

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 07-14816-B

VICTOR DIMAIO,
Plaintiff-Appellant,

v.

DEMOCRATIC NATIONAL COMMITTEE AND
FLORIDA DEMOCRATIC PARTY,

Defendants/Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
(CASE NO.: 8:07-CV-1552-T-26MAP)
THE HONORABLE RICHARD A. LAZARRA, JUDGE PRESIDING
BRIEF OF PLAINTIFF - APPELLANT

Michael A. Steinberg and Associates
Michael A. Steinberg, Esquire
1000 N. Ashley Drive, Suite 520
Tampa, FL 33602
(813) 221-1300
Counsel for Plaintiff-Appellant
Florida Bar No.: 340065

DiMaio v. DNC and FDP
Case No. 07-14816

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. APP. P. 26.1, Michael Steinberg makes the following disclosure: Neither Counsel for Plaintiff-Appellant, nor the Plaintiff-Appellant, Victor DiMaio, is a subsidiary or affiliate of any publicly owned corporation. The following persons have an interest in the outcome of this litigation:

1. Victor DiMaio, Appellant;
2. Charles Ketchey, Jr. Counsel for Defendant-Appellee, Democratic National Committee;
3. Amanda S. LaForge, Chief Counsel, Democratic National Committee;
4. Richard A. Lazzara, United States District Judge;
5. Joseph E. Sandler, General Counsel, Democratic National Committee;
6. Sean Shaw, Counsel for Defendant-Appellee, Florida Democratic Party;

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DiMaio v. DNC and FDP
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7. Michael A. Steinberg, Counsel for Plaintiff-Appellant;

s/Michael A. Steinberg
Michael A. Steinberg
Florida Bar No. 340065

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rules of Appellate Procedure 34(A), oral argument is not required when the facts and the legal arguments are adequately presented in the briefs and transcripts. Appellant, Victor DiMaio, believes that oral argument would significantly aid in the Court's decisional process.

CERTIFICATE OF TYPE OF SIZE AND STYLE

Pursuant to Eleventh Circuit Rule 28-2, Appellant hereby certifies that Appellant's Brief was printed in a Courier 12 point, non-proportionally spaced font.

s/Michael A. Steinberg
Michael A. Steinberg
Florida Bar No. 340065

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INTRODUCTION AND PRELIMINARY STATEMENT

Victor DiMaio, ("DiMaio") a citizen of Hillsborough County Florida, and a registered Democrat, brought an action against the Democratic National Committee ("DNC"), the official representative entity of the Democratic Party, which is responsible for promulgating the delegate selection rules for the 2008 Democratic National Convention ("the Rules"). The action was also brought against the Florida Democratic Party ("FDP"), the official representative entity of the Democratic Party in the State of Florida, which is responsible for insuring compliance with the rules of the DNC regarding the delegate selection process for the 2008 Democratic National Convention ("the Convention").

The Rules of the DNC provide that no state presidential preference primary election may be held prior to the first Tuesday in February or after the second Tuesday in June, in the calendar year of the convention, except for the states of New Hampshire, Iowa, Nevada, and South Carolina. The Rules further provide that the DNC may impose sanctions for violations by a state of these rules, including the reduction or elimination of the number of delegates to the Convention.

In 2007, the Florida Legislature amended Section 103.101(a) of the Florida Statutes to advance the Presidential preference primary from the second Tuesday in March to the last Tuesday in January. The amendment now mandates that "each political party other than a minor political party shall, on the last Tuesday in

January in each year the number of which is a multiple of 4, elect one person to be the candidate for nomination of such party for President of the United States or select delegates to the national nominating convention, as provided by party rule". On or about August 25, 2007, the DNC Rules and Bylaws Committee voted not to allow the State of Florida to seat delegates at the Convention because of the enactment of the amendment moving the State primary to a date which violates the Rules, unless within 30 days the FDP moves its primary back at least seven days from the current January 29, 2008 date.

