

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

BILL NELSON, ALCEE L. HASTINGS,
CORRINE BROWN, JANET B. TAYLOR,
EUGENE A. POOLE, SAM OSER,
CARLOS DE ZAYAS, and LUIS
FERNANDEZ,

Plaintiffs,

vs.

HOWARD DEAN, THE DEMOCRATIC
NATIONAL COMMITTEE, and KURT S.
BROWNING in his official capacity as
Secretary of State of the State of Florida,

Defendants.

Case No. 4:07cv427-RH/WCS

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, Bill Nelson, Alcee Hastings, Corrine Brown, Janet B. Taylor, Eugene A. Poole, Sam Oser, Carlos De Zayas, and Luis Fernandez, pursuant to Rule 56, Fed.R.Civ.P., hereby move for partial summary judgment based on grounds stated herein.

Introduction

Plaintiffs are Floridians and voters who challenge the action of the Defendants in denying Plaintiffs and some four million other Democratic voters any meaningful role in the selection of their party's Presidential nominee in the primary set by a Republican-

dominated state legislature for January 29, 2008. Plainly, voting is a fundamental right and one of the most cherished prerogatives in our democracy:

It is axiomatic that '[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'

Wesberry v. Sanders, 376 U.S. 1 (1976). Given the manifestly fundamental character of these rights, there are, in substance, only two issues this Court should address in resolving the merits of Counts I and II: (1) whether the actions of the Defendants sufficiently intertwined with the actions of the State of Florida so as to meet the definition of "state action," and (2) assuming that state action is found, whether the complete denial of any meaningful role to Florida's primary voters on January 29 constitutes a deprivation of any constitutional right, privilege, or immunity. Assuming, as Plaintiffs submit, that these questions should be answered affirmatively, a partial summary judgment should be entered providing such a declaratory adjudication. In that event, Defendants would have an opportunity to comply with this Court's declaration before reaching the issues of remedy, which, if necessary, could be separately determined.

This motion is based on the Statement of Undisputed Material Facts served herewith, (hereafter "Statement, ¶ ' ___'"), pursuant to Local Rule 56.1(A) of this Court.

Standing Requirements to this Suit are Met

The Plaintiffs have standing to pursue this lawsuit. *Baker v. Carr*, 369 U.S. 186, 207-208 (1962) (voters in equal protection claim had sufficient stake in the outcome to

litigate one-man, one-vote equal protection claim; voters are asserting “a plain, direct and adequate interest in maintaining the effectiveness of their votes”); *Clingman v. Beaver*, 544 U.S. 581 (2005)(dispute on ability of Oklahoma primary voter to vote in primary resolved on merits; standing implicitly found); *Dept. of Commerce v. U.S. House of Rep.*, 525 U.S. 316, 329-30 (1999)(resident had standing on vote dilution claim attributable to prospective loss of one representative in Congress for State of Indiana); *Smith v. Allwright*, 321 U.S. 757 (1944)(primary voter denied right to vote given relief). Indeed, as “super-delegates,” three of the Plaintiffs have been divested of their existing rights. (Statement, ¶¶ 2, 3 and 4). The other Plaintiffs also have sufficient interests “in maintaining the effectiveness of their votes” to meet any constitutional test for standing. (Statement, ¶ 5). As Sam Oser explained the injury facing him and other senior citizens:

I was shocked when I learned of the Democratic National Committee’s decision to penalize Florida Democrats by making sure that none of our votes will count in the upcoming Presidential primary election. The Committee’s decision has not only robbed me of my vote, but has also disenfranchised senior citizens like me. For a number of us, this may very well be our last Presidential election and our last opportunity to make our votes count.

(Exhibit “B,” Affidavit of Sam Oser, at ¶5). Plainly, the Plaintiffs have a sufficient stake in the outcome and an injury in fact which can be redressed by action of this Court.

The DNC and Florida’s Interdependent Roles in the Presidential Primary

Some states rely on private party caucuses funded by the Democratic and Republican parties rather than by taxpayers to select delegates to the national nominating conventions. The State of Florida, however, determined decades ago that it would conduct, at considerable public expense, Presidential primary elections to select those

delegates. (Statement ¶¶ 14-18). During the ensuing years, the Democratic and Republican parties have not taken steps that might arguably insulate their processes from constitutional safeguards by conducting their own procedures at their own expense. *Id.* Instead, they have embraced the primary election system in Florida and collaborated extensively with public agencies to use public funds for their selection of delegates. *Id.* As the Supreme Court of Florida explained, even apart from the obvious financial advantages of using public funding, utilizing a public election to measure the candidates' voting support and electability provides other substantial benefits to the Democratic and Republican parties. *Quinn v. State*, 259 So.2d 492 (Fla. 1972). As the Florida Supreme Court observed, "In this, a primary election, it is a matter of each political party putting forth its best candidate and therefore a recognized one who would be likely to find the favor of the voters of this nation." 259 So.2d at 494.

