Case No. 08-13241-D

United States Court of Appeals
for the Eleventh Circuit

VICTOR DIMAIO,

Plaintiff-Appellant,

v.

DEMOCRATIC NATIONAL COMMITTEE

Defendant-Appellee.

Appeal from the United States District Court
Middle District of Florida, Case No. 08-00672-CV-T-26-EAJ

ANSWER BRIEF OF APPELLEE DEMOCRATIC NATIONAL COMMITTEE

KATHERINE E. GIDDINGS
Florida Bar No.: 949396
PAMELA C. MARSH
Florida Bar No.: 057400
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Facsimile: (850) 222-0103
E-mail: katherine.giddings@akerman.com
E-mail: pamela.marsh@akerman.com

JOSEPH E. SANDLER
General Counsel, DNC
SANDLER, REIFF & YOUNG, P.C.
300 M Street, S.E. Suite 1102
Washington, D.C. 20003
Telephone: (202) 479-1111
Facsimile: (202 479-1115

Attorneys for Appellee, Democratic National Committee

Case No. 08-13241-D
Victor DiMaio v. Democratic National Party

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Eleventh Circuit Rules 26.1-1 to 26.1-3 and 28-1(b), Appellee Democratic National Committee ("DNC") hereby certifies that the following persons may have an interest in the outcome of this appeal, listed in alphabetical order with descriptions:

1. Akerman Senterfitt – Attorneys for Appellee;
2. Democratic National Committee – Appellee (a District of Columbia nonprofit, unincorporated association);
3. DiMaio, Victor – Appellant;
4. DNC Services Corporation – a District of Columbia nonprofit corporation that holds assets of the Appellee (DNC and DNC Services Corporation are registered together as the national committee of the Democratic Party of the United States under and for purposes of the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. § 431(14). Neither the DNC nor DNC Services has issued any shares and neither has any parent, subsidiary or affiliate that has issued any shares.);

5. Giddings, Katherine E. – Counsel to Appellee;

6. LaForge, Amanda S. – Chief Counsel to Appellee;

7. Lazarra, Richard A. – United States District Judge, Middle District of Florida;

8. Marsh, Pamela C. – Counsel to Appellee;

11. Sandler, Joseph E. – Counsel to Appellee;

12. Sandler, Reiff & Young, P.C. – Attorneys for Appellee;

13. Steinberg, Michael – Counsel to Appellant

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rules 28 and 34 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rules 28-1(c) and 34-3(c), Appellee, Democratic National Committee ("DNC") states that it desires oral argument. The issues in this case — which involve the constitutional rights of national parties to set and enforce rules governing the selection of a party's presidential nominee — are ones of national importance. Oral argument is warranted because such argument would significantly aid in the Court's decisional process and provide counsel the opportunity to answer any questions this Court may have regarding the issues in this case.

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STATEMENT OF JURISDICTION

The District Court denied Appellant Victor DiMaio's motion for summary judgment and granted the cross-motion for summary judgment of Appellee Democratic National Committee (DNC), on May 28, 2008. DiMaio appealed.[1] Jurisdiction in this Court is proper under 28 U.S.C. § 1291.

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[1] Initially, counsel for DiMaio failed to complete the 11th Circuit Transcript Information form as required under the rules and the appeal was dismissed. Order, Jul. 14, 2008, 11th Cir. Dkt. #26. DiMaio filed a Motion to Reinstate the case, which was granted on August 18, 2008, after the hearing transcript was filed. 11th Cir. Dkt. #37.

STATEMENT OF THE ISSUES

1. Whether the claim that the DNC's rule governing the timing of the Democratic Party primaries and caucuses used to allocate delegates to the Democratic National Convention violates the Fourteenth Amendment is justiciable.

2. Whether, even if the claim is justiciable, the DNC was acting under color of state law when it refused to allow the Florida Democratic Party to use the results of Florida's state-run presidential preference primary to allocate delegates to the Democratic National Convention, where the timing of that primary violated the DNC's rules.

3. Whether, even if the DNC were acting under color of state law, the DNC's establishment of its timing rule, based on consideration of a variety of politically relevant factors including the demographic composition of the Democratic electorate in various states, deprived Appellant DiMaio of equal protection of the laws under the Fourteenth Amendment.

STATEMENT OF THE CASE

Nature of the Case

In a prior case, Appellant DiMaio brought an action against the DNC and the Florida Democratic Party ("FDP"). *DiMaio v. DNC*, Middle Dist. of Fla. Case No. 07-01552-CV-T-26 (*"DiMaio I")*. In that case, DiMaio sought a declaratory judgment that the DNC's refusal to seat the delegates of the FDP at the 2008 Democratic National Convention violated the Equal Protection Clause and Article II of the United States Constitution. (*DiMaio I* Dkt # 1). The Defendants, DNC and FDP, moved to dismiss the case. The District Court granted the motion, holding that DiMaio lacked standing. The District Court further held that, even if DiMaio had standing, (1) the defendants did not exercise state action and (2) the national political parties have a constitutionally protected right to establish and enforce their rules for selection of delegates to their national nominating conventions. (*DiMaio I* Dkt # 18).

