IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,
Plaintiff,

v.

Case No. 24-002994-CI

PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE,
MICHAEL JOHN SHEROSKY,
JENNIFER W. GRIFFITH,
Defendants.
_____/

COMPANION WITH:
Case No. 24-003939-CI

NOTICE OF FILING DEFENDANTS' MATERIALS FOR CASE MANAGEMENT CONFERENCE

Defendants, PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE, MICHAEL JOHN SHEROSKY, and JENNIFER W. GRIFFITH, by and through their undersigned counsel, hereby give Notice of Filing the enclosed materials in support of their positions in advance of the Case Management Conference set in this matter for November 21, 2024 at 3:15pm.

Dated: November 20, 2024

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
FBN 1019960

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing documents were served upon John William Liccione, Plaintiff *Pro Se*, and all counsel of record on this 20th day of November, 2024.

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
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PCDEC, SHEROSKY, and
GRIFFITH

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November 20, 2024

The Honorable Judge Thomas Ramsberger
Sixth Judicial Circuit—Circuit Civil Section 19
545 First Avenue North
Room 200
St. Petersburg, FL 33701

VIA FLORIDA E-FILING PORTAL AND E-MAIL TO SECTION19@JUD6.ORG

Re: *John William Liccione vs. Pinellas Democratic Executive Committee, et al*
John William Liccione vs. Jennifer Griffith, et al
Case No. 24-002994-CI and Case No. 24-003939-CI
Materials for Case Management Conference
November 21, 2024—3:15pm

Dear Judge Ramsberger:

In advance of this Court's Case Management Conference in Case No. 24-002994-CI (for all Defendants) and Case No. 24-003939-CI (solely for Defendant Griffith), which is set for November 21, 2024 at 3:15pm, I am providing the following materials for you to consider in advance of the hearing on behalf of Defendants PCDEC, Griffith, and Sherosky.

Relevant sections of the provided case law is highlighted. Page numbers and bookmark numbers are indicated

1. Amended Notice of Telephonic Case Management Conference (pgs. 003-005)

Court Filings—Case No. 24-002994-CI

2. Defendants PCDEC, Griffith, & Sherosky's Motion to Dismiss Amended Complaint (pgs. 006-039)
3. Plaintiff's Response to Defendants' Motion to Dismiss (Original) Complaint (pgs. 040-060)
4. Plaintiff's Motion to Stay and/or Consolidate Case with Federal Case (pgs. 061-063)
5. Defendants' Memorandum in Opposition to Plaintiff's Motion to Stay Proceedings (pgs. 064-068)
6. Plaintiff's Motion for Leave to File Second Amended Complaint (pgs. 069-073)
7. Plaintiff's Motion to Strike Appearance of Attorney George Thurlow (pgs. 074-078)

8. Defendants' Response in Opposition to Plaintiff's Motion to Strike Appearance of Attorney George Thurlow (pgs. 079-081)
9. Plaintiff's Notice of Receipt of Extortive Death Threat (pgs. 082-094)

Court Filings—Case No. 24-003939-CI

10. Order Granting Court's *Ore Tenus* Motion to Consolidate (pgs. 095-097)
11. Order Granting Court's Motion to Stay (pgs. 098-101)
12. Defendant Griffith's Motion to Dismiss (pgs. 102-114)
13. Plaintiff's Response to Defendant Griffith's Motion to Dismiss (pgs. 115-127)
14. Defendant Griffith's Motion for Sanctions (pgs. 128-136)
15. Plaintiff's Response to Motion for Sanctions (pgs. 137-144)

Authorities on Free Speech and Assembly Rights of Political Parties

16. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989) (pgs. 145-170)
17. *Tashjian v. Repub. Party*, 479 U.S. 208 (1986) (pgs. 171-207)
18. *Concerned Citizens for Judicial Fairness v. Yacucci*, 162 So. 3d 68 (Fla. 4th DCA 2014) (pgs. 208-217)
19. Order Granting Defendant's Motion to Dismiss in *Donelon v. Pinellas Democratic Executive Committee,* Pinellas County Case No. 23-008089-CI. (pgs. 218-219)

Authorities on Motions to Dismiss filed under Florida's anti-SLAPP Statute (Fla. Stat. § 768.295)

