

FDP agrees to do so, FDP will not, by virtue of the DNC sanctions, be able to send delegates to the 2008 Democratic National Convention.

In their motion for partial summary judgment, plaintiffs, seeking to inject the federal courts into this internal party dispute, claim a constitutional right to force the DNC to recognize the results of the state-run January 29 primary in the allocation of delegates. In a striking exercise in circular reasoning, plaintiffs contend that even though the DNC does *not* want to use the state's primary, and has no use for it, the fact that *plaintiffs* want the DNC to use that primary somehow entangles the DNC with the state. Remarkably, plaintiffs are trying to create "state action" out of the DNC's very decision *not* to use the state's machinery for delegate selection in Florida.

Not only does such an extraordinary claim distort the state action doctrine beyond all recognition, but its implications are staggering. Is the DNC 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 plaintiffs now make, 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. The only state action involved here is that of the state of Florida, and it is the plaintiffs who are trying to enforce the state law against the wishes of, and in derogation of the constitutional rights of, the national Party. Contrary to plaintiffs' suggestions, since the Supreme Court's landmark decisions affirming the rights of the national parties to establish and enforce rules for the

selection of delegates, *no* court has held that the actions of a national political party in enforcing its delegate selection rules constitute state action. Rather, it is well-established that a national party has the constitutionally-protected right to enforce its rules for the selection of delegates to its national Convention, as long as those rules rationally advance the party's goals and do not racially discriminate. For those reasons, plaintiffs' motion for partial summary judgment should be denied.

I. In Enforcing the Delegate Selection Rules, the DNC Was Not Acting Under Color of State Law

A. There Are No "Interdependent Roles" With Respect to the Primary the DNC Does Not Want to Use or Recognize

Plaintiffs contend that the state of Florida requires the DNC to use a primary for delegate selection and that the state's expenditure of resources for this process somehow makes the actions of the DNC in this case "state action." Plaintiffs' Motion for Summary Judgment ("Pl. Mot.") at 3-9. That contention is simply illogical.

First, contrary to plaintiffs' suggestion, Florida law does *not* require the parties to "use the primary format for selecting their nominees" for President. Pl. Mot. at 4, quoting *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). Indeed, *no* state imposes such a requirement. The Democratic Party's nominee for president is not chosen by voters in state primaries but by a majority of delegates to the Democratic National Convention. See Defendants Howard Dean's and DNC's Statement of Material Facts, filed Oct. 30, 2007 ("DNC Statement") ¶2. As the Court explained in *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975), "The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice-President. . . .

[t]he States themselves have no constitutionally mandated role in the selection of the Presidential and Vice-Presidential candidates.”

Second, Florida law does not even require the Democratic Party to use the results of the state-run primary to allocate the delegates who will attend the Democratic Convention from Florida. To the contrary, the Florida statute makes clear, however, that “All delegates shall be allocated *as provided by party rule*.” Section 103.101(7), Florida Statutes (emphasis added).

Third, Florida law *could not* require the state party or the DNC to use the results of the state-run primary to allocate delegates in a way that violates the national Party’s rules. As the Court held in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), a state “cannot require that [the state’s] delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules.” *Id.* at 126.

Plaintiffs stress the substantial funds and effort that the state of Florida plans to expend in order to administer its January 29, 2008 presidential preference primary. Plaintiffs conclude that the DNC will thus have “enjoyed the benefit of the public’s election machinery to select its delegates.” Pl. Mot. at 6. But the DNC, of course, does not want to use the state’s election machinery at all, to allocate any delegates from Florida. It is *plaintiffs* who want the DNC to do that. From the DNC’s perspective, because the DNC rules require the FDP to use a privately-financed, party-run process complying with the rules to allocate FDP’s delegates, the state of Florida need not expend *any* financial or other public resources whatsoever conducting its presidential primary. Manifestly, that the *plaintiffs* want to force the DNC to use the state’s election

machinery, against the DNC's wishes, cannot and does not result in any "indispensable collaboration" between the DNC and the state, as plaintiffs contend. (Pl. Mot. at 7).