In mandating a Presidential primary election, Florida was well within its rights. According to the U.S. Supreme Court, it is "considered 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intra-party competition is resolved in a democratic fashion." *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000), *citing*, *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974). Equally clear is the reality that the State of Florida has required a Presidential preference primary. Section §103.101, Fla. Stat. (2007) provides in pertinent part as follows:

...
(2) There shall be a Presidential Candidate Selection Committee composed of the Secretary of State, who shall be a nonvoting chair; the Speaker of the House of

Representatives; the President of the Senate; the minority leader of each house of the Legislature; and **the chair of each political party required to have a presidential preference primary under this section.**

(a) ...The Secretary of State shall prepare and publish a list of the names of the presidential candidates submitted.

...

(4) The names of candidates for political party nominations for President of the United States shall be printed on official ballots for the presidential preference primary election and shall be marked, counted, canvassed, returned, and proclaimed in the same manner and under the same conditions, so far as they are applicable, as in other state elections. **If party rule requires the delegates' names to be printed on the official presidential preference primary ballot,** the name of the presidential candidates for that political party may not be printed separately, but the ballot may reflect the presidential candidate to whom the delegate is pledged. If, however, a political party has only one presidential candidate, neither the name of the candidate nor the names of the candidate's delegates shall be printed on the ballot.

(5) **The state executive committee of each party, by rule adopted at least 120 days prior to the presidential preference primary election, shall determine the number, and establish procedures to be followed in the selection, of delegates and delegate alternates from among each candidate's supporters.** A copy of any rule adopted by the executive committee shall be filed with the Department of State within 7 days after its adoption and shall become a public record. **The Department of State shall review the procedures and shall notify the state executive committee of each political party of any ballot limitations.** The Department of State may promulgate rules for the orderly conduct of the presidential preference primary ballot.

(6) Delegates must qualify no later than the second Friday in November of the year preceding the presidential preference primary **in the manner provided by party rule.**

(7) All delegates shall be allocated as provided by party rule.

(8) All names of candidates or delegates shall be listed as directed by the Department of State.

(Emphasis added).

In implementing the joint and interdependent action that results in the selection of the two major party nominees, Florida's Secretary of State, its 67 county supervisors of elections, and thousands of permanent and temporary employees of state and local government will expend their time and more than \$18 million of taxpayer funds to conduct a primary election so that the votes are tabulated and delegates are thereby selected for the Democratic and Republican National Conventions. (Statement ¶ 22). Moreover, the substantial public expenditures and extensive efforts by state and local governments do not end with the primary process. (Statement ¶ 23). The nominees ultimately selected at the major party conventions will appear automatically in Florida and throughout the nation on the ballot as the two major party candidates in the general election on November 4, 2008. §100.051, Fla.Stat. (2007). *Id.* By guaranteeing to the DNC and the RNC that the names of their nominee will be submitted to Florida voters and granted the top positions in competing for the state's 27 electoral votes, the State of Florida entrusts to the Democratic and Republican parties a vital role in the public functions of determining who may gain a place on the ballot. *Id. E.g.*, Fla.Stat. §103.021(2) (top Presidential ballot positions allocated to the leading political parties.) Having enjoyed the benefit of the public's election machinery to select its delegates, the DNC cannot credibly take the position that the voting public has no rights concerning delegate selection. As the Supreme Court explained decades ago:

Where the state law has made the primary an integral part of the procedure of choice or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise protected by Article I, section 2. And this right of participation is protected just as is the right to vote at the election, where **the primary is by law made an integral part of the election machinery.**

U.S. v. Classic, 313 U.S. 299, 318-19 (1941) (emphasis added).

Because the Florida statutory and operational scheme relies on indispensable collaboration with the Democratic Party in matters ranging from screening candidates for the initial primary to monitoring the final election vote through poll-watchers, that infusion constitutes by itself proof of joint action.