On appeal, this Court held that DiMaio lacked standing and affirmed the dismissal on that basis. *DiMaio v. Democratic Nat'l Comm.*, 520 F.3d 1299, 1303 (11th Cir. 2008). However, this Court ruled that, because DiMaio lacked standing, the District Court should not have considered the

merits and remanded the case with directions that the District Court dismiss the case for lack of subject matter jurisdiction, without prejudice. *Id.*

DiMaio then filed a new action for declaratory and injunctive relief solely against the DNC. DiMaio claimed that, by refusing to recognize the results of Florida's presidential primary election, the DNC was violating his rights under the Fourteenth Amendment of the United States Constitution. (Record Excerpts ("R.E.") Tab B at ¶ 15; Dkt # 1).[2] He further claimed that — because the DNC receives federal funding under the Presidential Election Campaign Fund Act, 26 U.S.C. § 9008, for the purpose of conducting its presidential nominating convention — the DNC's decision to give "preferential treatment" to the states of Nevada and South Carolina in the scheduling of their presidential primaries and caucuses violated Title VI of the Civil Rights Act of 1964. (R.E. Tab B, at ¶¶27-28; Dkt # 1).[3]

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[2] Pursuant to Rule 28(e), Federal Rule of Appellate Procedure, and Eleventh Circuit Rule 28-5, because the original record is being used pursuant to Circuit Rules and the record excerpts have not been consecutively paginated, references to the record are to specific documents in Record Excerpts ("R.E.") filed by DiMaio and, where available, page and paragraph numbers of that document, and the district court docket number. *DiMaio I* Dkt # references the docket from the Middle District of Florida Case No. 07-01552-CV-T-26 and Dkt # references the docket from the Middle District of Florida Case No. 08-CV-0672-RAL-EAT.

[3]DiMaio has abandoned his Title VI claim in this appeal.

Course of Proceeding and Disposition Below

DiMaio filed his Complaint on April 8, 2008. (R.E. Tab B; Dkt # 1). DiMaio moved for summary judgment on April 29, 2008. (R.E. Tab C; Dkt # 10). On May 1, 2008, the DNC filed a cross-motion for summary judgment. (R.E. Tab D; Dkt # 15). On May 28, 2008, a hearing on the motion and cross-motion for summary judgment was held. (Dkt # 22). Following the hearing, the Court entered a final Order denying DiMaio's motion for summary judgment and granting the DNC's cross-motion for summary judgment on all claims. (R.E. Tab E; Dkt # 24). The Order incorporated the reasons announced on the record at the conclusion of the hearing as well as the District Court's memorandum and order entered in the prior case brought by DiMaio. *Id.*

Statement of Facts

DiMaio's Complaint alleges that DiMaio is a citizen of Hillsborough County, Florida and a registered Democrat, and that he voted in the Florida Democratic presidential preference primary. (R.E. Tab B at ¶¶ 5, 10; Dkt # 1).

The DNC is the governing body of the Democratic Party of the United States and is responsible for promulgating delegate selection rules for the 2008 Democratic National Convention. *Id.* at ¶3; [DNC 2008 Delegate

Selection Rules ("Delegate Selection Rules") attached as Exhibit A to the Declaration of Philip McNamara ("McNamara Dec") in support of the DNC's Cross Motion for Summary Judgment, (R.E. Tab D; Dkt # 15)]. The FDP was responsible for conducting the process of selecting delegates from Florida to attend the Convention in accordance with the DNC's Delegate Selection Rules. (R.E. Tab B at ¶¶ 4; Dkt # 1).

The nominee of the Democratic Party for President of the United States is chosen by the delegates to the Democratic National Convention held in each presidential election year. The National Convention is organized and run by an arm of the DNC. The delegates from each state are chosen through a process adopted by the state's Democratic Party. (R.E. Tab D, McNamara Dec. at ¶¶ 4-5, Dkt # 15).

For each presidential election starting in 1976, the DNC has established formal Delegate Selection Rules to govern the selection, in each state, of its delegates to the National Convention. *Id.* at ¶¶ 7-9. These rules require each State Democratic Party to develop a written delegate selection plan and to submit that plan to the DNC's Rules and Bylaws Committee ("DNC RBC") for review and approval. *Id.* at ¶ 9.

The delegate selection process in each state involves two basic functions: (1) the allocation of delegate positions among presidential

candidates, *i.e.*, how many delegates from that state will go to the Convention pledged to each candidate; and (2) the selection of the actual individuals to fill those positions, *i.e.*, the selection of the people who will attend the Convention as delegates and alternates. *Id.* at ¶ 10.

Generally, state parties use either a primary or a caucus/convention system. In a primary system, the state party uses the state-government run or a party-run primary election to allocate delegate positions, and then a party-run meeting (caucus) to fill those positions. *Id.* at ¶¶ 10-11. In a caucus system, the state party uses a series of party-run meetings — caucuses — both to allocate delegate positions and to select the persons to fill those positions. A caucus/convention system does not involve use of the state's electoral machinery. *Id.* at ¶ 12. Of the 56 states and territories that sent delegates to the 2008 Democratic National Convention, 20 used party-run caucus/convention systems. *Id.* at ¶ 13.

The DNC's Delegate Selection Rules govern all aspects of these processes and reflect the values and ideals of the Party in a variety of ways. (R.E. Tab D, McNamara Dec., Exh. A; Dkt # 15). For example, the Rules require transparency and openness in the process, ensure participation by all voters who are registered as or identify themselves as Democrats, prohibit discrimination and require affirmative action programs to achieve diversity

in the delegations. (R.E. Tab D, McNamara Dec. ¶14; Dkt # 15). These values and ideals are reflected in part by the provisions governing the timing of primaries and first-tier caucuses, *i.e.,* the state party's event at which voters express their preference for President. *Id*. at ¶ 15.

For the last 38 years, a series of DNC commissions and bodies have wrestled with the complex questions of (1) when states should first be able to hold these events; and (2) which states, if any, should be allowed to hold events before all other states. The results of these deliberations have been reflected in the rules for each cycle governing the sequence and timing of primaries and caucuses. *Id.* These deliberations have involved a delicate balancing of the value of showcasing smaller less populous states — where more personal "retail" campaigning is still possible — against the competing value of giving a role to larger, more racially, ethnically and economically diverse states. In setting the timing of caucuses and primaries, the DNC also has had to balance the value of giving Democratic voters a longer time period to scrutinize the candidates (by stretching out the process), against the competing value of uniting the Party and rallying around a nominee earlier in the process and thereby conserving resources for the general election. *Id.* at ¶16.