Plaintiffs' suggestion that the DNC's own rules somehow require use of a state-run primary that violates those rules is false and illogical. Plaintiffs, on page 7 of their Motion, selectively quote from Rule 13(A) of the DNC Delegate Selection Rules, which provides, in full that delegates "shall be allocated in a fashion that fairly reflects the expressed presidential preference or uncommitted status of the primary voters *or, if there is no binding primary, the convention and/or caucus participants*" (emphasis added). And, of course, those same Rules provide that a primary cannot be made binding, for purposes of allocating delegates among presidential candidates, if it occurs on a date not allowed by the timing rule, Rule 11(A); *see* Rule 20(C)(1). In that situation, though, a state Democratic Party may easily comply with the DNC rules, and avoid any sanction, by simply using a state party-run process to allocate delegate positions and by scheduling that process to begin on or after a date that complies with the DNC Delegate Selection Rules. DNC Statement, ¶ 22. Democratic state parties did precisely that in Vermont in 1984; in South Dakota in 1988; and in Arizona, Delaware and Washington State in 2000. *Id.*

Here, the DNC obviously does *not* want to "depend on public funding and a public election to determine the award of Florida delegates," as plaintiffs would have it. (Pl. Mot. at 8). Rather, the DNC Delegate Selection Rules now require that the Florida Democratic Party—like 20 other states this cycle—use a party-run caucus/convention system to allocate delegates. Plaintiffs relegate that requirement to a footnote (Pl. Mot. at 8 n. 1), contending that the cost would be "prohibitive" and that such caucus/convention

systems are only found “in the small state process.” That contention flatly ignores the undisputed fact that the DNC offered to pay the entire cost of a caucus process in Florida complying with DNC Rules (DNC Statement ¶25). It ignores the undisputed fact that the Democratic state parties which have used party-run caucus systems in the past, and have notified the DNC they are doing so again in 2008, include states such as Michigan, with more than 7 million voters as of 2004, and Minnesota and Washington State, each with more than 3 million. *See* Declaration of Philip McNamara submitted with Defendants Dean and DNC Motion for Summary Judgment, Oct. 30, 2007 (“McNamara Dec”) ¶¶ 13, 57 & Exhibit B.

Nor is there any reason to believe, as plaintiffs suggest, that the Voting Rights Act would impose any obstacle to using a party-run caucus system to allocate delegates from Florida. In *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996), the Court did not find that use of a caucus system to nominate a candidate (in that case for US Senate) would violate the Voting Rights Act but only that imposition of a fee to participate in such a caucus could constitute such a violation. The DNC Rules explicitly prohibit imposition of any fee for participation in a caucus. DNC Delegate Selection Rule 2(D).

For these reasons there is no “interdependence” between state law and the DNC’s enforcement of its delegate selection rules so as to force the FDP *not* to use the state’s primary to allocate delegates from Florida.

B. None of the Tests for State Action Are Met

As plaintiffs correctly point out, there are three tests for determining if acts of a private entity constitute “state action:” (1) the “public function” test; (2) the “state compulsion” test; and (3) the “nexus/joint action” test. Pl. Mot. at 9-10, *citing Focus on*

the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1277-79 (11th Cir. 2003).

In this case it is clear that none of these tests has been met.

Plaintiffs suggest that the DNC is performing a public function in determining how delegates are to be allocated because a primary election is “accomplished through the state’s election machinery.” Pl. Mot. at 10. Again, however, what plaintiffs are complaining about is the DNC’s *refusal* to use the state’s election machinery to allocate delegates. Manifestly the act of requiring a state party to use a party-run process instead of a primary, to allocate delegates, is not itself a state function in any way. For that reason, cases such as *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994), involving the party’s use of a state-run primary to select its nominee, are inapposite.

Also misplaced is plaintiffs’ reliance on *Bode v. Democratic National 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 (1971), for the proposition that the party’s administration of its delegate selection rules constitutes state action. (Pl. Mot. at 11,16-17). What plaintiffs fail to note is that the D.C. Circuit subsequently questioned its own holding in those cases in *Ripon Society Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975)(en banc), *cert. denied*, 424 U.S. 933 (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 calculate 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 in original). The court went on to hold that:

[T]he 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.

In light of the *Ripon* decision, the holdings of *Bode* and *Georgia* as to state action obviously have no continuing vitality. Indeed, as the Eleventh Circuit observed in *Wymbs v. Republican State Executive Comm. of Fla.*, 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984), 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.” *Id.* at 1081.

Equally unavailing is plaintiffs' effort to invoke the White Primary Cases—*Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); and *Nixon v. Condon*, 286 U.S. 73 (1932)—to show that the DNC's enforcement of its delegate selection rules constitutes state action. (Pl. Mot. at 11-15). All of 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 (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, “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.” 409 U.S. at 4. And in so ruling, the Court specifically held the White Primary Cases to be inapplicable, explaining that, “This is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single state.” *Id.* at 4 n. 1. The same is true of the instant case.

