

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' OPPOSITION TO DNC AND DEAN'S  
MOTION FOR 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 respond to the Motion of Defendants Howard Dean ("Dean") and Democratic National Committee ("DNC") for Summary Judgment (DE 6), and respectfully urge that the Motion should be denied for reasons stated herein and in Plaintiffs' own Motion for Partial Summary Judgment. (DE 10).

**Introduction**

DNC and Dean (collectively, "Defendants"), in their motion and attached statement of undisputed facts (DE 6 and 7), admit the key factual allegations of the

Complaint. Specifically, Defendants acknowledge that because of a change in the Florida primary date for 2008 enacted by a Republican-majority legislature in legislation signed by Florida's Republican Governor, these Defendants have deprived Florida Democrats of any role in the selection of the party 2008 Presidential nominee, rendering the Plaintiffs' primary vote "meaningless," even for purposes of the Party's own rules. (DNC Rule 13H).. These Defendants thus concede, in effect, that they have nullified the fundamental right of Plaintiffs to cast votes that truly count in the Presidential primary.

Also effectively conceded by Defendants is the reality that the individual Plaintiffs and other voters are not at fault for the primary date that apparently offends Dean and the DNC. Instead, the Defendants attempt, in some detail, to explain their position that the complete evisceration of Plaintiffs' rights is justifiable collateral damage, because a handful of Democratic state legislators supposedly did not take "all" possible steps to oppose the change in the primary date, a change they were powerless to prevent in any case. According to the Defendants' astonishing notions of due process and just punishment, 4.25 million Floridians who are loyal and blameless Democrats should lose a fundamental right because of the alleged shortcomings of some Florida politicians. Clearly, this senseless decree for guilt by association does not warrant extended analysis. Bluntly stated, the disenfranchisement of voters based on the alleged transgressions by elected office holders is not only unconstitutional, it is ridiculous.

Fortunately, the Court need not preside over a trial on the performance or motives of Florida politicians. This case is about the rights of voters and, as is set forth in the

pages that follow, the Defendants' attempts to justify the destruction of the Plaintiffs' rights fails.

### **The Procedural Prerequisites to this Action are Met**

Dean and the DNC do not challenge Plaintiffs' standing, which exists in this case due to the loss of their right to cast a vote that has legal significance. Based on the cases cited in Plaintiffs' own motion for partial summary judgment, there is no question but that this threshold requirement is met. (Plaintiffs' Motion for Partial Summary Judgment at 2-3).

Nor do Defendants argue that the issues presented by the present case are nonjusticiable or "political questions," as analyzed in *Wymbs v. Republican State Exec. Ctee of Florida*, 719 F.2d 1072 (11th Cir. 1983) (challenge to Republican state rules "nonjusticiable" when indispensable party, the RNC, was not joined). Indeed, it is clear that judicially manageable standards are readily available here. *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994); *LaRouche v. Fowler*, 152 F.3d 974, 979-981 (D.C. Cir. 1998). This is not a case, like *Wymbs*, where the issue was the specific formula for the division of Florida's delegates among Congressional districts, nor does the present case entail merely fine-tuning the details of delegate selection. The question here is, instead, far more drastic and profound: whether the Defendants' complete deprivation of Florida's Democratic voters of any role in the 2008 Presidential nomination selection process violates Plaintiffs' constitutional rights. As one court explained the judicial role in such extreme scenarios, "In this chiaroscuro corner of the law, one thing is clear: total and complete disenfranchisement of the electorate as a whole is patently and fundamentally unfair (and,

hence, amenable to rectification in a federal court).” *Bonas v. Town of North Smithfield*, 265 F.3d 69, 74 (1<sup>st</sup> Cir. 2001). While the parties disagree on the merits of the case, there is apparent agreement that these dramatic issues are not political but constitute important legal questions that stand before this Court.

### **Defendants Acted Under “Color of Law”**

Initially, Dean and the DNC attempt the inherently implausible argument that the two major political parties can benefit from the massive infusion of Florida’s financial and human resources and then completely ignore the rights of Florida voters because they are “not a state actor.” Motion for Summary Judgment, DE 6 at 3. In arguing for that troubling thesis, the Defendants rely heavily on a Voting Rights Act (“VRA”) decision while ignoring the numerous constitutional precedents cited in cases such as *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994), citing *Terry v. Adams*, 345 U.S. 461, 469 (1953); *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944); and *Nixon v. Condon*, 286 U.S. 73, 88 (1932).