Adding even more dimensions to the state action equation is the reality that the State of Florida's embrace of the major parties is fully reciprocated. Just as Florida's system explicitly depends upon and incorporates the DNC's vital participation, the DNC, in turn, explicitly absorbs into its processes the state-funded Presidential primary. Thus, the Democratic Party Rules expressly provide that the vote in primaries such as Florida's shall determine the allocation of delegates supporting various candidates at the Party's nominating Convention. (See Defendants' Statement of Material Facts, Exhibit "A"). Democratic Party Rule 12 and 13 provides detailed procedures, but the heart of the matter is stated in Rule 13.A., which squarely states that if there is a primary as in Florida, **"delegates shall be allocated in a fashion that fairly reflects expressed presidential preference or uncommitted status of primary voters,"** (emphasis added). *Id.* (Exhibit "A," at 14). For a primary such as Florida's, the interrelation of the Florida Statutes with

the Party rules require the allocation of delegates by the Convention based on primary results “to the third decimal point.” Rule 13.D. *Id.*

While the Defendants may now wish to re-define the Florida primary as a mere beauty contest, their own rules heap scorn on such an event, which they expressly describe as “meaningless.” Indeed, the DNC’s rules strongly disparage such exercises in voting futility, stating that “non-binding advisory Presidential preference portion of primaries shall not be considered a step in the delegation selection process and is considered detrimental. State parties must take steps to educate the public that a non-binding Presidential preference event is meaningless, and state parties and Presidential candidates should take steps possible not to participate.” Rule 13.H. (emphasis added). *Id.* (Exhibit “A” at 15). Accordingly, when, as here, state law prescribes a Presidential primary, Democratic Party Rules 12 and 13 denounce the use of elections that have no meaning and require that the allocation of delegates be governed by the binding primary.

Thus, while state election law explicitly relies upon the Democratic and Republican parties at critical junctures in the public election scenario, the DNC unmistakably depends on public funding and a public election to determine the award of Florida delegates to its nominating convention.¹ Predictably, the Defendants’ attempt to create a political quarantine for themselves, portraying the function of delegate selection

¹ Further, party-sponsored caucuses are generally found in the smaller state process because, in states like Florida with millions of Democratic voters, their cost is prohibitive. In addition to the funding impracticabilities and the DNC’s own rules insisting that the primary results should control the award of delegates to candidates, the Voting Rights Act would likely impose substantial obstacles to junking the results of the primary and thereafter using party caucuses as the only relevant processes. *See generally Morse v. Republican Party of Va.*, 517 U.S. 186 (1996).

as completely isolated from the publicly funded and operated election. But that false isolation is utterly implausible. In Florida, neither exists without the other. Moreover, the interdependence between Florida and the DNC extends across major stages of the Presidential election process. Thus, the state action here is not merely found in the conducting of the primary election, nor is state action found only in holding the primary plus the delegate counting process. Rather, state action encompasses those two indispensable and inextricable steps plus the general election – where the Democratic candidate is awarded one of the top two positions on the ballot – that leads to “a single instrumentality of choice” in Florida’s Presidential election process. *See, generally, Smith v. Allwright*, 321 U.S. 649 (1944) (describing fusing of primary and general elections for state action purposes).

Dean and the DNC Acted Under “Color of Law”

In our two-party system, the Democratic Party and its Republican counterpart are, to be sure, private organizations for some purposes, but their actions are often sufficiently intertwined with the actions of the state government to represent “state action.” As the Eleventh Circuit observed in *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1276 n.4 (11th Cir. 2003), the “state action” requirement of constitutional jurisprudence and the “under color of law” requirement of 42 U.S.C. §1983 are “the same thing.” Acts of a private entity can be considered as “state action” in one of three ways. First, if the actor is performing a “public function”; second, if the actions of the state are so “interdependent” with the private party that the action may fairly be described as “joint action”; or third, if the state has exercised coercion or significant encouragement over the

private action. *Focus on the Family*, 344 F.3d at 1277- 79. In this case, the tests for state action clearly are met.

The law provides that, when accomplished through the state’s election machinery, primary elections are imbued with state action. *U.S. v. Classic, supra*, 313 U.S. at 319. Accordingly, the DNC’s responsibility for allocating delegates, an obviously indispensable element of the state funded nomination system, cannot be conveniently extracted from the Constitution as a purely private matter since “the duties do not become matters of private law because they are performed by a political party.” *Smith v. Allwright*, 321 U.S. 649, 660 (1944).