For the last several cycles, the DNC Rules set the earliest date on which a binding primary or first-tier caucus could be held, with exceptions allowing Iowa to hold its caucuses, and New Hampshire to hold its primary, before that date. *Id.* at ¶¶17. Until the 2004 election, that date was the first Tuesday in March. Then, in 2000, the Republican Party — for the first time — issued rules setting the earliest date for Republican primaries and caucuses as the first Tuesday in February. The DNC then matched the Republican rule for 2000 and 2004 but with exceptions for Iowa and New Hampshire. *Id.* at ¶¶18-19.

After strenuous objections were voiced by some party leaders, the DNC agreed to create a commission (the "Price-Herman Commission") to study the issue. *Id.* at ¶¶ 20-21. In December 2005, after a nearly year-long process involving numerous hearings and meetings, the Price-Herman Commission found that the traditional role of Iowa and New Hampshire should be balanced against the need to place candidates before a range of voters more reflective of the Party's geographic, racial and economic diversity. *Id.* at ¶¶ 20-23. The Commission recommended adding one to two additional caucuses between the Iowa caucuses and the New Hampshire primary, and one to two additional primaries after the New Hampshire

contest but before February 5, 2008, *i.e.,* the first date on which all other states could start to hold their events. *Id.* at ¶¶24-25.

During 2006, the DNC RBC invited state Democratic Parties to apply to be one of the states allowed to hold those pre-February 5th events. Eleven state parties did so. Florida was not among them. *Id.* at ¶¶26-28. After another extensive round of presentations and meetings, the DNC RBC recommended a set of rules providing that (1) the Iowa caucuses would take place no earlier than January 14, 2008; (2) one caucus would be held between the Iowa caucus and the New Hampshire primary, and (3) this caucus would be held in Nevada. *Id.* at ¶ 29. Nevada has a significant and growing Latino population, a sizeable Asian American and Pacific Islander community, and a strong organized labor presence; and is in the western region of the country where the Democratic Party was making electoral gains. *Id.* The DNC RBC further recommended that one primary be held between the New Hampshire primary and the opening of the window on February 5th, and that this primary be held in South Carolina, a southern state in which African-Americans represent a significant share of the Democratic electorate. *Id.* All other state parties would be required to hold their primaries or first caucuses on or after February 5, 2008. *Id.*

The full DNC adopted this rule (the "Timing Rule") as Rule 11A of the Delegate Selection Rules for the 2008 Democratic National Convention. (R.E. Tab D, McNamara Dec. Exh. A; Dkt # 15). To ensure that the DNC could effectively enforce the Delegate Selection Rules, those rules provide for imposition of sanctions on state parties violating certain fundamental strictures, including the "Timing Rule". The Rules provide that any state party violating that rule automatically loses 50% of its pledged delegate positions and that the DNC members, Democratic Members of the state's congressional delegation, and others normally entitled to attend the Convention as unpledged voting delegates will not be permitted to so attend. (R.E. Tab D, McNamara Dec. ¶¶ 31-32; McNamara Dec. Exh. A, Rules 20(C)(1)-(3); Dkt # 15). In addition, the Rules confer on the DNC RBC the authority to impose additional sanctions, including further reductions in the state party's delegation to the Convention. (R.E. Tab D, McNamara Dec. ¶32; McNamara Dec. Exh. A, Rules 20(C)(5) & (6); Dkt # 15).

In early 2007, the Florida Legislature proceeded to enact a law, HB 537, changing the state's presidential preference primary from the second Tuesday in March (which would fully comply with the DNC's Rules) to the last Tuesday in January. The bill was signed into law in May 2007,

amending section 103.101, Florida Statutes. (R.E. Tab D, McNamara Dec. ¶39; Dkt # 15).

Even in a state in which the state runs a presidential preference primary, the state's Democratic Party is free to disregard the results of that primary and use a party-run process instead, to allocate delegate positions among presidential candidates. *Id.* at ¶ 35. In a state in which the state runs a presidential preference primary in violation of the DNC's timing rules, the state's Democratic Party is free to disregard the results of that primary — treating it as a non-binding contest — and to use a party-run caucus/convention process instead, to allocate delegate positions among presidential candidates in compliance with the DNC's timing rules, thereby avoiding any sanctions. Democratic state parties did exactly that in Vermont in 1984; in South Dakota in 1988; and in Arizona, Delaware and Washington State in 2000. *Id.* at ¶¶ 35-37.

Discussions and meetings between the DNC and FDP continued in June, July, and August of 2007. During that period the DNC developed a plan for a party-run congressional district caucus system that would comply with DNC rules and afford an opportunity for all Florida Democrats to vote for President. The DNC even offered to cover the entire cost of implementing that system. *Id.* at ¶¶ 40-42.

The FDP rejected this offer. *Id.* at ¶43. Then, at a meeting on August 25, 2007, the DNC RBC considered Florida's plan to use the January 29th primary in violation of the DNC rules. The DNC RBC then discussed the issue at length, carefully weighing the impact of sanctions against the need for the DNC to be able to enforce its rules on timing to vindicate the goals and values underlying those rules, lest the nominating process descend into chaos, with each state free to leapfrog other states in a never-ending cycle. *Id.* at ¶46. After that discussion, the DNC RBC found the Florida 2008 Delegate Selection Plan in non-compliance with the timing rule, thereby triggering the automatic reduction of the State Party's delegation by 50% and the disentitlement of the state's DNC members and Democratic Members of Congress to attend the Convention as delegates. As part of the same motion, the DNC RBC voted to further reduce the state's total number of pledged and unpledged delegates to zero, as authorized by the Delegate Selection Rules. *Id.* at ¶47.

DiMaio filed the Complaint in this case in April 2008. In his Complaint, DiMaio alleged that the DNC's actions in enforcing its delegate selection rules discriminate against citizens of states not chosen by the party to hold their primaries in the "early window," *i.e.* before February 5, 2008, on the basis of "geographical and racial stereotypes." (R.E. Tab B at ¶23;

Dkt # 1). He also asserted a count under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *Id.* at ¶¶ 25-29. As noted above, the District Court granted summary judgment for the DNC on May 28, 2008. (R.E. Tab. E; Dkt # 24).