Defendants’ attempt to meet the constitutional challenge through reliance on VRA case law is all the more puzzling because *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), their principal authority, actually supports the Plaintiffs’ position. In *Morse*, the Court held that the VRA was violated because the Republican Party in Virginia had not pre-cleared a new practice of charging admission to its own state nominating convention. Thus, *Morse*, a divided opinion, addressed statutory issues of pre-clearance under § 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, and did not directly address state action for constitutional purposes or the “color of law” requirement

of 42 U.S.C. § 1983. Even so, in critical respects, *Morse*, which invalidated the state party's convention process, hurts rather than bolsters the DNC's position on "state action." Among other things, the *Morse* court held that for the purposes of the Voting Rights Act, action of a political party could be, and was in that case, considered action of a "state." In its analysis, the *Morse* court followed and adopted the logic of the "white primary" and apportionment cases relied upon by Plaintiffs in holding that the parties' handling of the nomination process, as a public function, performed jointly with the state, was "state action" for constitutional purposes<sup>1</sup>. Strikingly, even the *Morse* dissenters did so expressly based on their view that the statutory term "state" under the VRA had a different and narrower meaning than "color of law" under 42 U.S.C. §1983. Thus, the dissenting Justices did not diminish "state action" for constitutional purposes, and throughout the opinion it was acknowledged that "state action" could include the actions of political parties. 517 U.S. at 264-66 (Thomas, J., dissenting); 517 U.S. at 249-50 (Kennedy, J., dissenting).<sup>2</sup>

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<sup>1</sup> Justice Kennedy, who would have reached a different result, recognized that the cases relied upon by Plaintiffs (specifically *Terry v. Adams* and *Smith v. Allwright*) represent "vital doctrine" that applies when "we confront discrimination in the participatory processes that are the foundation of a democratic society." 517 U.S. at 248 (Kennedy, J., dissenting).

<sup>2</sup> In confirming that a political party's admission requirements were not insulated from judicial scrutiny, the Supreme Court noted that the party's interest was outside the "core" of its associational rights. In emphasizing the differentiation between core and non-core associational values, the Court held that the Republican Party's "non-core" associational interests could not override the federal statutory strictures of the VRA. In the present case, the associational rights advanced by these Defendants – maintaining an orderly calendar - are clearly non-core and, in all events, they cannot trump the constitutional imperatives of equal protection, due process, and the voters' own rights of association concerning candidates and campaigns.

Also untenable is Defendants' attempt to ignore state action by arguing that "states have no constitutionally-mandated role in the great task of selection of Presidential and Vice-Presidential candidates," citing *Cousins v. Wigoda*, 419 U.S. 477 (1975) (emphasis added). The issue before this Court, however, is not whether the Constitution mandates a role of the states in the first instance. The real question is whether or not the State of Florida, in collaboration with the major parties, has, in fact, properly decided to perform such a role. As to that issue, the statutory scheme of §103.101, Fla. Stat. (2007) and the factual record in the present case overwhelmingly demonstrate the Defendants' extensive joint participation with the State of Florida. Along with the Florida Statutes and the factual specifics set forth in Plaintiffs' moving papers is Exhibit "B" to the Defendants' own affidavit (DE 7-3 at 30) which itself admits that Florida has a binding "state-run" primary (See DE 7-2 at 5, ¶13 designating Florida with a "P").

As is described in Plaintiffs' moving papers (DE 10), the State of Florida requires, and conducts at its own very substantial expense, a binding primary for delegate selection at the Democratic and Republican conventions, assigning to the major parties the allocation of delegates among states and the task of translating the primary vote into delegate selection. (Plaintiffs' Motion for Partial Summary Judgment, DE 10, at 9-17). There is and can be no dispute but that the two major parties in the United States are intimate parts of the "election machinery" which ultimately determines who will be President and Vice President. Indeed, in the Defendants' own motion to dismiss, they, too, describe the fact that delegate selection necessarily consists of not only the allocation