Applying a joint action analysis, the Eleventh Circuit, in *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994) found state action with respect to the 1992 Florida Presidential preference primary. The Eleventh Circuit held that the actions of the committee to determine which names would be allowed on the primary ballot, a committee including representatives of the major parties, were attributable to the state, finding state action based on essentially the same statute at issue here (with only the date of the primary changed). The reasoning of *Duke* applies to the present case:

[A]n entity may, however, become “so impregnated with the governmental character is to become subject to the constitutional limitations placed upon state action.” *Evans v. Newton*, 382 U.S. 296, 299 (1996). When, as here, this state empowers its officials to exclude presidential aspirants from the Presidential primary ballot, the power exercised is directly attributable to the state. *Smith v. Allwright*, 321 US 649, 664- 65 (1944). Indeed, the committee performs a critical public function by limiting the electorate voting choices to its candidates only. *Id.* That the committee exercises judgment independent of the state does not necessarily negate state action. *See Terry v.*

Adams, 345 US 461, 469 (1953). The committee acts in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. *Nixon v. Condon*, 286 U.S. 73, 88 (1932), its power to restrict ballot access flows directly from the state *ab initio*.” See *Allwright*, 321 US at 664.

Duke, 13 F.2d at 393. Here, as in *Duke*, the undisputed facts show that the Florida Presidential primary represents joint action between the parties and the state, who together handle the public function of elections. As another leading case emphasized, “The Equal Protection Clause, as we have indicated above, embraces within its protection proceedings intimately connected with the progression of the elective process.” *Bode v. Democratic National Party*, 452 F.2d 1302, 1306 (D.C. Cir. 1971); accord: *Georgia v. National Democratic Party*, 447 F.2d 1271, 1275-76 (D.C. Cir.), cert. denied, 404 U.S. 858 (1971) (“every step in the nominating process” is state action insofar as “those activities touch upon the machinery whereby candidates are nominated by the parties to seek election to local or national office”). As described earlier, the state sets the procedural requirements, pays the \$18 million bill - the number budgeted for the 2008 primary - supervises the elections in accordance with Florida law, and pays for printing and counting of the ballots (Statement ¶¶ 22-23), which, as the *Duke* case observed, greatly benefits the major parties. See also *Quinn v. Stone*, 259 So.2d 492, 495 (Fla. 1972).

As was discussed by the Eleventh Circuit in *Duke* and by the D.C. Circuit in *Bode*, a long line of enduring Supreme Court decisions establishes that actions of the political parties in relation to primaries are in fact state action. Also illustrating this

principle, the Supreme Court in *Smith v. Allwright*, 321 U.S. 649, 663 (1944) held that the “statutory system for the selection of party nominees” in a primary rendered the primary to be a state action. When party membership “is also the essential qualification for voting in a primary to select nominees for the general election, the state makes the action of the party the action of the state.” *Id.* at 664-65.

In *United States v. Classic*, 313 U.S. 299 (1941), the Supreme Court faced a §1983 indictment charging two Commissioners of Elections with willful miscounting of votes, alteration of ballots, and false certification of election results in the Democratic primary election in a New Orleans ward. With words that are compelling here, the Supreme Court observed that “the right of voters at the primary to have their votes counted is [] a right or privilege secured by the Constitution,” *Id.*, 313 U.S. at 325, and therefore gave short shrift to any question concerning the basis for the state action issue: “misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of state law.’” *Id.* at 326. In the same way, the Democratic Party’s ability to allocate and award delegates from Florida relies on the fact that the State of Florida has paid for and conducted the Presidential primary.

In yet another compelling decision, *Nixon v. Condon*, 286 U.S. 73. 89 (1932), the Supreme Court found that the Democratic Party’s conduct in choosing who was eligible to vote in the Texas Democratic primary constituted state action and was thus, subject to “the great restraints of the Constitution.” *Id.* at 89. The Court’s reasoning was based on the premise, equally applicable today, that the Democratic Party’s role in the primaries is

derived from the power ceded to it by the state in relation to the public function of elections:

[W]hen those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, **they become to that extent the organs of the state itself**, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, **they must do in submission to the mandates of liberty and equality that bind officials everywhere**. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly.

Id., 286 U.S. at 89 (emphasis added). Although *Condon* involved an all-white primary, and thus arose from a striking factual scenario, the Democratic Party remains to this day a “repository of official power” involved in “matters of high public interest,” and “intimately connected to government functions.”