The United States District Court dismissed DiMaio's complaint, with prejudice. The Court held that DiMaio did not have standing to bring this action, that even if he had standing to bring the action, the DNC was not a "state actor" and therefore DiMaio could not establish jurisdiction under 28 U.S.C. § 1343 for violation of his Fourteenth Amendment right to equal protection, and finally, even if DiMaio could show standing and state action requirements, the DNC's right to conduct its own internal affairs, including the enforcement of delegate selection rules and the decision as to which state delegates it will recognize, under the First Amendment right to freedom of association, prevails over any countervailing state interest or the interest of any individual voter.

The Court dismissed DiMaio's complaint with prejudice because it determined that allowing Plaintiff to amend to cure deficiencies of his complaint would be "an exercise in futility.

STATEMENT TO JURISDICTION

The District Court had subject matter jurisdiction over this action under 28 U.S.C. § 1331, 1343 and 2201. Venue is proper under 28 U.S.C. § 1391(b), as a substantial part of the events giving rise to the claim occurred in the Middle District of Florida.

The United States District Court for the Middle District of Florida entered an order dismissing DiMaio's complaint with prejudice. This final judgment disposed of all claims with respect to all parties. DiMaio filed a timely Notice of Appeal on October 10, 2007.

CONSTITUTIONAL AND STATUTORIAL PROVISIONS INVOLVED

Florida Statute § 103.101(a) and Amendment Fourteen to the United States Constitution are the constitutional and statutory provisions relevant to this case. For procedural and jurisdictional purposes 28 U.S.C. §§ 1331, 1343, 2201, and 1391(b) are relevant to this case.

STATEMENT OF THE ISSUES

- I. Whether Action of a national political party in the allocation of delegates to its national nominating convention constitutes state action for purposes of determining whether an individual's equal protections rights under the Fourteenth Amendment to the United States Constitution have been violated.
- II. Whether the actions of a national political party, by treating voters in one state differently than voters in another state, with respect to when presidential preference primaries or caucuses may be held, violates

the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

III. Whether the District Court erred by dismissing DiMaio's complaint with prejudice.

STANDARD OF REVIEW

Because this case is before the Court at the pleading stage, it must accept, for the purposes of this appeal, the truth of DiMaio's factual allegations. Blackston v. State of Alabama, 30 F.3d, 117, 120 (11th Cir. 1994). A District Court, before dismissing a complaint with prejudice, because of a mere pleading defect, ordinarily must give a Plaintiff one opportunity to amend the complaint and to cure the pleading defect. Isbrandtsen Marin Services, Inc. v. M/V Inagua Tania, 93 F.3d 728, 734 (11th Cir. 1996). However, leave to amend need not be granted where amendment would be futile. Galindo v. Ari Mutual Insurance Company, 203 F.3d 771, 777 (11th Cir. 2000). Here the District Court concluded that amendment would be futile because even if DiMaio could plead his standing, pursuant to 28 U.S.C. § 1343, the complaint still would fail to state a claim. Therefore, this court must first determine whether, if Plaintiff had standing, he could state a claim.

STATEMENT OF FACTS

Procedural History

Appellant, DiMaio, filed this action in the United States District Court for the Middle District of Florida asking the Court to determine whether the actions of the DNC, in determining that the State of Florida would not be entitled to any delegates

to its national nominating convention, violates his equal protection rights under the Fourteenth Amendment to the United States Constitution. The DNC and the FDP moved to dismiss DiMaio's complaint and on October 5, 2007, the District Court granted the motions to dismiss.

SUMMARY OF ARGUMENT

ARGUMENT

- I. The District Court erred by finding that the actions of the Democratic National Committee did not constitute the exercise of power conferred or delegated by the State of Florida, and therefore, was not state action invoking the provisions of 28 U.S.C section 1343 and the 14th Amendment to the U.S. Constitution.

The actions of the DNC constitute state action with respect to application of the Fourteenth Amendment of the United States Constitution and 28 U.S.C. § 1343.

The Supreme Court has not yet addressed the issue of whether actions of a national political party at its national nominating convention constitute state action for purposes of a citizen invoking his equal protection rights under the Fourteenth Amendment of the United States Constitution. However, the Supreme Court has held that a nominee selected by a state party convention is engaged in "state action" for purposes of jurisdiction under the Voting Rights Act. There is no logical basis for finding state action for purposes of the Voting Rights Act, but not for purposes of invoking the Fourteenth Amendment. Both require the same degree of state action for the court to have jurisdiction.

In Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) the facts were as follows: The state election code

provided that the nominees of the two major political parties would automatically appear on the general election ballot without the need to declare their candidacy or to demonstrate their support for the nominating petition. Virginia law authorized the two parties to determine for themselves how they would select their nominees, by primary, nominating convention, or by some other method. The Supreme Court stated that the parties "act under authority" of Virginia when they decide who will appear on the general election ballot. Virginia had the sole authority to set the qualifications for ballot access. Virginia prescribed stringent criteria for access with which nearly all independent candidates and political organizations must comply, but reserved two places on its ballot, the top two positions, for the major parties to fill with their nominees, however chosen. Those parties were granted the power to enact their own qualifications for placement of candidates on the ballot, which the Commonwealth ratified by adopting their nominees. The court further stated that the party was delegated the power to determine part of the field of candidates from which the voters must choose. Therefore, when Virginia incorporated the party's selection, it endorsed, adopted, and enforced the delegate qualifications set by the party for the right to choose that nominee. The Court cited Smith v. Allright 321 U.S. 649, 664 (1944). The Court iterated that major parties have no inherent right to decide who may appear on the ballot. The privilege was conferred by Virginia law, not natural law, and if the party chooses to avail

itself of this delegated power over the electoral process, it necessarily becomes subject to the regulation.

In the case herein, Florida Statute 101.2512 states "the Supervisor of Elections of each county shall print on ballots to be used in the county at the next general election, the names of candidates who have been nominated by a political party and the candidates who have otherwise obtained a position on the general election ballot in compliance with the requirement of this code". The State of Florida has given the candidate that emerges from the Democratic Nominating Convention preference in access to the state's general election ballot. In Mrazek v. Suffolk County Board of Elections, 630 F.2d 840, 894 (2nd Cir. 1980), the court suggested that nominating procedures must conform to constitutional requirements, because insured access to the ballot may constitute a form of state action.

In the case of Smith v. Allright, 321 U.S. 649(1944) Petitioner was an individual voter who was denied the right to vote in a primary election conducted by a political party. The political party adopted a rule that all white citizens of the State of Texas... shall be eligible for membership in the Democratic Party, and, as such, entitled to participate in its deliberations. As a result of that rule, Petitioner, a negro, was not permitted to vote in the primary election conducted by the party.

As in this case, the party argued that the Democratic Party of Texas was a voluntary organization and free to select its own membership, and to limit to whites, participation in the party

primary. They further asserted that the Fourteenth Amendment only applied to general elections and that primaries are political affairs handled by party, not governmental officers.

The Court concluded that while membership of a party was of no concern to the state, when that privilege was also the essential qualification for voting to select nominees for a general election, the state makes the action of the party, the action of the state.

In Terry v. Adams, 345 U.S. 461 (1953), Petitioners, qualified negro voters of a Texas county, sued to determine the legality of their being excluded, solely because of their race and color, from voting in elections held by an association consisting of all qualified white voters in the county. In that case, the association's elections, as in the case at bar, were not governed by state laws. The District Court issued a declaratory judgment holding invalid racial discrimination in a pre-primary election.

In the case of Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971), the Court found state action in the formulas the National Party used to allocate delegates to a National Nominating Convention. The Court concluded that by placing the nominee of the convention on the ballot, the states "have adopted this narrowing process as a necessary adjunct of their election procedures" id. 1276.

In the case of Bode v. National Democratic Party, 452 F.2d 1304 (D.C. Cir. 1972), the Court held that the DNC's adoption of a formula for the allocation of delegates to its 1972 National

Convention was "tantamount to a decision of the states acting in concert and therefore subject to constitutional standards, applicable to state action".

However, in Brown v. O'Brien, 469 F.2d 563 (D.C. Cir. 1972), when the Circuit Court for the District of Columbia found that a delegate seating decision by the credential committee constituted state action, and that the actions against the State of California were unconstitutional, the Supreme Court stayed the order. While the Supreme Court did not decide the issue, it found that there was a highly important question to be answered, to wit: "whether the action of the credentials committee was state action". In this case, the Court stated "this is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single state".