20. Fla. Stat. Ann. § 768.295 (LexisNexis, Lexis Advance through the 2024 regular session) (pgs. 220-235)
21. *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019) (pgs. 236-253)
22. *Davis v. Mishiyev*, 339 So. 3d 449 (Fla. 2d DCA 2022) (pgs. 254-263)

Authorities Regarding Whether Political Parties Are Considered State Actors

23. *Kissinger v. Mahoning Cnty. Republican Party*, 677 F. Supp. 3d 716 (N.D. Ohio 2023) (pgs. 264-280)
24. *Emmanuelli v. Priebus*, 2012 U.S. Dist. LEXIS 52064 (M.D. Fla. 2012), aff'd by *Emmanuelli v. Priebus*, 500 Fed. Appx. 886 (11th Cir. 2012). (pgs. 281-288)

Authorities on Disqualification of Defendants' Attorneys

25. Fla. Bar Reg. R. 4-3.7 (Rule and Commentary) (pgs. 289-291)
26. *Allstate Ins. Co. v. English,* 588 So. 2d 294, 295 (Fla. 2d DCA 1991) (pgs. 292-295)
27. *AlliedSignal Recovery Trust v. AlliedSignal, Inc.,* 934 So. 2d 675, 680 (Fla. 2d DCA 2006) (pgs. 296-307)

Sincerely,

George A.D. Thurlow, Esquire
Counsel for Defendants PCDEC,
Griffith, and Sherosky

Cc: John William Liccione (via email)

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,
Plaintiff,

v. Case No. 24-002994-CI

PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE,
MICHAEL JOHN SHEROSKY,
JENNIFER W. GRIFFITH,
Defendants.
_____/

COMPANION WITH:
Case No. 24-003939-CI

AMENDED NOTICE OF TELEPHONIC HEARING
Amended to Include Plaintiff's Newly Filed Motions

YOU ARE HEREBY NOTIFIED that the above-styled cause has been set for a telephonic **CASE MANAGEMENT CONFERENCE** as designated below:

DATE:	November 21, 2024
TIME:	3:15 pm (30 minutes)
JUDGE:	The Honorable Thomas Ramsberger

ALL PENDING MOTIONS IN THIS INSTANT CASE (CASE No. 24-002994-CI) AS WELL AS ALL MATTERS PERTAINING TO DEFENDANT JENNIFER GRIFFITH IN CASE NO. 24-003939-CI[1] WILL BE HEARD AT THIS CASE MANAGEMENT CONFERENCE.

As of this filing, those Pending Motions include:

CASE NO 24-002994-CI:

- Plaintiff's Motion to Stay Proceedings (Doc # 17)
- Defendants' PCDEC, Sherosky, and Griffith's Motion to Dismiss Amended Complaint with Prejudice as a Strategic Lawsuit Against Public Participation (Doc #PENDING, filed November 14, 2024)[2]
- Plaintiff's Motion for Leave to File Second Amended Complaint (Doc #PENDING, filed November 17, 2024)
- Plaintiff's Motion to Strike Appearance of Attorney George Thurlow (Doc #PENDING, filed November 18, 2024)

[1] At a November 12, 2024 hearing, The Honorable Patricia Muscarella ruled that this Court and The Honorable Thomas Ramsberger, in Case No. 24-002994-CI, should have jurisdiction over Defendant Jennifer Griffith in Case No. 24-003939-CI. An Order to this extent is forthcoming.

[2] This Motion replaces Defendants' Motion to Dismiss Complaint (Doc #15), which came moot upon Plaintiff filing an Amended Complaint on November 7, 2024 (Doc #31)

CASE NO 24-003939-CI:

- Defendant Griffith's Motion to Dismiss Amended Complaint (Doc #40)
- Defendant Griffith's Motion for Sanctions (Doc #55)
- Plaintiff's Motion to Compel Discovery Against Defendants Jennifer Griffith and Cathy Salustri Loper (Doc #71)
- Plaintiff's Motion to Shorten Time for Defendants Griffith and Loper to Respond to Plaintiff's Motion to Compel Discovery (Doc #74)

Should additional Motions be filed with the Court before this Case Management Conference in either Case No. 24-002994-CI or in Case No. 24-003939-CI (pertaining only to Defendant Griffith), this Court may consider those Motions at this Hearing without further notice.