Further underscoring the reality that political parties infuse themselves with state action when they assume vital roles in state primaries is *Terry v. Adams*, 345 U.S. 461 (1953). In *Terry*, the Court held that the actions of the “Jaybird Club,” a subdivision of the Democratic Party in Texas which conducted its own primaries, constituted “state action.” There was no contention that the state had any role or control of the Jaybird primaries (unlike the case with Florida’s Presidential preference primary), but in Justice Black’s view, speaking for three justices, “it was immaterial that the state does not control that part of this elective process, which it leaves for the Jaybirds to manage.” *Id.* at 470. The Court found it sufficient that the Jaybirds conducted a role in the public

function of “any election in which public issues are decided or public officials selected.” *Id.* at 468. Four more justices, in a concurrence written by Justice Clark, concurred with the gist of Justice Black’s “public function” analysis: “the Democratic Party of itself, and perform any other political party” was subject to constitutional requirements inasmuch as it was involved in “any part of the machinery for choosing state officials’,” citing *Smith v. Allwright*, 321 U.S. at 664. *Terry*, 345 U.S. at 481 (Clark, J., concurring). Plainly this reasoning requires a finding of state action here.

Finally, in still another affirmation of this principle, the Supreme Court in *Gray v. Sanders*, 372 U.S. 368 (1963) addressed a challenge to the counting of votes in the Georgia Democratic primary. The Defendants in this constitutional challenge were Democratic Party officials and the state Secretary of State, who had a ministerial role similar to its equivalent in Florida. The specific issue was whether use of a “county unit” system, which measured counties rather than voters, was permissible under the Constitution for primary balloting. Before reaching the merits, the Supreme Court upheld the district court’s decision that “the Democratic primary in Georgia is ‘state’ action within the meaning of the Fourteenth Amendment,” *Id.* at 373: “state regulation of this preliminary phase of the election process makes it a state action.” *Id.* at 374-75. The lower court’s state action analysis, which was affirmed by the Supreme Court, is on point here:

Our conclusion that the protection of the Fourteenth Amendment extends to invidious discrimination if they exist in a party primary in Georgia in no way depends on the degree to which the Democratic party primary is tantamount to the final election. It is based rather on prior decisions of the Fifth Circuit where it has been held that the

conduct of a **Primary election** in Georgia is such an **essential part in the total election process, its conduct and management is so closely supervised by State law and the effect to be given it is so clearly determined by statute that the action of the party in the conduct of its primary constitutes state action.**

Gray v. Sanders, 203 F.Supp. 158, 167 (N.D. Ga. 1962)(emphasis added), *aff'd. on this point, modified on other points*, 372 U.S. 368 (1963). As the Supreme Court stated,

We think these provisions show that **the state**, through the managers it requires, **collaborates in the conduct of the primary and puts its power behind the rules of the party**. It adopts the primary as part of the public election machinery. **The exclusions of voters made by the party by the primary rules become exclusions enforced by the state.**

Gray v. Sanders, 372 U.S. 368, 374 (1963) (emphasis added). Thus, the Fifth and Fourteenth Amendment protections of the Constitution – in this case, in particular, the Equal Protection and Due Process clauses – apply.

Accordingly, the abundance of state regulation that pervades the Presidential primary process makes it clear that state action applies. Among other things, the multiple, interdependent components include the approval of candidate names by the public official-dominated Selection Committee, the actual operation of Florida's elections by government agencies, the allocation of delegates based on that election by the national parties in accordance with Fla. Stat. §103.101(6), and the DNC's own rules that incorporate those processes for its own delegate's selection procedure. Plainly, this interdependent relationship between Florida's government and the major political parties is indispensable to voter participation in the selection of Presidential nominees.

For the right to vote to have any meaning, Florida’s electoral system requires not only that the votes be counted on election day, but that election ballots result in votes that are going to be counted at the major parties’ conventions through the presence of delegates. Neither the Constitution nor Florida’s election law will tolerate an expensive, publicly funded and operated Presidential primary that is merely an exercise in futility. Rather than a sham, our laws and democratic values demand that voting be meaningful, not “meaningless.”

Every encouragement consistent with due process should be given to make it easy to vote, to impress the voter with the fact that his or her vote is effective in that election, lest he become discouraged in the conscientious effort he wants to make if only he knows that it is worthwhile and if the issue is made clear.

Quinn v. Stone, 259 So.2d 492, 495 (Fla. 1972).