of delegate positions, but also the election machinery to fill those positions (Defendants' Motion, DE 6 at 5), which in Florida is undeniably the state-run primary. Similarly, in the Defendants' Declaration of Philip McNamara, it is stated that "the allocation of delegate positions to Presidential candidate is accomplished by the State Democratic Party, either through a primary or a caucus convention system." McNamara, par. 11. His declaration further acknowledges that, "In a primary system, the State Party uses the state-run or a party-run primary to allocate delegate positions ...." *Id.* Thus, the Defendants themselves further confirm the extensive interdependence and collaboration between the major parties and the state elections system in the allocation of delegates. Very plainly, this is "state action" under cases such as *Smith v. Allwright*, 321 U.S. 757 (1944), *United States v. Classic*, 313 U.S. 299 (1941), *Nixon v. Condon*, 286 U.S. 484 (1932); *Terry v. Adams*, 345 U.S. 461 (1953), and *Gray v. Sanders*, 372 U.S. 368 (1963). *See also Bode v. Democratic National Party*, 442 F.2d 302, 1306 (D.C. Cir. 1971) (state action envelopes national party through collective state action of the individual state parties).

The paucity of successful challenges to delegate selection does nothing to undermine the teachings of the unchallengeable U.S. Supreme Court "state action" holdings which remain the binding law of our nation. In fact, the numerous holdings that the Democratic Party's role in elections, including primary elections, is state action have never been overruled and are cited in *Morse* and *Duke v. Smith*, *supra*. If the recent case law is more limited, it is because, fortunately, recent years have not seen abuses anything like Defendants' present onslaught against Florida, denying more than four million registered voters any role in the Presidential nomination process. In any event, the

subsequent cases addressing challenges to delegate selection processes have generally assumed the presence of state action and provide no assistance to Defendants on this pivotal issue. *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Democratic Party v. Wisconsin ex rel LaFollette*, 450 U.S. 108 (1981).

The Defendants' citation to a recent district court case, *DiMaio v. DNC*, Case No 07-civ-1552 (M.D. Fla. 2007) is more misleading than helpful.<sup>3</sup> While the court in that case did find an absence of state action, it did so based "only on the allegations" of the particular, highly deficient, complaint in that case. Indeed, in *DiMaio*, the plaintiff did not affirmatively allege that state action was present or even that the U.S. Constitution had been violated. Significantly, although not disclosed by the Defendants here, the *DiMaio* Court took the trouble of expressly "emphasizing" in a footnote at the end of the opinion that it was not attempting to address the merits of the present case. Unfortunately, the Defendants have failed even to acknowledge the explicit mention of this case in *DiMaio*, and, plainly, *DiMaio* does not help them. Therefore, based on the record in this case, it is clear that the Defendants acted under color of state law, and thus they cannot ignore the U.S. Constitution.

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<sup>3</sup> The Defendants also cite a VRA case which is equally unhelpful to their position. In *LaRouche v. Fowler*, 77 F.Supp.2d 80 (D.D.C. 2000), *aff'd.*, 529 U.S. 1035 (2000), a three judge district court held that pre-clearance of a change in DNC Party Rules was not required under §5 of the Voting Rights Act. *LaRouche* presented a "core" associational concern, namely, the issue of whether a racist anti-Semite who was not a "bona fide Democrat" had the right to appear as a party-approved ballot, *Id.* at 83, 88-89, and this fact influenced the *LaRouche* court to narrowly interpret the statutory language to avoid a constitutional issue.

## **Plaintiffs Have a Compelling Equal Protection Claim**

Defendants' attacks on the merits of Plaintiffs' position are no more convincing than their unsupported "state action" argument. As was demonstrated in Plaintiffs' own moving papers, banishing Floridians from the Presidential nomination process violates Equal Protection through geographically-based discrimination. (Plaintiffs' Motion for Partial Summary Judgment at 17-19). *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[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..."). "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 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).<sup>4</sup> As one landmark decision explained, "Diluting the weight of votes

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<sup>4</sup> 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.*

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.

When severe infringement is inflicted by classification in the domain of fundamental rights, it cannot be justified unless it is “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, *supra*, 504 U.S. at 434. The complete disenfranchisement of Florida primary voters is not just a severe restriction, it is, in fact, the ultimate restriction on their right to vote. *Bonas v. Town of North Smithfield*, 265 F.3d 69, 75 (1<sup>st</sup> Cir. 2001) (judicial remedy warranted to address “total complete disenfranchisement of the electorate as a whole”). The Defendants do not even attempt to state a compelling interest or to pass strict scrutiny, nor could they. They cannot say, for example, that Florida voters have any less entitlement than Democratic voters in South Carolina, Nevada, Iowa or New Hampshire, to be heard concerning the future of the Presidency. Indeed, Dean and the DNC only attempt to assert one basis for their action in this case -- the attempt to avoid “chaos” regarding the scheduling of primaries.