On May 31, 2008, subsequent to the District Court's Order in this case, the DNC RBC voted to seat all the delegates from Florida, each to cast a one-half vote.[4] Then, on August 24, 2008, the Credentials Committee of the 2008 Democratic National Convention adopted a resolution to seat all delegates from Florida with a full vote. On Monday, August 25, 2008, the Democratic National Convention, meeting in Denver, Colorado, then approved that resolution and, in accordance with that action, all delegates

[4] Although the undisputed facts in this paragraph are not included in the record on appeal, based on the nature of this case, counsel for the DNC have an ethical obligation to include these recent developments in this brief. *See Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (Developments relating to the possible mootness of the case "should be called to the attention of the Court *without delay*" (emphasis in original); *Fusari v. Steinberg,* 419 U.S. 379, 390-91 (Burger, J., concurring) (all parties have an obligation to inform the Court of developments which could impact the Court's decision such as subsequent amendments to the law). *See also* Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, *Supreme Court Practice* § 13.11(k) (9th ed. 2007) (Any important factual or legal development occurring after the decision below was rendered, or after the Court has granted review, should be brought to the attention of the Court's attention in the brief if the development may change the status of the case or the need for the Court to resolve the questions raised).

{TL170321;1}

from Florida were seated with a full vote at the 2008 Democratic National Convention.

Statement of the Standard of Review

This Court reviews *de novo* the District Court's order denying DiMaio's motion for summary judgment, applying the same legal standard used by the District Court. *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 836 (11th Cir. 2006); *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1242 (11th Cir. 2001). Under that standard, "summary judgment is appropriate where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.*, 496 F.3d 1231, 1241 (11th Cir. 2007) (quoting Fed. R. Civ. P. 56(c)).

SUMMARY OF ARGUMENT

First, DiMaio's Fourteenth Amendment claim is not justiciable. The DNC's First Amendment right of freedom of association protects the Party's ability to establish and enforce rules for selection of delegates to its National Convention in ways that serve and promote the Party's ideologies and preferences. The Timing Rule represents a core exercise of this right, reflecting the Party's internal decision about how best to balance competing

political goals and values in the scheduling of primaries and caucuses. Adjudication of the Fourteenth Amendment claim would implicate the courts in political party policy-making and is constrained by the Party's First Amendment rights.

Second, even if the claim were justiciable, it lacks merit because the DNC, in establishing and enforcing the Timing Rule, was not acting under color of state law. Not one of the three tests established by this Court for finding state action has been met. Further, since the Supreme Court established that the national parties' rights to enforce their delegate selection rules are protected by the First Amendment, no court has held that a national party's enforcement of such rules constitutes state action.

Third, even if the DNC's actions were under color of state law, they did not violate the Equal Protection Clause. The selection of certain states to hold early primaries and caucuses did not discriminate against any individual voter or against the voters of any particular state, on *any* basis. In any event, the DNC surely has the right to determine which state Democratic Parties can hold primaries and caucuses before others. And at least in the absence of any invidious racial discrimination, the DNC has the right to take into account various political factors, including the demographic

composition of the Democratic electorate, in making that determination, if such determination rationally advances its political goals.

ARGUMENT

The 2008 Democratic National Convention has concluded, all the delegates from Florida were seated with a full vote, and thus there is no live controversy remaining. In determining whether DiMaio's claim for injunctive relief is moot, however, this Court also considers whether "it can be said with assurance that there is no reasonable expectation that the alleged violation will recur." *Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001) (quoting *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1201 (11th Cir. 1997) (internal quotations omitted)). The DNC cannot offer such an assurance at this time because the Florida law setting the primary date prior to the earliest time allowed under DNC Rules remains in effect, and the DNC's timing rule for the 2012 Democratic National Convention has not yet been determined. Accordingly, the merits of the case are argued below.

I. THE FOURTEENTH AMENDMENT CLAIM IS NOT JUSTICIABLE.

Before reaching the issue of whether the DNC's actions violated the Fourteenth Amendment, this Court must determine whether DiMaio's Fourteenth Amendment claim is justiciable. *Wymbs v. Republican State Exec. Comm. of Fla.*, 719 F.2d 1072, 1076-77 (11th Cir. 1983), *cert. denied*,

465 U.S. 1103, 104 S. Ct. 1600 (1984). DiMaio's claim is not justiciable, for precisely the reasons that were applicable in *Wymbs* — adjudication of this claim would require the courts to engage in political party policy-making and is constrained by the Party's First Amendment right of association.

A. The DNC Has A Constitutionally Protected Right To Establish And Enforce Rules For Selection Of Delegates To Its National Nominating Convention.

In the establishment and enforcement of rules for selecting delegates to its national convention, the "National Democratic Party and its adherents enjoy a constitutionally protected right of political association." *Cousins v. Wigoda*, 419 U.S. 477, 487, 95 S. Ct. 541, 547 (1975). In *Cousins*, the DNC refused to seat Illinois' delegates to the 1972 Democratic National Convention, because those delegates — although elected in a state-run primary in accordance with state law — had been selected in violation of the national party's delegate selection rules. A state court ordered the delegates seated in accordance with state law, and the state appellate courts upheld that order. The United States Supreme Court reversed, holding that the DNC had a constitutionally protected right to enforce its delegate selection rules, while the "States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." 419 U.S. at 489-90, 95 S. Ct. at 549.

Then, in *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 101 S. Ct. 1010 (1981), Wisconsin state law provided for a state-run Democratic presidential primary open to Republicans and independents, and required delegates to vote in accordance with the results of the primary. The state submitted a delegate selection plan providing for such an open primary. The DNC's Compliance Review Commission (now the DNC Rules and Bylaws Committee) disapproved the plan because the plan violated the DNC delegate selection rule banning open primaries. The DNC indicated that delegates chosen under the plan would not be seated at the 1980 Convention. The State of Wisconsin sued in the state Supreme Court to force the DNC to seat the delegates. The state court ordered that the delegates be seated based on the results of the state-run open primary. The United States Supreme Court reversed, ruling that the State of Wisconsin could not force the DNC to seat a delegation chosen in contravention of the DNC's rules because such a requirement would violate the party's associational rights protected by the First Amendment. *LaFollette*, 450 U.S. at 122, 101 S. Ct. at 1019.