Citing decisions such as *Nixon v. Condon*, *supra*, and *Terry v. Adams*, *supra*, the leading appellate court to address directly the question of whether state action reaches a national party’s allocation of delegates to the states² found state action. In *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir. 1971), the court applied state action for at least three different reasons. First, because such a result would be “the clear force” of the so-called White Primary cases such as *Terry v. Adams*; second, because “... logic dictates that a state party’s action in selecting delegates to its national convention is also invested with state action since the delegate’s primary function is the nomination for

² While other courts have mentioned the state action issue, they generally either assume its presence or decide the case on other grounds. *Wymbs v. Republican State Committee of Florida*, 719 F.2d 1072 (11th Cir. 1983). And none of the above-cited Supreme Court decisions have been overruled.

the candidate for the nation’s highest office.” 447 F.2d at 1275. Finally, the D.C. Circuit explained that the national party’s decisions with respect to delegate selection constituted a collective form of state action:

Since the promulgation of each party’s delegate-allocation formula for the next national convention is, as we have indicated, ...the responsibility of a body designated by the state parties (Democratic procedure), the precise national party decisions challenged in this case were, in reality, the decisions of the states acting in concert. Those acts are, therefore, not immune from constitutional scrutiny.

Id. at 1275-76. Thus, the delegate selection process in Florida has become “so impregnated with a government character so as to become subject to constitutional limitations placed upon state action.” *Duke v. Smith*, 13 F.3d 388, 393 (11th Cir. 1994).³ Plainly, the Defendants cannot completely ignore the U.S. Constitution. Just as clearly, once its protections come into play, the outcome becomes certain.

The Exclusion of Florida Democrats from the Presidential Nomination Process Violates the Equal Protection Clause

Once it is established that constitutional principles apply, determining that they have not been met here is a simple task. Indeed, many of the precedents relied upon above also go to the merits. One such decision, *United States v. Classic*, 313 U.S. 299, 325 (1941), has said all that is necessary to dispose of this case: “the right of voters at a primary to have their votes counted is, as we have stated, a right or privilege secured by

³ A separate and independent predicate for state action articulated in cases such as *Focus on the Family v. Pinellas Suncoast Transit Authority*, *supra*, is the state compulsion test. As this criteria has been explained, it requires that the state has “coerced” or at least “significantly encouraged” the action alleged to violate the Constitution. *Rayburn ex rel. Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001). As some decisions have described “significant encouragement” from the state, it can be “either overt or covert,” *Granger v. Harris*, WL 2007, 1213416, at 8 (E.D.N.Y. 2007).

the Constitution.” Thus, the wholesale disenfranchisement of every Democratic voter in Florida is a classic violation of Equal Protection that forbids geographically-based extremism in order to favor one community at the expense of another. “The idea that one group can be granted greater voting strength than the other” is contrary to our jurisprudence. *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969). These principles are too well settled to warrant extended discussion and are anchored upon the proposition that:

...people govern themselves through their elected representatives and that ‘each and every citizen has **an inalienable right to full and effective participation in the political processes.**’

Board of Estimate v. Morris, 489 U.S. 688, 693 (1989), quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (emphasis added). “By denying some citizens the right to vote, such laws deprive them of a fundamental political right...preservative of all rights.” *Dunn v. Blumstein*, 405 U.S. 330, 335 (striking down Tennessee’s duration residency requirement).⁴ The cases are uniform as to the fundamental nature of the right to vote. *Purcell v. Gonzalez*, --U.S. --, 127 S.Ct. 5, 7 (2006); *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir.2006). “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v.*

⁴ Even when interests far less precious than the right to vote are implicated, the Supreme Court condemns classifications that unfairly discriminate against residents of some states in favor of other residents. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1983) (domestic preference tax “constitutes the very sort of parochialism that the Equal Protection Clause has intended to prevent”); *Williams v. Vermont*, 472 U.S. 14, 24 (1985) (striking down automatic tax registration fee based on discrimination “solely because of their different residence”).

Sims, 377 U.S. 533, 555 (1964). Further, as the Supreme Court has stated, “[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . . *Reynolds*, 377 U.S. at 565. The complete disenfranchisement of Florida primary voters is a severe restriction on their right to vote, which cannot be justified unless it is “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, *supra*, 504 U.S. at 434. The Defendants do not even attempt to state a compelling interest or to pass strict scrutiny, and they cannot.