While a rational basis is not enough to meet strict scrutiny, even if it were relevant here, the Defendants’ asserted excuse lacks substance. The Defendants’ attempt to argue that the sky will fall if Florida Democrats (like Florida Republicans) vote on January 29, 2008, rather than one week later, February 5, 2008, is ludicrous. In fact, for all of Defendants’ hand-wringing about their meticulously crafted schedule and the obedience of other states, they have neglected to advise the Court that Iowa has moved its caucus

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*Sims*, 377 U.S. 533, 555 (1964).

date to January 3, 2008, in violation of DNC rules (Exhibit “E” and “F”). And yet, no punishment whatsoever has landed in the Hawkeye State. Moreover, as the primary schedule now stands, Florida also follows the New Hampshire primary (which is not yet finally scheduled), the Nevada caucuses on January 19th, and South Carolina, which is now set for January 26, 2008. One week after January 29, 2008, 24 states (nearly half of all Democratic delegates) will conduct primaries on February 6, 2008. (Defendants’ Exhibit “B”). As these facts show clearly, allowing the Florida primary to go forward with an election in which the votes are to be counted would harm no one; it would neither create nor increase “chaos”; and it would fully protect the Plaintiffs’ fundamental constitutional rights.

On the other hand, conducting an election which, for Florida Democrats, has been consigned to irrelevancy, creates its own disruptive and chaotic scenarios. For example, millions of Democratic voters in Florida will be wondering whether to even show up at the polls on January 29, 2008, given the Defendants’ purge of all Democratic delegates and the lock-out of Democratic candidates. While some voters may make the effort to get to the polls, speculating that post-election developments could allow some delegates to be ultimately seated, such guesswork and confusion should not define our most essential democratic processes.

Meanwhile, with many voters staying home, understandably viewing the January 29th Presidential primary as an electoral mockery (as DNL Rule 12.H. states), numerous elections for local offices on January 29th will suffer dramatic reductions in voter turnout. This is an especially damaging prospect for local candidates who, while running

in non-partisan elections, nonetheless share Democratic ideals, and thus, the Defendants' freeze-out of Florida Democrats could well cause local Democrats to lose local elections. Afterwards, for thousands of Democratic activists, the question of what to do about conducting delegate caucuses for each candidate who wins votes (even without campaigning) is yet another source of potential bewilderment. All the while, the DNC's actions will continue to place a dark and chilling shadow over candidates and voters in Florida.

Although the Defendants insist that Party rules cannot be questioned by the Courts, paradoxically, much of the Defendants' conduct in the present case offends their own rules. As described in Plaintiffs' own motion, DNC Rule 13A calls for delegates to be allocated based on the Presidential primary returns while Rule 13H denounces non-binding advisory elections. (Plaintiffs' Motion for Partial Summary Judgment at 7-8). Moreover, whatever the DNC rules may say, the deprivation of constitutional rights has never been held to be acceptable simply because a party rule may allow such a result. *Smith v. Allwright*, 321 U.S. 757 (1944); *Nixon v. Condon*, 286 U.S. 484 (1932); *Terry v. Adams*, 345 U.S. 461 (1953). The Supreme Court's decision in *Gray v. Sanders*, 372 U.S. 368 (1963), which held that a county-unit voting system deprived voters of their constitutional rights to equal protection, is still another case ignored by Defendants. Indeed, the dilution of the Plaintiffs' vote to zero in the present case is far more extreme than the diminution prohibited in *Gray*. Since a fundamental right is at stake, *Wesberry v. Sanders*, 376 U.S. 1, 17(1976), a compelling interest is needed to justify its deprivation. When examined within this framework, the convenience of a rigid calendar and the

comfort of one's housekeeping rule pales when compared to the Plaintiffs' fundamental constitutional rights.

**Plaintiffs State a Valid Claim for Violation of  
Substantial Due Process Issues**

Substantive due process rights lead to the same result as equal protection. Here, too, Defendants are wrong and ignore a dispositive case that validates Plaintiffs' due process rights. *United States v. Classic*, 313 U.S. 299, 325 (1941). In *Classic*, the Supreme Court held that "the right of voters at a primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution." As another court summarized the basic principles:

Voting is a fundamental right. The Supreme Court has stated that "[n]o right is more precious in a free country than having a voice in the election of those who \*1357 make the laws under which, as good citizens, we must live." *Reynolds v. Sims*, 377 U.S. 533, 560, 561-562 (1964) (citations omitted). Because voting is a fundamental right, the right to vote is a "liberty" interest which may not be confiscated without due process. *United States v. Texas*, 252 F.Supp. 234, 250 (W.D.Tex.), *aff'd mem. per curiam*, 384 U.S. 155 (1966).