The Court rejected Wisconsin's argument that its open primary law placed only a minor burden on the national party, holding that a "State . . . may not constitutionally substitute its own judgment for that of the Party. *A political party's choice among the various ways of determining the makeup of*

a State's delegation to the party's national convention is protected by the Constitution." 450 U.S. at 123-24, 101 S. Ct. at 1020 (emphasis added). The Court concluded that Wisconsin was certainly free to conduct a primary that violated the DNC rules, but that if Wisconsin did so, "it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules." 450 U.S. at 126, 101 S. Ct. at 1021.

Here, too, the state of Florida was free to run its presidential primary on January 29, 2008. DiMaio was free to vote in that primary — and did so. (R.E. Tab B ¶10; Dkt# 1). In refusing to seat the delegates from Florida, the DNC was doing no more than it did in *LaFollette* — establishing and enforcing its rules for selection of delegates to the Convention.

B. *The DNC's Promulgation And Enforcement Of Its Timing Rule Represents An Exercise Of Its Constitutionally Protected Rights*.

"Freedom of association means not only that an individual voter has the right to associate with the political party of her choice,…but also that a political party has a right to. . . select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 225, 109 S. Ct. 1013, 1021 (1989), *quoting Ripon Society, Inc. v. Nat'l Republican Party*, 525 F.2d 567,

601 (D.C. Cir. 1975) (en banc) (Tamm, J., concurring in result), *cert. denied*, 424 U.S. 933, 96 S. Ct. 1147 (1976). Here, a party commission and the DNC's Rules and Bylaws Committee, after extensive and lengthy deliberation, recommended rules to govern the selection process. Those rules reflect a carefully thought-out determination that a standard bearer best representing the Democratic Party would more likely be chosen through a process that balanced the traditional role of early events in Iowa and New Hampshire with early events in other states better reflecting the Party's diversity — not only racial and ethnic diversity, but economic and geographic diversity as well. A further deliberation resulted in the decision that those states, in 2008, should be Nevada and South Carolina, rather than some other states. (R.E. Tab D, McNamara Dec. ¶¶22-24, 29; Dkt # 15). The DNC's associational rights are thus squarely implicated by the DNC's decision to adopt the Timing Rule violated by the FDP.

As the Florida Northern District Court held in another recent challenge to these same actions of the DNC, "[t]he DNC had the right to establish a schedule for primaries and caucuses used in the selection of delegates to its national convention. And the DNC has a First Amendment right of association to exclude delegates not chosen in compliance with the schedule." *Nelson v. Dean*, 528 F. Supp. 2d 1271, 1281 (N.D. Fla. 2007).

C. DiMaio's Fourteenth Amendment Claim Is Non-Justiciable.

DiMaio challenges the DNC's Timing Rule itself. Specifically, he challenges the DNC's decision to allow the State Democratic Parties of Nevada and South Carolina to use a binding caucus and primary, respectively, before other State Parties were allowed to hold similar events. Ini. Br. at 4. DiMaio contends that this decision violated the Fourteenth Amendment because the DNC gave "significant consideration to the racial and national origin demographics of a state, in permitting one state to conduct its presidential preference primary, earlier than other states." *Id*. at 13. The undisputed facts of record, however, are that the DNC considered a variety of factors — state size, geography, union density, and ethnic and racial diversity, the tradition of retail politics — in determining that the Democratic State Parties in four states (Nevada, South Carolina, Iowa and New Hampshire) should be allowed to use presidential preference primaries or caucuses taking place before those in other states. (R.E. Tab D, McNamara Dec. ¶¶ 23-24, 29; Dkt # 15).

In these circumstances, Plaintiff's Fourteenth Amendment claim is clearly non-justiciable. In *Wymbs,* a Republican voter challenged the national Republican Party's delegate selection rule (reflected in the state party's rules),

which provided for apportionment of delegates among congressional districts. 719 F.2d at 1074. The voter argued that the rule violated the "one-person one-vote" requirement and therefore ran afoul of the Fourteenth Amendment. *Id.* This Court held that the case was non-justiciable for several reasons.

First, this Court ruled that, "to provide the relief [plaintiff] has requested would require this court to engage in political party policy making beyond its role in society and beyond our ken as article III judges." *Id.* at 1082. "We think it plain that this court is an inappropriate body to decide how the Florida delegation to the Republican National Convention should be selected." *Id.*

Second, this Court ruled that, even if that were not the case, "we would be constrained by the Party's countervailing *first amendment* rights of free speech and association." *Id.* at 1084 (emphasis added). "[T]he strong first amendment associational freedoms possessed by political parties limited the district court's ability to tell the Republican Party how to conduct its internal affairs and whom it should represent." *Id.* at 1086.

Finally, this Court noted that the case was one in which there is a "'lack of judicially discoverable and manageable standards to resolve the controversy presented.'" *Id.* at 1085 (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962)). This Court stated that the ultimate decision on what delegates would be seated at the Convention would have to be made by the

Convention itself, under *LaFollette,* and that the "court would find it difficult, if not impossible," to determine how to reapportion Florida's delegate districts as requested by the plaintiff. *Id*. at 1085-86.

Here too, for this Court to overturn the DNC's Timing Rule on Fourteenth Amendment grounds would require the Court "to engage in political party policymaking," *Wymbs*, 719 F.2d at 1082, by deciding what factors the Party should consider in the scheduling and sequencing of presidential primaries and caucuses and then applying those factors. As in *Wymbs*, such an exercise would be constrained by the DNC's countervailing First Amendment right of association, which is clearly implicated, as explained above, in the DNC's deliberations leading to promulgation of the Timing Rule. Finally, this case also lacks judicially manageable standards for resolving the controversy — what criteria would the Court use to decide which state Democratic Parties should be allowed to hold primaries or caucuses before others, and when those events should take place?