In the case of Cousins v. Wagoda, 419 U.S. 477 (1975), the Supreme Court held that an Illinois court had unconstitutionally attempted to enjoin delegates selected pursuant to Democratic party rules, from taking their seats at the 1972 National Convention. Because the case arose in the context of a state court injunction, the Court found state action was clear, and it was not necessary to determine whether the decisions of a national party, in the area of delegate selection, constituted state or government action.

In Ripon Society v. National Republican Party, 523 F.2d 567 (D.C. Cir. 1975) the D.C. Circuit Court pointed out that the nexus between the state and the delegate allocation formula is

open to question, since the Supreme Court in Cousins v. Wagoda, 419 U.S. 477 (1975) held that an individual state is without power to interfere with the delegate selection procedures of a national convention. The Court concluded that since the case failed on its merits, they declined to decide the state action question. Id. at 576.

In the case at bar, under the District Court analysis, an individual voter could never successfully bring an action against a national political party, for violation of that voter's equal protection rights, under the Fourteenth Amendment, because the National Nominating Convention (in reference to delegate allocation at a National Nominating Convention) does not amount to state action. Therefore, under this analysis, if the rules of the National Party provided that non-Christians, females, blacks, or Hispanics could not be delegates to its National Nominating Convention, an aggrieved party would not have standing to challenge the rules of the National Nominating Convention, for violation of his or her equal protection rights under the Fourteenth Amendment to the United States Constitution, because the National Party was not a "state actor".

DiMaio concedes that this situation does not involve such invidious discrimination as set forth above, but the principal is exactly the same. The National Party, in conducting its National Nominating Convention, is either a state actor or it is not a state actor, regardless of the merits of a voter's Fourteenth Amendment rights arguments.

The District Court stated that DiMaio was not being denied the right to vote. DiMaio posits that the right to vote, where that vote is meaningless, is not the right to vote at all. DiMaio therefore asks that this Court determine that with respect to allocation of delegates at a National Nominating Convention, a National Party, who is guaranteed access on a state ballot, is engaged in state action, for purposes of jurisdiction in cases involving alleged violations of equal protection under the Fourteenth Amendment to the United States Constitution.

II. The District Court erred by finding that under the circumstances presented herein, the Democratic National Committee's right to manage and conduct their own internal affairs prevailed over any countervailing state interest or the interest of any individual voter.

DiMaio would posit that the pivotal issue in this case is whether the National Party's right to determine when each state may conduct its presidential preference primary or caucus, resulting in the assignment of a delegate for a presidential candidate, supercedes the right of an individual voter in one state to be treated equally to the voters in another state.

The District Court's reliance on Cousins v. Wagoda, 419 U.S. 477 (1975), and Wisconsin v. DNC, 450 U.S. 107 (1981), is misplaced, because in those cases, the Plaintiffs were not asserting a violation of their equal protection rights under the Fourteenth Amendment.

In Wisconsin v. DNC, 450 U.S. 107 (1981), the National Party's rules provided that if committed delegates could be elected by persons not registered as Democrats, the National Party would not seat the delegates elected, at its National

Nominating Convention. Had the rules allowed Iowa, Nevada, New Hampshire and South Carolina to have its delegates elected in this fashion, but not Wisconsin, the Supreme Court's ruling may very well have been different.

DiMaio is not asserting that the state has the right to dictate to the National Party how it selects its delegates. Instead, he is asserting that the National Party must treat the citizens of one state, equally to the citizens of another state.

The District Court did not address the disparity in the treatment of voters of Florida versus the voters of Iowa, New Hampshire, South Carolina and Nevada.

Had the DNC Rules provided that no state shall have its presidential preference primary or caucus, before February 5, 2008, or that state would not be entitled to delegates at the National Nominating Convention, DiMaio would agree that there would not be an equal protection issue. (There might be a Voting Rights Act issue, but DiMaio did not assert that argument in his complaint)

In the case of Cousins v. Wagoda, 419 U.S. 477 (1975) and Wisconsin v. DNC, 450 U.S. 107 (1981), the party rules were the same for every state. In this case, the rules are different for South Carolina, New Hampshire, Nevada and Iowa, than for Florida. These rules have nothing to do with freedom of speech or association. There is no rational basis for requiring and allowing the aforementioned states to conduct their presidential preference primaries and caucuses, before other states. These

rules are arbitrary, discriminatory, and violate DiMaio's Fourteenth Amendment Right to equal protection.