Clearly, the “inalienable right” to “full and effective participation” in the Florida Presidential primary has been destroyed for over four million Floridians. Equally certain are the constitutional guarantees offended by such transgressions. “There is no doubt that the allocation among the states of delegates to a party national convention is subject to the Equal Protection requirements of the Fourteenth Amendment.” *Bode v. Democratic National Party*, 146 U.S.App.D.C. 373, 462 F.2d 1302, 1305 (D.C. 1971). No compelling interest exists to support the action. Therefore, as a matter of law, the Equal Protection clause has been violated, and summary judgment should be granted as to this claim.

**Substantive Due Process Has Been Violated By
Broad-Gauged Unfairness and Disenfranchisement**

Substantive due process has also been violated by this disintegration of voting rights. “We deal here with matters close to the core of our constitutional system[:] ‘The right ... to choose.’” *Carrington v. Rash*, 380 U.S. 89, 96 (1969). While due process is not activated by every election dispute, in a case of broad-scale disenfranchisement like

this one, it applies with full force. *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). As the analysis has been explained:

The right to vote remains, at bottom, a federally protected right. **If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated** and relief under §1983 is therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action.

570 F.2d at 1077 (emphasis added). The present case is a vivid embodiment of the “broad-gauged unfairness” that federal courts will not tolerate when the fundamental right to vote is at stake. More than 4.25 million Democratic voters are being told that their Presidential candidates are boycotting their state, and that their own votes will be meaningless, all because of decisions made by a state government dominated by the opposing political party. (Statement, ¶ 49). This is not a garden variety election dispute, *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1988) (discussing attempts to distinguish between “patent and fundamental unfairness” from “garden variety” election disputes), but one of the most sweeping, drastic and inequitable mistreatment of innocent voters in electoral memory.

The DNC’s Right of Association Does Not Authorize Their Decision to Eliminate the Rights of 4.25 Million Florida Democrats

Based on Defendants’ positioning to date, it seems evident that their counter-arguments will not seriously attempt to find a constitutionally sufficient basis for arguing that all Democratic voters in Florida deserve to forfeit their “inalienable” voting rights

due to alleged conduct by Florida Democratic officials.⁵ Instead, they apparently rely on the First Amendment rights of free association as explicated in cases such as *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (California could not require party primary to be open to voters regardless of party affiliation); *Tashjian v. Republican Party of Ct.*, 479 U.S. 208 (1986) (Connecticut could not require closed primary where Republican Party wished to be open to independent voters); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (state injunction against delegate seating at Democratic Party convention reversed); and *Democratic Party v. Wisconsin ex rel LaFollette*, 450 U.S. 107 (1981) (Wisconsin could not require Democratic Party to recognize open primary results contrary to Democratic Party rules). While Plaintiffs agree that associative freedom is a valuable right, it has no force in the present case.

Cases like *Cousins v. Wigoda*, *supra*, do not help the Defendants. The *Wigoda* decision held only that a state court could not intervene in an “intra-party” dispute over the delegate selection process and choose between competing slates of Illinois delegates for the Democratic national convention. The decision was squarely based on its unique factual setting and emphasized that there was “no claim” that “the Party’s delegate selection procedures are not exercised within the confines of the Constitution.” 419 U.S. at 491. The Supreme Court’s reasoning in *Wigoda* sheds little light on this case, which does involve very serious constitutional claims. Similarly, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) held that a California law mandating that Republicans and

⁵ Any attempted rationale for punishing the Democratic voters due to legislature actions would be especially inequitable in a state where two-thirds of both legislative houses are Republican. (Statement, ¶ 49).

independents be allowed to vote in the Democratic primary violated the party's association rights. The Court took care to state that, while a limitation of its primary to Democrats was proper, the Party's rights of association stop at the point where its action "violates some independent constitutional proscription," *Id.* at 573 n.5, as in the "White Primary" cases. The "independent constitutional proscriptions" of the due process and equal protection clauses are precisely the issues presented in this case.

The major concern of cases like *Democratic Party v. Wisconsin ex rel LaFollette*, 450 U.S. 107 (1981) – the ability of the Party to define itself and exclude non-adherents – is simply not at issue in this case. In substance, the Supreme Court has ruled that the rights of association recognized in cases such as *Wigoda* and *LaFollette*, allow the Democratic Party to override state laws that might otherwise require it to include Republicans and independents in intra-party decision-making. The federal courts have not held, however, that the right of political parties to exclude non-members is an unlimited license for inflicting arbitrary disenfranchisement upon legitimate members of their own parties.