*Raetzel v. Parks/Bellefont Absentee Election Board*, 762 F.Supp. 1354, 1357 (D. Ariz. 1990). As was described in Plaintiffs' Motion for Partial Summary Judgment (DE 10), "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). Thus, the controlling analysis is firmly settled:

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.

*Griffin v. Burns*, 570 F.2d 1065,1077 (1st Cir. 1978) (emphasis added). 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, par. 49). This is not a garden variety election dispute, *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1988) distinguishing between “patent and fundamental unfairness” from “garden variety” election disputes), but an egregious denial of fundamental rights that are protected by due process. 802 F.2d at 1315. For that reason, the court in *Bonas v. Town of North Springfield*, 265 F.3d 69 (1<sup>st</sup> Cir. 2001), emphasized that complete disenfranchisement of the electorate is a due process violation that federal courts will not tolerate. As with the violation of equal protection, no compelling, and indeed no rational basis, is provided by Defendants in their papers to defend their action.

A closely related and crucial dimension of the Defendants’ due process violation is the DNC’s preclusion of candidates from campaigning in Florida. For more than two centuries, our legal traditions have cherished free and open debates on the qualification of candidates because unobstructed political campaigning is integral to voting and the system of government established by our Constitution. In banning Florida campaigning for the Democratic Presidential nomination, Defendants are shattering the fundamental rights of millions, rights that include “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters ... to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.”

*Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). As a result of Defendants' actions, multiple constitutional injuries have been inflicted upon Plaintiffs' rights to associate for the advancement of their shared political beliefs and their right to endorse or oppose a particular candidate as well as the issues the candidate espouses. Not only will Plaintiffs and other Democratic voters be excluded from their party's own processes of debate, advocacy and candidate selection, they will be denied any realistic opportunity to encourage independent and even Republican voters to consider the merits of Democratic candidates and their ideals. After all, because the Democrats' own contenders will be missing in action, Presidential campaigning in Florida will be a Republicans-only process throughout this critical stage of the campaign.

The Defendants should not be muzzling their own candidates with such gag orders. It is anathema to a free society to prohibit political candidates from addressing a certain class of voters, whether identified by race, gender, or geographical location. Also indefensible is the DNC's position that it is not responsible for the embargo on campaigning in Florida, given its confiscation of all of the state's 210 delegates as well as the plain language of DNC Rule 20.C.1.b (prohibiting candidates from campaigning in any state which does not comply with DNC's "timing" rule). Because the DNC and Dean are the substantial, even the predominant factors in the candidates' boycott of Florida, declaratory relief by this Court as to the rights of Floridians in this regard is fully warranted. "Free discussion about candidates for public office is no less critical before a primary than before a general election." *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989). As a result, a ruling is urgently needed so that

Democratic candidates, free of the shackles imposed by the DNC's Rules, would be free to address Floridians as surely as they can speak to any other voters in our nation.<sup>5</sup>

### **Plaintiffs State a Valid Claim for Violation of Procedural Due Process**

As for procedural due process, the Defendants rely largely on the argument that some Democratic legislators were warned as to the possibility of sanctions and did not do enough about it to satisfy the Defendants. DE 6 at 20. While wrong for many reasons, Defendants' argument is especially misguided because it ignores the individual voters whose rights are being obliterated. Given the Defendants' stubborn insistence that they can punish millions of voters because Defendants are unhappy with certain Florida politicians, it may be helpful to review the basic constitutional reality that the affected voters have their own individual rights to procedural due process.