If Plaintiff's claim that the Timing Rule itself violates the Fourteenth Amendment is non-justiciable, the claim that the DNC's enforcement of the rule violates the Constitution also is non-justiciable. If the DNC has the right to establish rules for the selection of delegates, it must be allowed to enforce those rules. And as the Supreme Court made clear in *LaFollette*, the

appropriate way — indeed, the only way — that the national party can enforce these rules is to refuse to seat delegates selected through a process that violates those rules. *LaFollette*, 450 U.S. at 126.

Further, a finding of non-justiciability is especially warranted where, as in this case, the Party itself has already addressed the controversy through its own internal procedures. As the Supreme Court held in *O'Brien v. Brown*, 409 U.S. 1, 92 S. Ct. 2718 (1972), in staying a Court of Appeals decision overturning recommendations of the Credentials Committee of the 1972 Democratic National Convention: "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." *Id.* at 4, 92 S. Ct. at 2720. The Court ruled that "no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy that are essentially political in nature." *Id.*

The Call to the 2008 Democratic National Convention conferred this power, to determine intra-party disputes over the seating of delegates, on the DNC RBC, until June 29, at which point the Convention Credentials Committee assumed that authority. (R.E. Tab D, McNamara Dec. ¶¶57-58;

Dkt # 15). In this case, the DNC RBC acted to seat all of Florida's delegates with a half-vote each, and then the Credentials Committee and the Convention itself voted to seat the delegates with a full vote. The DNC RBC and the Credentials Committee are clearly the "proper fora" for determining this dispute. For the reasons set forth in *Wymbs,* judicial intervention is therefore not only inappropriate, but it also is unwarranted.

II. THE DNC'S ESTABLISHMENT AND ENFORCEMENT OF ITS TIMING RULE DO NOT CONSTITUTE STATE ACTION.

Even if DiMaio's Fourteenth Amendment claim were justiciable, the DNC's establishment and enforcement of its Timing Rule do not constitute state action. In the prior Order adopted by the District Court as the basis for the Order in the instant case, the District Court correctly ruled that "DiMaio fails to state a cause of action because the DNC and the FDP do not exercise any power conferred or delegated by the State of Florida; rather, they are private actors." (*DiMaio I* Dkt # 18).

A. None Of The Tests For State Action Was Met.

Three tests are used to determine whether a private entity, such as the DNC, is exercising "state action:"

> (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test. The public function test limits state action to instances where private actors are performing functions "traditionally the exclusive prerogative of the state." The state compulsion test limits state action to

> instances where the government "has coerced or at least significantly encouraged the action alleged to violate the Constitution." The nexus/joint action test applies where "the state has so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise."

Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1277 (11th Cir. 2003) (quoting *Willis v. Univ. Health Serv., Inc.*, 993 F.2d 837, 840 (11th Cir.), *cert. denied*, 510 U.S. 976, 114 S. Ct. 768 (1993)).

Here, the DNC refused to allow the FDP to use the state-run, January 29, 2008, presidential preference primary to allocate, among presidential candidates, Florida's delegates to the 2008 Democratic National Convention, because that primary took place before the earliest date allowed by the DNC's Delegates Selection Rules. (R.E. Tab B, ¶¶ 6-10; Dkt # 1). The DNC was insisting that the FDP, instead, use a party-run alternative process, complying with the DNC's Rules, to allocate delegates to the Convention. *Id.* ¶¶ 9, 13.

With respect to the three tests for state action, first, clearly the DNC was not exercising a "public function" in insisting that the FDP *refrain from using* the state-run primary for the allocation of delegates. As DiMaio alleges, the DNC is insisting that the FDP *not* use the state's election machinery at all in the process for selecting delegates to the Convention; but rather, that the FDP use an alternative, state party-run process instead.

Contrary to DiMaio's suggestion (Ini. Br. at 8-9), the Florida presidential preference primary does *not* select the presidential nominee who appears on the state's general election ballot. The entire Democratic National Convention does that. The DNC sanctions involve the allocation of delegate positions that are not in any way created or assigned by the state. Indeed, those sanctions would have been removed long before the May 2008 DNC RBC meeting had the FDP agreed to implement a delegate allocation process — a caucus system — within the DNC's Timing Rule (on or after Feb. 5, 2008), which would *not* involve the state in any way whatsoever.

Second, the DNC did not exercise any state compulsory power here. Again, the DNC was exercising only its own authority, under its Delegate Selection Rules, to determine that, if a state Democratic Party is to send delegates to the Convention, it must select those delegates through a process that complies with the Party's Delegate Selection Rules.

Finally, the State of Florida was in no way involved or implicated in the DNC's enforcement of its Delegate Selection Rules. Rather, the DNC was requiring the FDP to *ignore* the results of the state-run presidential preference primary because it was held in violation of the DNC's rules. In so doing, the DNC took the state of Florida out of the equation entirely: the DNC was insisting — as it has the constitutionally protected right to do —

that the FDP run its own process, complying with DNC rules, for the allocation of delegates to the Convention. For these reasons, the DNC clearly was not "acting under color of state law" in enforcing its Delegate Selection Rules against the FDP.

B. Since The Supreme Court Has Recognized That The National Parties' Right To Establish And Enforce Delegate Selection Rules Is Constitutionally Protected, No Court Has Held That Enforcement Of Those Rules Constitutes State Action.

