether the statement is true or false.

"The simple interest in providing voters with additional relevant information does not justify a state **requirement** that a writer make statements or disclosures she would otherwise omit... Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirements." (McIntyre, 115 S.Ct. at 1520).

Fla. Stat. 106.143 is also overbroad for the reasons set forth with respect to Fla. Stat. 106.071. Specifically, Fla. Stat. 106.143 applies to political advocacy directed at elected officials and thus burdens the right of citizens to "...instruct their representatives and petition for redress of grievances". The statute also fails to make a distinction between political advocacy regarding referendum issues and candidates. In addition, the statute is not restricted only to words of "**express advocacy**" with respect to candidates.

Finally, the most telling argument in support of the unconstitutionality of Fla. Stat. 106.143 is that if Margaret McIntyre had distributed her pamphlets in Westerville, Florida,

instead of Westerville, Ohio, she would have been subject to the penalty provisions of Fla. Stat. 106.143.

Based on the foregoing reasons and authorities the Plaintiffs submit that Fla. Stat. 106.143 is unconstitutional where the statute burdens the exercise of speech that is at the "core" of the First Amendment; the statute serves no overriding state interest; and the statute is not narrowly tailored to meet an overriding state interest.

Point Three

Fla. Stat. 106.144 Violates the Appellant's Right to Freedom of Speech, the Right to Freedom of Association protected by the First Amendment to United States Constitution and the Right to Instruct Representatives and Petition for Redress of Grievances protected by Article 1, §5 of the Florida Constitution.

Fla. Stat. 106.144 is entitled "Endorsements or Opposition by Certain Groups and Organizations" and provides as follows:

(1) Any group, club, association, or other organization, except organizations affiliated with political parties regulated by chapter 103, which intends to endorse or oppose the candidacy of one or more candidates for public office, or which endorses or opposes any referendum, by means of political advertisements shall, prior to publishing, issuing, broadcasting, or otherwise distributing such advertisement, file a statement as provided by this section with the officer or officers provided in this section. Such statement shall be filed with the officer before whom each candidate that the organization intends to endorse or oppose qualified for office pursuant to law. Each statement shall contain the following information:

(a) The date the organization was chartered and the number of members during the most recent 12 months and how many of these members, if any, have paid dues;

- (b) A list of current officers or directors of such organization and a statement as to their method of selection;
- (c) A statement of the procedures used by such organization in determining which candidates to endorse or oppose;
- (d) If political advertisements for endorsement or opposition purposes are to be paid from funds other than the dues of the membership of the organization, a statement describing the sources of such funds; and
- (e) The amount of funds paid to the organization by candidates for public office, including payments in the form of dues, and the name of, and office sought by, each such candidate.

The failure of any "officer, director or member acting on behalf of the organization" to register subjects that person to a civil penalty of up to \$1,000 pursuant to Fla. Stat. 106.265,

Fla. Stat. 106.144 differs from the other statutes before the Court in that Fla. Stat. 106.144 regulates political advertisements disseminated by individuals associated together and acting collectively rather than by an individual.

It is beyond dispute that the citizens of Florida have the right to associate freely with others. Where the association is for the purpose of engaging in political advocacy, the activity is at the core of the First Amendment. *Eu v. San Francisco Cty. Democratic Cent. Committee* 489 U.S. 214, 109 S. Ct. 1013 (1989); *State by Buttexworth v. Republican Party* 604 So.2d. 477 (Fla. 1992).

Fla. Stat. 106.144 burdens the right of citizens to associate freely and to express their collective views by requiring any group wishing to engage in political advocacy to register with the government and to disclose the identity of the organization, the identity of the officers and directors of the group and other information concerning the internal operations of the organization.

The impact of compelled disclosure on the freedom of association was recognized by the Supreme Court in *N.A.A.C.P. v. Button* 371 U.S. 415, 83 S.Ct. 328 (1962) and reiterated in *Gibson v. Florida Legislative Investigation Committee* 372 U.S. 539, 83 S.Ct. 889 (1963) wherein the Court stated,

"It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute effective restraint on freedom of association. This Court has recognized the vital relationship between freedom to associate and privacy in one's association. Inviolability of privacy in group association may be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." (372 U.S. at 544, 83 S.Ct. at 892-3)

Fla. Stat. 106.144 serves no overriding state interest, The statute cannot be said to prevent corruption or the appearance of corruption since the statute in no way is restricted to the expenditure of funds on behalf of a candidate or issue. Further, the state's interest in informational accuracy does not justify the forced disclosure of the details of the internal operations of the organization.

The overbreadth of the statute is clear. The statute mandates that any "group, club, association, or other organization" from the Boy Scouts to the neighborhood bridge club must first register with the State and disclose information about the internal structure of the group before expressing their collective political views,

As previously noted political advocacy is at its best when it is spontaneous and unbridled. The thought that citizens acting in concert must refrain from engaging in constitutionally protected speech until they have first registered with the Government is clearly contrary and repugnant to our form of government.

Conclusion

For the reasons and authorities contained herein the Appellants respectfully requests this Court to reverse the **Final** Judgment of the trial court and remand the case with instructions that the Complaint for Declaratory Relief seeking a declaration that the specified statutes are unconstitutional be granted.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to George Waas, Esquire, Office of the Attorney General, PL-01, Tallahassee, FL 32399-1050 this 24 day of September, 1996.


Respectfully Submitted,

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