“No right,” the Supreme Court observed in *Reynolds v. Sims*, 377 U.S. 533, 560, 561-62 (1964), “is more precious in a free country than having a voice in the election of those who make the laws under which, as good citizens, we must live.” The right to vote is, accordingly, a liberty interest which may not be withheld or withdrawn without due process. *United States v. Texas*, 252 F.Supp. 234, 250 (W.D.Tex.), *aff'd mem. per curiam*, 384 U.S. 155 (1966). **An elector cannot be disenfranchised without notice and an opportunity to be heard.** *Doe v. Rowe*, 156 F.Supp.2d 35, 48 (D.Me.2001) (denial of the right to vote is a denial of a fundamental liberty); *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F.Supp. 1354, 1358 (D.Ariz.1990) (an election board “cannot disqualify ballots, and thus disenfranchise voters, without ... to an individual whose absentee ballot has been disallowed, advising the

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<sup>5</sup> While directed to candidates, the Defendants' “stay-away order” also removes the Democratic voters from Florida primary campaigning also violating their rights because “the rights of voters and the rights of candidates do not lend themselves to neat separation ...” *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

individual of the disqualification and the reason therefore, and providing some means for the individual to make his or her position on the issue a matter of record before the appropriate election official.”).

*Bell v. Marinko*, 235 F.Supp.2d 772, 777 (N.D. Ohio 2002) (emphasis added).

Further, even apart from the guilt by association theory that punishes millions for the alleged insubordination of a few, due process fails because, as in *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994), there is ultimately no standard to prevent arbitrary decision-making by the DNC. As constitutional decisions clearly establish, procedural due process requires notice and opportunity to be heard by the affected party; it also requires standards, criteria, and grounds for denying delegates.

When measured against these standards, DNC Rule 20.C.5 is an abject failure. It provides no criteria or standards as to when and under what conditions additional sanctions should apply. Apart from their vague reference to DNC Rule 20.C.5 and 6, the Defendants provide no justification or explanation for the fact that Florida was denied all its delegates and therefore any role whatsoever in selection of the Democratic Presidential nominee. As has been described, DNC Rule 20.C.1.a. by its plain terms mandates (at most) only a 50% loss of delegates for violating the party rules.<sup>6</sup>

In *Duke v. Smith*, 13 F.3d 388, 395 (11th Cir. 1994), the Eleventh Circuit held that a committee that included party officials and 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

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<sup>6</sup> Ironically, the Republican Party, with essentially the same rule, has applied the Rule and allowed half of Florida’s delegates to be seated at its convention and allows its candidates to campaign in this pivotal state.

rationale is true here, particularly given that DNC Rule 20.C.1.a. by its plain terms specifies a 50% loss of delegates as the penalty for timing issues, and yet, the Defendants deprived Florida of all delegates without any “articulable standards.” 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). Without “articulable standards,” arbitrary and discriminatory action can occur, just as it did here. To this day, Defendants have still not provided any additional evidence or additional criteria that supposedly justified the additional sanction of 100% loss of Florida’s delegates. (Exhibits “B” and “D”).

Even apart from the lack of written standards in the rule was the absence of asserted aggravating factors at the DNC’s meeting. The FDP representatives came to the August 25, 2007 meeting prepared to argue why the 50% penalty should not apply to Florida. Notice of further grounds for a 100% penalty had not been provided and they did not come prepared to address any supposed aggravating factors. Rather, the FDP representatives presented information as to why the Presidential preference primary date could not be changed or turned into merely a beauty contest: 1) the fact that it was Republican controlled legislature, 2) the need to get the paper trail requirement amendment to the bill changing the date of the Presidential preference primary passed, and 3) the need to have Democratic voters voting in the Presidential preference primary because of the property tax amendment.<sup>7</sup> Thus, when the DNC imposed a reduction of the

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<sup>7</sup> This is demonstrated by the very fact that “as part of the same motion,” the DNC RBC voted to further reduce Florida’s number of delegates to zero, a 100% penalty. See McNamara Dec. ¶ 59.

state's delegation beyond the 50% reduction specified as the penalty for violation of timing in DNC Rule 20.C.1.a, it did so without fair notice and the opportunity to be heard concerning the additional grounds for the enhanced sanctions.

**Defendants Cannot Excuse Their Constitutional Violations  
By Relying on a Make-Believe Election**

Among all of Defendants' efforts to excuse the disenfranchisement of Florida Democrats, none is more remarkable than the presumably straight-faced contention of Dean and the DNC that they have not "deprived anyone of the right to vote." DE 6 at 3. As they say in their papers:

Second, the DNC sanctions are not depriving Plaintiffs or any other Florida Democratic voters of the right to vote.  
**The state-run primary will take place and Plaintiffs and their constituents are free to vote in it.**

Defendants' motion at 19 (emphasis added).