In the *Cousins* case, the Court found it unnecessary to determine whether the DNC's enforcement of its delegate selection rules constituted state action. 419 U.S. at 483 n.4, 95 S. Ct. at 545 n.4. Since *Cousins*, courts have generally found it unnecessary to decide whether a national party's enforcement of its delegate selection rules constitutes state action. This is because, as explained in section III below, the courts have consistently held that, even if it does, the national parties have the constitutionally protected right to enforce those rules and that right prevails over any countervailing state interest or the interest of any individual voter. *See, e.g., LaRouche v. Fowler*, 152 F.3d 974, 993 (D.C. Cir. 1998); *Wymbs,* 719 F.2d at 1085-86; *Nelson,* 528 F. Supp. 2d at 1277-78. And certainly, *no* court, since the *Cousins* decision, has ever held that a national party's enforcement of its delegate selection rules constitutes state action.

DiMaio relies heavily on *Morse v. Republican Party of Virginia*, 517 U.S. 186, 116 S. Ct. 1186 (1996). Ini. Brief at 7-8. That reliance is misplaced. In *Morse*, the Court held that a political party's imposition of a registration fee for participation in its state Convention did, in effect, constitute state action for purposes of section 5 of the Voting Rights Act. It did so because Virginia law directly conferred on the state party the power and authority to use that state Convention to select its nominee for United States Senate. 517 U.S. at 203, 116 S. Ct. at 1198. The Supreme Court took pains to distinguish that situation, however, from the enforcement of delegate selection rules, with respect to the issue of state action. The Court distinguished its earlier summary affirmation of a district court decision holding national party delegate selection rules did not have to be pre-cleared under the Voting Rights Act in *Williams v. Democratic Party of Georgia*, 409 U.S. 809, 93 S. Ct. 67 (1972). In *Morse*, the Court explained:

> *Williams* did not concern the selection of nominees for state elective office, but rather a political party's compliance with a rule promulgated by the Democratic National Party governing the selection of delegates to its national Convention….[T]he State exercised no control over, and played no part in, the State Party's selection of delegates to the Democratic National Convention.

Morse, 517 U.S. at 201-202, 116 S. Ct. at 1197.

Indeed, the only other court since *Morse* actually to have addressed the issue of whether enforcement of national party delegate selection rules constitutes state action for purposes of Voting Rights Act section 5, found that it does not. In *LaRouche v. Fowler*, the court held that the Voting Rights Act "should not be read to extend coverage that would interfere with core associational rights; specifically here, internal national party rules as followed by state parties in a covered jurisdiction." 77 F. Supp. 2d 80, 89 (D.D.C. 1999) (three judge court), *aff'd w/o opinion,* 529 U.S. 1035, 120 S. Ct. 1529 (2000).

Also misplaced is DiMaio's reliance on *Bode v. Democratic Nat'l Party*, 452 F.2d 1302 (D.C. Cir. 1971), and *Georgia v. National Democratic Party,* 447 F.2d 1271 (D.C. Cir.), *cert denied*, 404 U.S. 858, 92 S. Ct. 109 (1971), for the proposition that the party's enforcement of its delegate selection rules could constitute state action. Ini. Brief at 9-10. As DiMaio acknowledges (*id.* at 12), the D.C. Circuit itself subsequently questioned its own holding in those cases in *Ripon Society, Inc. v. Nat'l Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933, 96 S. Ct. 1147 (1976). In that case, plaintiffs challenged the delegate allocation formula used by the national Republican Party on grounds that the formula violated the Equal Protection Clause. The D.C. Circuit noted that, since

Bode and *Georgia* had been decided, the Supreme Court had decided several state action cases as well as the *Cousins* case, and that, as the question of state action "now comes to us a third time…its answer is much less clear." 525 F.2d at 574. The court declined to decide the state action question, holding that, *even if* the party was a state actor and the Equal Protection clause applied, it would not apply in the same way to the party as to the state itself because:

> [A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation. The express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association.

Id. at 585 (emphasis added).

In light of the *Ripon* decision, the holdings of *Bode* and *Georgia* as to state action obviously have no continuing vitality. Indeed, as this Court observed in *Wymbs*, in declining to follow *Bode* and *Georgia*: "Were the District of Columbia Circuit called upon to decide these cases today, the court might reach a different result." 719 F.2d at 1081.

Equally unavailing is DiMaio's effort to invoke two of the White Primary Cases — *Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809 (1953), and *Smith v. Allwright*, 321 U.S. 649, 63 S. Ct. 757 (1944). Ini. Brief at 9-10.

Those cases involved exclusion of African-Americans from a party-run primary for statewide office, the winner of which was automatically put on the general election ballot by the state. In *O'Brien v. Brown*, 409 U.S. 1, 92 S. Ct. 2718 (1972), the Supreme Court stayed lower court orders denying the Democratic National Convention the right to strip two states, Illinois and California, of all of their delegates because those delegates were selected in violation of national party rules. The Court held that, "[i]t has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4, 92 S. Ct. at 2720. And in so ruling, the Court specifically held the White Primary Cases to be *inapplicable*, explaining that, "[t]his 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." *Id*. at 4 n.1, 92 S. Ct. at 2721.

The instant case, of course, is also not such a case: "[I]n this case, DiMaio does not contend that the Democratic National Committee was engaged in malicious discrimination…." Ini. Brief at 16. DiMaio raises the question of what analysis would apply if a national party were to impose invidious discrimination in the selection of delegates (*id*. at 15), rather than

strictly forbid such discrimination, as the DNC Rules actually do. (R.E. Tab D, McNamara Dec., Exh. A, Rules 4-7; Dkt # 15). But that is simply not a question actually presented in this case.

Thus, based on the undisputed facts, DiMaio's allegations do not, and cannot, demonstrate the requisite state action to support his claim of a violation of his rights under the Fourteenth Amendment.

III. THE DNC'S ESTABLISHMENT AND ENFORCEMENT OF ITS TIMING RULES DID NOT VIOLATE THE FOURTEENTH AMENDMENT.

In addition to DiMaio's claim being non-justiciable and there being a lack of state action, judgment also should be rendered for the DNC because the DNC's actions did not constitute discriminatory treatment that violates the Equal Protection Clause.