Nor is plaintiffs’ position supported by *Gray v. Sanders*, 372 U.S. 368 (1963), involving, like the White Primary Cases, exclusion of voters, by party-rule, from actually voting in a state-run primary. As the Eleventh Circuit has explained, “Justice Douglas’ opinion for the majority [in *Gray*] was limited to primary elections, and did not reach issues concerning party conventions or delegate selections....Moreover, the *Gray* court was not faced with first amendment issues. In the years since *Gray*, the Supreme Court has afforded broad protection to the speech and associational rights of political parties.” *Wymbs, supra*, 719 F.2d at 1083 n. 29.

Indeed, as noted in the DNC’s Motion for Summary Judgment, after the *Cousins* decision in 1975, *not a single federal court* has ever found the enforcement of delegate selection rules by a national party to constitute state action. And the only two courts to have squarely addressed the question since that time have found that such enforcement does not constitute state action. *DiMaio v. Democratic Nat’l Comm.*, No. 8:07-cv-1552-

T-26MAP (M.D. Fla., filed Oct. 5, 2007), appeal pending; *LaRouche v. Fowler*, 77 F. Supp. 2d 80, 89 (D.D.C. 1999)(3-judge court), *aff'd w/o opinion*, 529 U.S 1035 (2000).

For these reasons, the DNC's enforcement of its delegate selection rules in this case does not constitute state action.

II. The DNC's Enforcement of Its Delegate Selection Rules Does Not Violate the Equal Protection Clause

Even if the DNC were regarded as a state actor, its decision to force FDP to use a party-run system in order to allocate delegates to the 2008 Democratic National Convention would not violate the Equal Protection Clause. The fundamental flaw in plaintiffs' argument (Pl. Mot. at 18-19) is that, even if the DNC's actions were treated as state action, and even if the "geographic" discrimination alleged by plaintiffs were deemed to trigger strict scrutiny because the right to vote is involved (*id.* at 18), the DNC would *not* have to show that its actions were "narrowly drawn to advance a state interest of compelling importance." *Id.* at 19, *quoting Burdick v. Takushi*, 504 U.S. 428, 434 (1992). 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.

As noted above, 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, supra*, 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.

The exact same approach was taken in *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987). In that case, a Democratic voter challenged the DNC delegate selection rule requiring that a state’s delegation be composed of equal number of men and women, claiming that this rule violated the Equal Protection Clause and the voter’s fundamental right to vote for delegates of his choice. The court rejected that claim, holding that, while the plaintiff voter certainly had a right to vote, the “question we must decide is whether the private associational rights of the party to give shape to its goals through the equal participation of women at the national convention impermissibly limit [the plaintiff voter’s]...participation in the primary process.” *Id.* at 842. The court ruled that:

The First Amendment associational rights of a political party have been deemed to outweigh various state interests in protecting the rights of that state’s voters....The case before us is limited to Bachur’s right to vote. Nonetheless, the efforts of the states to regulate delegate selection have been repeatedly rebuffed, and we may therefore derive instruction on the scope and sanctity of a political party’s associational rights.

When we balance the broad, encompassing First and Fourteenth Amendment protection enjoyed by the National Party and the State Party against the limited restriction on Bachur’s right to vote for delegates, we can only conclude that Rule 6C does not unconstitutionally infringe on Bachur’s right to vote.The Equal Division Rule manifestly has a rational purpose. *See Ripon Society*, 525 F.2d at 586-87 (“representational scheme and each of its elements [must only] rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals.”).

Id.

Again, in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), the court ruled that the DNC could enforce a DNC delegate selection rule depriving a presidential candidate of any delegates based on a determination that he was not a bona fide Democrat, even though the candidate had won enough votes in the primaries to be allocated delegates. The court concluded that even if the DNC were to be treated as a state actor, it would not be subject to the “compelling state interest” test because of “the presence of First Amendment interests on both sides of the equation.” 152 F. 3d at 995. Following *Ripon Society*, the court held that the Constitution would be “satisfied if [the party’s rules] rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals.” *Id.* at 995, quoting *Ripon Society*, 525 F.21d at 586-87.

Here, as set forth in detail in Mr. McNamara’s Declaration, the DNC’s 2008 rule governing the timing of binding primaries and caucuses rule resulted from a long, careful deliberation by a party commission about how to schedule primaries and caucuses so as to balance the value of “retail” grassroots politics with the need to place candidates before a range of voters more reflective of the Party’s diversity. *See* McNamara Dec. ¶¶20-22. And the choice of *which* states would be selected to achieve that balance similarly resulted from a similarly extensive and careful consideration, by the DNC Rules and Bylaws Committee, of how best to achieve those goals. *Id.* ¶¶25-28. Thus it is indisputable that the timing rule, DNC Delegate Selection Rule 11(A), “rationally advances” the DNC’s “legitimate interest. . . in winning elections or otherwise achieving its political goals.”