III. The United States District Court erred by finding that Victor DiMaio did not have standing to bring this action, or in the alternative, by dismissing DiMaio's complaint with prejudice.

The District Court should not have dismissed DiMaio's case with prejudice, if there was a reasonable possibility that DiMaio could have cured deficiencies in his complaint to state a cause of action. Isbrandtsen Marin Services, Inc v. M/V Inagua Tania, 93 F.3d 728, 734 (11th Cir. 1996). Without conceding the point, if DiMaio failed to state a cause of action, by failing to plead a genuine threat of immediate injury, in an amended complaint, DiMaio could easily cure these defects by alleging that the DNC in fact violated his equal protection rights by denying him a meaningful right to vote in a presidential primary election, by refusing to allocate committed delegates to the National Nominating Convention, as a result of that election, when he, as a voter from the State of Florida, is being treated differently than voters in other states.

Therefore, if this Court agrees with the District Court's findings as to "state action" and whether the DNC, if it was a state actor, could violate a voter's equal protection rights by failing to allocate committed delegates determined by an election of voters of a state, when allocation of delegates determined by an election of voters in other states in the same manner, are allowed the seating of their delegates, then the District Court was correct in dismissing DiMaio's complaint with prejudice. If

not, the District Court should have allowed DiMaio at least one opportunity to amend his complaint.

CONCLUSION

This cause should be reversed with a finding that the DNC, in conducting its National Nominating Convention, is engaged in state action, and that the decision of the DNC to strip Florida of its delegates to the National Nominating Convention, violates DiMaio's Fourteenth Amendment rights, because it treats him differently, than voters in other states. If the Court finds that DiMaio did not properly set forth assertions in his complaint to allege standing, the decision of the District Court to dismiss DiMaio's complaint with prejudice, should be reversed, and DiMaio be given the opportunity to amend his complaint to cure said deficiencies.

s/Michael A. Steinberg
Michael A. Steinberg
1000 N. Ashley Drive
Suite 520
Tampa, FL 33602
(813) 221-1300
(813) 221-1702 Fax
Counsel for Plaintiff
Florida Bar No: 340065
Frosty28@aol.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that the foregoing brief complies with the type-volume limitation, typeface requirements, and type style requirements. This brief complies with the type-volume limitations of Fed.R.App.P 32(a)(7)(B) because this brief contains 4,778 words, excluding the parts of the brief exempted by Fed.R.App.P 32(a)(7)(B)(iii). This brief has been prepared in

a proportionally spaced typeface using Microsoft Office Word 2003 in Courier 12 point, non-proportionally spaced font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 25th day of October, 2007, a true and correct copy of the Brief of Plaintiff - Appellant, was filed in the Eleventh Circuit Court of Appeals via CM/ECF System and a copy serviced upon counsel for Defendant, Democratic National Committee, Charles Ketchey, Jr., Akerman Senterfitt, 401 East Jackson Street, Suite 1700, Tampa, FL 33602-5803 and upon counsel for Defendant, Florida Democratic Party, Sean Shaw, Messer, Caparello & Self, P.A., P.O. Box 15579, Tallahassee, FL 32317. I further certify that a copy of the foregoing document and the notice of electronic filing were mailed by first-class mail to the following non-CM/ECF participants: Joseph E. Sandler, Sandler, Reiff & Young, P.C., 50 E. Street, S.E., #300, Washington DC 20003; and Amanda S. LaForge, Chief Counsel, Democratic National Committee, 430 S. Capitol Street, S.E. Washington, DC 20003.

s/Michael A. Steinberg
Michael A. Steinberg
1000 N. Ashley Drive
Suite 520
Tampa, FL 33602
(813) 221-1300
(813) 221-1702 Fax
Counsel for Plaintiff
Florida Bar No: 340065
Frosty28@aol.com