First, to the extent DiMaio is claiming that the Timing Rule itself impermissibly discriminates among states based on race or national origin, (R.E. Tab B, ¶¶21-23; Dkt # 1), that claim is illogical. At the outset, it is clear that the DNC must have the right to set a schedule for the primaries and caucuses used to award delegates; and that the DNC is not required to force all the states to hold events the same day or to allow each state to hold its event whenever it pleases. Would the DNC be constitutionally required to allow Florida to hold a binding primary *before* the New Hampshire

primary if Florida's legislature decided to enact such a law? Before Delaware or North Dakota or Colorado? Since voters in any state that enacts a law to hold a primary earlier than that permitted by DNC rules could make the same claims as DiMaio now makes, is the DNC constitutionally required to allow states to hold binding primaries on any day they wish? On Thanksgiving Day? New Year's Eve?

Of course, the answer to all these questions is no. As the Northern District of Florida recently held in *Nelson* in granting summary judgment to the DNC:

> Plaintiffs have offered not a single argument — and none comes to mind — in support of the notion that there can be no national schedule. Plaintiffs have offered not a single argument — and none comes to mind — in support of the notion that each state must be free to do as it pleases. A national party has a compelling interest in setting a schedule and requiring compliance.

528 F. Supp. 2d at 1280.

If the DNC is to be allowed to determine the schedule and sequence of these primaries and caucuses, it must be permitted to take into consideration factors that rationally advance its political interests. The selection of four states that are allowed to hold presidential preference primaries and caucuses before other states obviously did not discriminate against any individual

voter. Nor did it necessarily discriminate against the voters of any particular *state*, on *any* basis.

To be sure, at the outset of the Democratic Party nominating process for this presidential election, some held the view that the votes of Democrats in states holding events later in the year would be diluted or worth less because the nomination would be effectively decided before those events took place. That, of course, turned out *not* to be the case at all. The nomination was not decided until late in the process. Arguably, those Democratic voters in states holding primaries or caucuses at the very end of the process exerted at least as much — if not more — influence than the voters of Iowa, New Hampshire, Nevada, and South Carolina. Indeed, had Florida scheduled its primary in accordance with the DNC rules, for a date on or after February 5, 2008, or used an alternative party-run process taking place on or after that date, arguably its Democratic voters would have had *more* influence over the nominating process than did the Democratic voters of the four early states.

Even if that were not the case, however, the DNC's selection of these four states could not be held to violate the Fourteenth Amendment. It is undisputed that the racial and ethnic diversity of two of these states, South Carolina and Nevada, was but one factor in their selection, and not the

decisive one. (R.E. Tab D McNamara Dec. ¶29; Dkt # 15). Even if the DNC were considered a state actor, the promotion of diversity would constitute a compelling state interest that would enable the DNC's actions to pass constitutional muster in the absence of any indication that race was the decisive factor in its selection of these states. *Compare Grutter v. Bollinger*, 539 U.S. 306, 328-335, 123 S. Ct. 2325, 2338-47 (2003) (promotion of diversity is compelling state interest as long as race is not decisive factor), *with Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003) (where race was decisive factor, process not narrowly tailored to serve compelling state interest).

But, of course, the DNC is not a state. Even if the DNC's actions were considered "state action" for purposes of constitutional analysis, unlike the state itself, the DNC has its *own* constitutional rights which must be weighed against those of the voter. For that reason, the "compelling state interest" test does not apply. Instead the DNC must only show that its delegate selection rule rationally advances some legitimate interest of the party in achieving its political goals.

Thus, in *Ripon Society*, the Court held that the test for compliance of national party delegate selection rules with the Equal Protection Clause would not be "compelling state interest," but rather that, the "party's choice,

as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation." *Ripon Society,* 525 F.2d at 585. The Court determined that "the Equal Protection Clause, assuming it is applicable . . . is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *Id.* at 586-87. *See also LaRouche v. Fowler*, 152 F.3d 974, 995 (D.C. Cir. 1998) (Constitution is satisfied if the Party's delegate selection rules "rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals"); *Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 842 (4th Cir. 1987) (DNC delegate selection rule of requiring delegates to be equally divided by gender did not violate Equal Protection because the rule rationally advanced legitimate interest of the party).

Here, as explained in I(B) above, the DNC's Timing Rule clearly advances the legitimate interests of the Party in winning elections and achieving the Party's political goals, by striking what the Party believes is the proper balance among the competing interests and values at stake in determining the sequencing and timing of presidential primaries and

caucuses. Even if the DNC were regarded as a state actor, then, its promulgation of the Timing Rule is consistent with the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the district court properly granted the DNC's motion for summary judgment and the judgment of the district court should be affirmed.

CERTIFICATE OF TYPE SIZE & STYLE

I hereby certify that this brief complies with the type-set and volume limitation set forth in Rule 32(a)(7)(B), Federal Rules of Appellate Procedure. This brief contains 8,179 words.

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KATHERINE E. GIDDINGS
Florida Bar No.: 949396
PAMELA C. MARSH
Florida Bar No.: 057400
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Facsimile: (850) 222-0103
E-mail: katherine.giddings@akerman.com
E-mail: pamela.marsh@akerman.com

JOSEPH E. SANDLER
General Counsel, DNC
SANDLER, REIFF & YOUNG, P.C.
300 M Street, S.E. Suite 1102
Washington, D.C. 20003
Telephone: (202) 479-1111
Facsimile: (202 479-1115

Attorneys for Appellee, Democratic National Committee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th date of September, 2008, a true and correct copy of the Answer Brief of the Democratic National Committee was filed in the Eleventh Circuit Court of Appeals via EDF System; an original of the Answer Brief was forwarded to the Eleventh Circuit Court of Appeals for filing on Friday, September 19, 2008; and a true and accurate copy of the Answer Brief was served by U.S. Mail, First Class, upon counsel Michael A. Steinberg, 1000 N. Ashley Drive, Suite 520, Tampa, Florida 33602.

____
KATHERINE E. GIDDINGS