Evidently, based on Defendants' reasoning, the mere pushing of a button on a machine, even if the machine is not connected to a vote-counting system, satisfies the fundamental right to vote. Even if the ballots are effectively ignored - the argument apparently goes - those who have physically "voted" have enjoyed their full rights as voters in our democracy. But, as Defendants should recall, the whole focus of the dramatic ordeal during the 2000 Presidential recount was not whether the election did "take place" and not whether Floridians were "free to vote in it", but whether all their ballots were being truly counted. As the Supreme Court has explained this self-evident proposition:

'[t]he right to vote is protected in more than the initial allocation of the franchise. Equal Protection applies as well

to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.'

*Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). While even if some may have short memories, Floridians have not forgotten 2000. And even if a make-believe election in Florida is good enough for Defendants, the Constitution does not share their enthusiasm for a meaningless ritual: it is the right to "have their votes counted" which is fundamental. *United States v. Classic*, 313 U.S. 299, 325 (1941). Participation in a "meaningless" charade satisfies neither the DNC's own Rule 12.H., and it most assuredly does not satisfy the requirements of the U.S. Constitution. *Black v. McGuffage*, 209 F.Supp.2d 889, 900 (N.D. Ill. 2002) ("Nevertheless, it would appear that the right to vote, the right to have one's vote counted, and the right to have ones vote given equal weight are basic and fundamental constitutional rights incorporated in the due process clause of the Fourteenth Amendment to the Constitution of the United States.")

### **Defendants Cannot Excuse Their Own Constitutional Violations by Telling Florida to Hold Caucuses**

The DNC is also wrong in insisting that the Florida Democratic Party should ignore the state-mandated primary election and conduct a party-run caucus to determine which candidates should receive delegates. Most fundamentally, the Defendants are wrong because the State of Florida has already chosen its path by enacting legislation to conduct a primary election. §103.101, Fla. Stat. (2007). Thus, the issue is not whether there will be a primary, but whether the votes to be cast in that state-financed and operated primary are being unconstitutionally diminished or even eviscerated by

Defendants' conduct. Florida's decision to conduct a Presidential primary, with all the benefits willingly enjoyed by the major parties, is clearly within a state's prerogative. 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). When, as here, state law confers upon voters the right to go to polls in their precinct place to cast a meaningful ballot for the Presidential nomination, neither Dean, the DNC, nor the Florida Democratic Party may now reverse this judgment by the State of Florida and pull the rug out from under the electorate. Once a state has determined to conduct an election, that process must proceed in accordance with constitutional standards. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665 (1966).

Nor is a party-run caucus a viable scenario in any event. While some have proposed holding "caucuses" which ratify the results of the state conducted primary, the DNC has expressly refused to allow a "caucus" which simply reflects the results of the primary<sup>8</sup>. After all, this would allow the primary vote to have significance, and that is the very thing that Dean is anxious to prevent.

On the other hand, if one were to implement caucuses where participants would completely ignore the results of the primary in their decision-making, further legal and practical concerns would emerge that are insurmountable. First, using caucuses to effectively eliminate an election when the State of Florida has mandated a primary,

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<sup>8</sup> Even in this case, the absence of campaigning enforced by the DNC and Rule 20.C.1.B would still represent a deprivation of the Plaintiffs' rights of association.

would be contrary to the Florida Statutes and simply reinforces the constitutional infirmity here – that the Presidential primary votes being cast are being rendered utterly meaningless. *Harper, supra*; *Bonas v. Town of North Smithfield*, 265 F.3d 69, 75 (1<sup>st</sup> Cir. 2001) (eliminating an election as a means to select local office holders violates the U.S. Constitution); *Afran v. McGreevey*, 115 Fed. Appx. 539, 545 (3d Cir. 2004) (“Assuming New Jersey required an election in this case, refusal to hold it would rise to the level of a constitutional violation.”) Additionally, a caucus would be contrary to state Democratic rules. (Exhibit “A”).

Third, it is financially and practically impossible. Florida, with more than six times the population of Iowa, has a far greater size and population than the states which employ party-run caucuses. Even with the DNC’s proposed financial contributions, the human and financial resources are not available to use caucuses to replace polling places in Florida. Iowa conducts caucus sessions in each of its 1748 precincts. Exhibits “E” and “F”. While this may be feasible in a state of that size, it is clearly not viable for major state like Florida where Miami-Dade County alone has some 750 polling places.