HELD VIA: Conference Call
Dial-in number (US): (425) 436-6303
Access code: 141878#

INSTRUCTIONS FOR SECTION 19

UNTIL FURTHER NOTICE, ALL HEARINGS set before Judge Thomas Ramsberger, Civil Section 19 will be conducted by TELEPHONE CONFERENCE.
ZOOM VIDEO CONFERENCE (upon approval).
(Zoom requests shall be made directly to the JA via e-mail prior to requesting / scheduling a hearing).

At the time of your hearing please use the **conference call line** that appears above in this Notice of Hearing to reach the Judge. This number will be used for all hearings so when you join the call its possible another hearing may be in progress so please mute your line and do not place the call on hold because that will activate hold music that all the other participants will hear.

Please call in at your scheduled hearing time and no sooner than 5 minutes prior to avoid too many parties on the line at once. Judge Ramsberger will make every effort to stay on schedule regarding hearing times but due to the high volume of calls, you may expect a wait time, please be patient and remain on mute (not hold) until the judge calls your case.

Judge Ramsberger has requested all lawyers please notify any Pro Se litigants of this change and provide them with the conference call number and access code listed below.

If you have been waiting on the phone for longer than 15 minutes, please call Valerie at (727)582-7874 to verify your case is on the docket.

Dated: November 18, 2024

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
FBN 1019960

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice has been served upon John William Liccione, Plaintiff *pro se*, via Florida E-Filing Portal on this 18th day of November, 2024.

/s/ George A.D. Thurlow
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Attorney for Defendants, PDEC, Griffith & Sherosky

IMPORTANT

If you are a person with a disability who needs an accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact:

Human Rights Office
400 S. Ft. Harrison Ave., Ste. 500
Clearwater, FL 33756

Phone: 727.464.4062 V/TDD
Or 711 for the hearing impaired

Contact should be initiated at least seven days before the scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than seven days.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,
Plaintiff,

v. Case No. 24-002994-CI

PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE,
MICHAEL JOHN SHEROSKY,
JENNIFER W. GRIFFITH,
Defendants.
_____/

DEFENDANTS' PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE, SHEROSKY, AND GRIFFITH'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE AS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION

Defendants, PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE ("PCDEC"), MICHAEL SHEROSKY[1] ("SHEROSKY"), and JENNIFER GRIFFITH[2] ("GRIFFITH"), by and through their undersigned attorneys, hereby move this Court, pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and 1.140(b)(6), to dismiss the Amended Complaint on the grounds that it is an impermissible strategic lawsuit against public participation, that this court (and any other court) lacks subject matter jurisdiction, for failure to state a cause of action upon which relief can be granted, and as a shotgun pleading, and in support thereof state as follows:

I. INTRODUCTION

Plaintiff's *modus operandi* in filing this lawsuit is to seek revenge against PCDEC, its Chair, and its Secretary for declining to support Plaintiff's candidacy for United States Congress and declining to provide Plaintiff with a platform for his candidacy. Since filing this instant lawsuit, Plaintiff has continued this retaliatory course of conduct through filing another lawsuit in the Sixth Judicial Circuit and filing a lawsuit in the United States District Court for the Middle District of Florida. None of these lawsuits have any merit.

[1] Michael Sherosky is the duly elected Secretary of the PCDEC, which is an unpaid, volunteer, and part-time position.
[2] Jennifer Griffith is the duly elected Chair of the PCDEC, which is an unpaid, volunteer position.

This Court should dismiss Plaintiff's Amended Complaint for lack of subject matter jurisdiction because the entirety of Plaintiff's Amended Complaint is based upon the Defendants' exercise of free speech, the actions of PCDEC—which is recognized as a county-level political party under Florida law—and its internal governing procedures and right to associate with whom it desires, all of which are non-justiciable before this Court. However, even if this Court were to find that it has subject-matter jurisdiction over some or all counts of Plaintiff's Amended Complaint, this Court should still dismiss it as it fails to state a cause of action upon which relief may be granted and because it is a shotgun pleading. This Court should also dismiss Count V of the Amended Complaint as Plaintiff lacks standing to bring such claim.