Accordingly, while Dean and the DNC, may discriminate against primary voters because they are Republicans or independents, they cannot discriminate against Democratic voters because they are Floridians. As federal law establishes, "... once the delegate's role is determined, any opportunity the voters may be given to participate in the delegate selection process cannot be deemed or diminished on account of geographic, racial, or political differences." *Graham v. Eu*, 403 F.2d 37, 44 n.28 (N.D., Cal. 1976), *aff'd per curiam*, 96 S.Ct. 85 (1976). As with the Voting Rights Act's application to

political parties, upheld over right of association objections in *Morse v. Republican Party of Va.*, 517 U.S. 186, 228-29 (opinion of Stevens, J, for two justices); *Id.* at 239 (opinion of Breyer, J., for three justices), the Party decision at issue here is “well outside the area of greatest ‘associational’ concern,” *Id.* at 239.

As *Morse* recognized, “associational” rights ensure that a political party may define its core values, limit its primaries to adherents, and exclude non-adherents. But this does not mean that a major political party may accept the benefits of public resources, conduct a highly interactive and collaborative relationship with government and then violate with impunity constitutional prohibitions against arbitrary and invidious discriminations -- such as the petulant penalization of Floridians shown by the undisputed record. Whatever Defendants may say about Florida Democratic officials, this case is about the rights of Florida voters. There is no contention that Plaintiffs and other four million registered Florida Democrats are in any sense less than authentic Democrats. Equally clear is the fact that loyal Democrats in Florida are entitled to all the rights of which they would be entitled to if they lived in South Carolina or New Hampshire.

There is no question that the Party’s rights are significant, and there is more than one methodology for adopting and applying the results of a Presidential primary. For instance, the Party is free to weigh delegate selection, not only by population, but also by factors such as the party registration in particular states or the state’s vote in preceding elections. But even assuming that the DNC’s right of association allows it to consider factors in addition to population in allocating delegates, no sufficient purpose can be found for its all-out war against Floridians. Just as a major political party cannot limit

itself to white voters only, or males only, it cannot, in its collaboration with public elections, purge all Democratic voters in states that start with “M,” since such discrimination has no fair and substantial relationship to the associational goals protected by the First Amendment. It is for this reason that the Plaintiffs are asking the Court, as an initial matter, to declare that the effective nullification of meaningful voting by Democrats on January 29th, is a violation of their rights, leaving to the Defendants in the first instance an opportunity to forge a solution that complies with the Plaintiffs’ rights in accordance with the Court’s declaration.

In *Duke v. Smith*, 13 F.3d 388, 395 (11th Cir. 1994), the Eleventh Circuit held that a committee (composed of party officials among others) which had uncontrolled discretion to keep names of declared candidates off the primary ballot, failed because of the lack of “articulable standards,” thus allowing “arbitrary” and “discriminatory” action. The same is true here, particularly given that DNC Rule 20.c.1.a. by its plain terms mandates 50% loss of delegates for timing issues, and yet the Defendants deprived Florida of all delegates. When the fundamental right to vote is at stake, a defendant’s incantation of remote “administrative benefit” is simply insufficient. *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

“Arbitrary” and “discriminatory” are words that resonate hauntingly amidst the irrational and self-defeating actions of Dean and the DNC in the present case. Eliminating the voice of Florida from the Democratic nomination process will not advance any of the stated policy goals of the DNC nor the broader state goals of democracy (with a small “d”). Indeed, the DNC has consistently championed voting rights and diversity, two of

the many public policy interests being severely undermined here. Less than two months before erasing Florida Democratic voters from the Presidential nomination process, Dean and the DNC sent waves of e-mails around the country proclaiming their commitment “to make sure every vote counts,” emphasizing that “we all know what happened in Florida in 2000.” (Statement ¶ 39). Paradoxically, rather than honor its stated philosophy of striving to assure that every vote must be counted, the DNC is insisting that no Florida Democrat’s vote will count.

Conclusion

For the reasons set forth in this motion and memorandum, Plaintiffs respectfully request that this Court grant them partial summary judgment, declaring that the actions of Defendants causing the effective disenfranchisement of Plaintiffs in connection with the Florida Presidential primary violate Equal Protection and the Due Process Clause of the United States Constitution. Plaintiffs further request that this Court schedule any appropriate further proceedings concerning remedies for these violations and also to determine the remaining claims in the case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 5, 2007, the foregoing was served via the Court's CMIECF electronic filing system to the following:

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