Finally, along with the other enormous problems, effectively abandoning the state-run primary election to switch to party-run caucuses would clearly violate the Voting Rights Act, Section Five pre-clearance rules, *Morse*, 517 .S. 186 (1996). Under Section 5, the prerequisite of federal scrutiny applies to any change in a “standard, practice, or procedure” which has a “potential for discrimination” against minorities. 42 U.S.C. §1973(c). As federal law clearly provides, these strictures include actions that alter election provisions “in even a minor way” because the phrase “standard, practice, or

procedure” is to be accorded the “broadest possible scope.” *Allen v. State Bd. Of Education*, 393 U.S. 544, 561-67 (1969). As is well-known, caucuses are very different from primaries and require hours of participation, entail much smaller levels of participation and typically do not provide for secret balloting.(Exhibits “E” and “F”). Therefore, for legal as well as practical reasons, the Defendants’ “caucus” option is phony and Floridians are entitled to the Presidential primary election that their legislators have chosen and that their tax dollars are funding.

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

As has already been addressed in Plaintiffs’ motion for partial summary judgment (DE 10 at 20-24), it is apparent that the DNC’s rights of free association discussed in cases such as *Democratic Party v. Wisconsin ex rel LaFollette*, 450 U.S. 107 (1981), do not authorize “total and complete disenfranchisement” of Florida’s entire Democratic electorate. The major concern of cases like *LaFollette* – the ability of the Party to define itself and exclude non-adherents – is simply not at issue in this case. While such doctrine allows the Democratic Party to override state laws that might otherwise require it to include Republicans and independents in intra-party decision-making, it is not a license for wiping an entire state off the Presidential primary map. 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). Therefore, even assuming that the DNC’s right of association allows it to consider factors in addition to population in allocating delegates, no justification exists 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 due to a matter such as state of residency since no such discrimination has a substantial enough relationship to any legitimate associational goals protected by the First Amendment.

### **A Valid Voting Rights Act Claim Is Established**

The Defendants offer nothing persuasive to defend the asserted violation of Section Two of the Voting Rights Act of 1965, 42 U.S.C. §1973. For the same reasons that the Supreme Court majority in *Morse, supra*, held that the Republican Party was subject to the VRA in Virginia because it exercised the delegated power of a covered “state,” the DNC is subject to Section Two here. Equally clear is the fact that by Defendants’ decision to deny any role in presidential selection to Florida’s Democrats, the DNC has imposed a “standard,” a “practice,” and a “procedure” which has, as Defendants admit, creates a disparate impact on black voters. Because Section Two does not require proof or allegation of discriminatory purpose, the elements of a Voting Rights Act claim are fully established. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 482 (1997).

The principal issue that Defendants raise is remedy and they suggest that any remedy should be an order changing the date of the primary. As federal law has clearly

established, in an election case, when the court's authority is properly invoked, its parameters for remedy are broad. *See authorities cited in Arbor Hill Concerned Citizens Neighborhood Assn. v. Co. of Albany and Albany Co. Board of Elections*, 357 F.3d 260, 262-63 (2d Cir. 2004) (ordering that a special primary be conducted on a specified date). In the present case, Plaintiffs are asking the Court to defer the issue of remedy in favor of the order of declaratory relief, in accordance with the logic of cases which counsel allowance of political bodies an initial opportunity to correct a violation identified by a court. E.g., *Tallahassee NAACP v. Leon County*, 827 F.2d 1436, 1438 (11th Cir. 1987)(principle of deference); *Dickinson v. Ind. St. Elec. Bd.*, 933 F.2d 497, 501 (7th Cir. 1991)(discussing merits of declaratory option).

While this issue may be fully addressed at a remedial stage, the DNC and Dean are wrong in their attempt to shift the entire responsibility to the State of Florida. Should this Court decide that the DNC and Dean are part of the problem of Voting Rights Act violation, they should be held accountable as part of its solution as well.

### CONCLUSION

Plaintiffs request that the Motion for Summary Judgment filed by Defendants Dean and DNC be denied, and Plaintiffs' own motion be granted, for the reasons set forth in this opposition as well as in their motion for partial summary judgment motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 16, 2007, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the Mailing Information for Case No.: 4:07cv427-RH/WCS. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF. Counsel of record who are not on the Mailing Information list to receive e-mail notices for this case have been served via U.S. Mail.

By: /s/ Kendall Coffey