Additionally, as this lawsuit aims to quiet the political speech of PCDEC, Griffith, and Sherosky, the Defendants request that this Court deem this lawsuit to be a strategic lawsuit against public participation (SLAPP) that is prohibited under Florida's anti-SLAPP statute, Fla. Stat. § 768.295. Fla. Stat. § 768.295(3) states that "A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue." Plaintiff filed this lawsuit against PCDEC, Griffith, and Sherosky because PCDEC, Griffith, and Sherosky have exercised their constitutional right of free speech in connection with a public issue—namely the Democratic Primary for Florida's 13th Congressional District—in a way that has not been beneficial to Plaintiff's political campaign.

II. THE LEGAL STANDARD FOR A MOTION TO DISMISS—GENERALLY AND UNDER FLA. STAT. § 768.295

While a Motion to Dismiss generally requires a Court to simply accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant, the 2d DCA has held that a Motion to Dismiss based upon the anti-SLAPP statute requires the trial court to do more. *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 314 (Fla. 2d DCA 2019); *Davis v. Mishiyev*, 339 So. 3d 449, 453 (Fla. 2d DCA 2022).

Rather, in a Motion to Dismiss based upon the anti-SLAPP statute, the Defendant must demonstrate a *prima facie* case that the anti-SLAPP statute applies—in that the Plaintiff's suit was based on some activity that would qualify as an exercise of the Defendant's First

Amendment rights in connection to issues of public importance. *Id*. Then, the burden of proof shifts to the Plaintiff to demonstrate that the Defendants' activity was actionable and that the claims are not primarily based upon the Defendants' exercise of their first amendment rights. *Davis*, 339 So. 3d, at 453. This procedure serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss. *Gundel*, 264 So. 3d, at 314.

Denial of a Motion to Dismiss on anti-SLAPP grounds is an appealable non-final order. Notably, in *Gundel v. AV Homes, Inc.*, the 2d DCA quashed a trial court order denying a Motion to Dismiss, For Judgment on the Pleadings, or For Summary Judgment because the allegations contained within the pertinent counterclaim were too vague to permit the trial court to determine whether the alleged conduct was protected free speech. *Id*. at 315.

A prevailing party to a Motion to Dismiss under Fla. Stat. § 768.295 is entitled to the award of their reasonable attorney's fees and costs.

III. THERE IS A *PRIMA FACIE* CASE THAT PLAINTIFF'S LAWSUIT APPEARS TO BE A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION.

Of the forty-nine (49) paragraphs of factual allegations made in the Complaint, forty-one (41) of those paragraphs (Compl. ¶ 8-21, 30-56) in some way relate to Plaintiff's status as a candidate for United States Congress in Florida's 13th Congressional District, and the acts that the Defendants allegedly took in opposition to the Plaintiff's candidacy for Congress. Additionally, Plaintiff requests injunctive relief in the Complaint (Compl. ¶ 49-51, 84(e)) that would force PCDEC to permit Plaintiff to attend its events for the explicit purposes of advancing Plaintiff's political candidacy.

The speech of all three defendants who take part in this motion (PCDEC, Griffith, and Sherosky) constituted exercise of their First Amendment rights in connection to an issue of public importance—the Democratic Primary in Florida's 13th Congressional District. Both the Florida Supreme Court and the United States Supreme Court have held that expressing one's opinion about who should serve in public office, such as United States Congress, is political speech that falls within the protection of the First Amendment. *In re Code of Judicial Conduct*, 603 So. 2d 494, 496 (Fla. 1992). "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Concerned Citizens for*

Judicial Fairness v. Yacucci, 162 So. 3d 68, 73 (Fla. 4th DCA 2014), citing *Eu v. San Francisco Cnty. Democratic Ctr. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Additionally, the United States Supreme Court has held that political parties making endorsements[3] in primary elections is protected political speech that may not be restricted by state or federal law. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223-29 (1989). Certainly, this right would also extend to individual leaders of political parties. There is no legal barrier against political parties taking internal steps affecting their own process for the selection of candidates. *Tashjian v. Repub. Party*, 479 U.S. 208, 224 (1986).

Based on this clear showing that Defendants engaged in protected First Amendment speech, **Plaintiff now has the burden to demonstrate that the conduct of the Defendants was actionable.** Based on the allegations set forth in the Amended Complaint, none of the alleged conduct of the Defendants is actionable. Therefore, this Court should dismiss Plaintiff's Amended Complaint with prejudice as it is a strategic lawsuit against public participation intended to have a chilling effect on the Defendants' ability to exercise their First Amendment rights, and grant Defendants' entitlement to their reasonable attorney's fees and costs pursuant to Fla. Stat. § 768.295.