For these reasons, even if the DNC’s sanctions were treated as state action, such action would not violate the Equal Protection Clause.

III. The DNC's Enforcement of Its Delegate Selection Rules Does Not Violate Substantive Due Process

As noted in the DNC's Motion for Summary Judgment, it is not the DNC that is depriving any Florida voter of a right to vote in a process that will actually allocate delegates among presidential candidates. It is the state of Florida, in the first instance, by legislating a state-run primary to be held in violation of national Party rules. And at this point, it is the FDP, which refuses to implement a state party-run caucus process in which all Democrats could participate and which would—notwithstanding the “decisions made by a state government dominated by the opposing political party,” Pl. Mot. at 20—result in FDP sending a full delegation to the 2008 Democratic National Convention. The DNC's enforcement of its delegate selection rules does not deprive plaintiffs of substantive due process.

IV. The DNC's Associational Rights Are Squarely Implicated in This Case

Plaintiffs attempt to distinguish *Cousins* and *Democratic Party v. Wisconsin* on the grounds that those cases recognize only “the ability of the Party to define itself and exclude non-adherents,” Pl. Mot. at 22, that is, deal only with “state laws that might otherwise require it to include Republicans and independents in intra-party decision making.” *Id.* The holdings of these cases, however, are not so limited. *Cousins* did not involve the issue of participation of non-Party members, but actually involved various violations of the DNC's delegate selection rules, *including* violation of the DNC timing rules applicable at that time. *Cousins*, 419 U.S. at 478 n. 1. And in *Democratic Party v. Wisconsin*, the Court did not limit the DNC's associational rights to exclusion of Republicans and independents from the nominating process, but rather broadly declared that, “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 126.

What plaintiffs overlook is the fundamental nature of the associational rights vindicated by the DNC's enforcement of its Delegate Selection Rules. “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 (1989), quoting *Ripon*, supra, 525 F.2d at 601 (Tamm, J., concurring in result).

Plaintiffs contend that the DNC timing rule “has no fair and substantial relationship to the associational goals protected by the First Amendment,” Pl. Mot. at 24. That contention rings hollow. Here a party commission and the DNC's Rules and Bylaws Committee, after extensive and lengthy deliberation, recommended rules reflecting 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. A further deliberation resulted in the decision that those states, in 2008, should be Nevada and South Carolina, rather than some other states. DNC Statement ¶¶14-17; McNamara Dec. ¶¶21-29. The DNC's associational rights are thus squarely implicated by the DNC's decision to adopt the timing rule that the FDP has violated and to enforce that rule by requiring FDP to use an alternative, party-run process complying with the rules; and by denying FDP delegates to the Convention unless and until FDP avails itself of that remedy..

Indeed, the full DNC—with no objection at all from its Florida members—voted near-unanimously to adopt those recommendations and to incorporate them into the Delegate Selection Rules for 2008. DNC Statement ¶18. No Democratic party from any state in the Nation, other than that of Florida, has sought to use a binding process for 2008 in violation of those rules. No Democratic Party in the Nation, other than that of Florida, faced with a state-run primary that violates the DNC’s timing rule, has refused to adopt any alternative process that complies with them, in 2008 or any earlier presidential year.

These plaintiffs now protest that the DNC’s effort to enforce these rules represents action that is “discriminatory” and “arbitrary.” (Pl. Mot. at 24). To the contrary, it is the special *exemption* from these rules for Florida that plaintiffs now demand, that would be “discriminatory” and “arbitrary.” The DNC owes to the integrity of its process and to the 55 other state and territorial Democratic Parties, its best effort to enforce its rules fairly and uniformly. That is exactly what the DNC has done.

CONCLUSION

The DNC’s decision to enforce its Delegate Selection Rules with respect to the timing of binding presidential preference primaries and caucuses does not violate any rights of the plaintiffs and is itself protected by the Constitution. For these reasons, plaintiff’s motion for partial summary judgment should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served via CM/ECF to Counsel for Plaintiffs. Kendall Coffey and Jeffrey B. Crockett, Coffey Burlington, Office in the Grove, Penthouse, 2699 S. Bayshore Drive, Miami, Florida 33133 and Ronald G. Meyer,

Meyer and Brooks, P.A., 2544 Blairstone Pines Drive, Tallahassee, Florida 32301, and to counsel for co-defendant Kurt S. Browning, Lynn C. Hearn, General Counsel, Department of State, 500 S. Bronough Street, Tallahassee, Florida, 32399 on November 19, 2007.

Respectfully submitted on November 19, 2007,

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