IV. PCDEC'S "VETTING PROCESS" FOR CANDIDATES IS PROTECTED FIRST AMENDMENT ACTIVITY THAT IS NON-JUSTICIABLE BY THIS COURT, OR ANY OTHER COURT.

Without dissecting the factual allegations made by the Plaintiff, or analyzing whether specific causes of action exist or were sufficiently pled, this Court may dismiss Counts III, IV, V, VI, VIII, and VIII of the Amended Complaint as they present non-justiciable claims over which this Court lacks subject-matter jurisdiction. Namely, this Court lacks jurisdiction because this lawsuit pertains to the decisions made by a county-level political party, the leadership of that county-level political party, and a state-level political party regarding a primary election for United States Congress. Given that the overwhelming amount of the facts pled in the Complaint relate to that theme, none of the claims made are justiciable.

[3] While there are technical distinctions between PCDEC making an endorsement in a primary election and PCDEC engaging in a "vetting process," as is alleged in the Complaint, those distinctions are not relevant to this instant case.

a. PCDEC IS A POLITICAL PARTY THAT HAS A LEGAL RIGHT TO ASSOCIATE OR NOT ASSOCIATE WITH PARTICULAR CANDIDATES, AND CONDUCT ITS PRIMARY ELECTIONS IN THE MANNER IT SO DESIRES.

The case of *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222-24 (1989) controls. In *Eu*, the U.S. Supreme Court struck down California's legal ban on political parties making endorsements in primary elections on the grounds that it was an unconstitutional restriction on free speech. Specifically, the U.S. Supreme Court found that restricting a political party's governing body from "stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought" is an unconstitutional restriction on speech because it "directly hampers the ability of a party to spread its message and voters seeking to inform themselves about the candidates and campaign issues." *Eu*, 489 U.S., at 223. *Eu* further held that political parties—due to their freedom of association--have the right to identify the people they wish to associate with, and select a standard bearer who "best represents the party's ideologies and preferences." *Id.* at 224. This decision was resolute, with the Court going as far as saying that restrictions on speech are " particularly egregious where the State censors the political speech a political party shares with its members." *Id.* at 223-24.

Restricting political parties from this right "suffocates" them because it prevents parties from promoting candidates "'at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community'." *Id.* at 224, quoting *Tashjian v Republican Party of Connecticut,* 479 US 208, 216 (1986).

Even when taken as true, Plaintiff alleges that PCDEC found that Plaintiff did not pass their vetting process and accordingly denied Plaintiff a stage for his candidacy, while promoting other candidates. Based on clear legal precedent, Plaintiff was well within its constitutional rights to make that decision and promote any candidates it so desires.

b. THIS COURT HAS PREVIOUSLY UPHELD PCDEC'S RIGHT TO CONTROL ITS OWN INTERNAL GOVERNING PROCEDURES.

Along these lines, in the recent case of *Donelon v. Pinellas Democratic Executive Committee*, Pinellas County Case No. 23-008089-CI, this Court dismissed the Plaintiff's Complaint, which concerned the elections process for PCDEC's Credentials Committee, on the

grounds that based upon the authorities of *Repub. Party v. Davis*, 18 So. 3d 1112 (Fla. 3d DCA 2009) and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court lacked jurisdiction to hear an action regarding the internal operations of a political party such as PCDEC. PCDEC maintains that its candidate vetting process is a matter of internal operation that is non-justiciable by this Court.

c. PLAINTIFF PREVIOUSLY SOUGHT REDRESS THROUGH THE FLORIDA DEMOCRATIC PARTY, WHICH WAS DENIED.

The bottom line is that political parties have the right to control the selection of their candidates free from undue state interference such as court rulings. Plaintiff's entire lawsuit is a gripe he has with a political party and its officers over the political party exercising its First Amendment rights in controlling its internal affairs in relation to candidate selection. This court does not have subject-matter jurisdiction over such a lawsuit, and therefore, this Court should dismiss this lawsuit.

d. DEFENDANTS SHEROSKY AND GRIFFITH HAVE A RIGHT TO SUPPORT OR OPPOSE CANDIDATES IN THEIR INDIVIDUAL CAPACITIES.

As individuals both Griffith and Sherosky enjoy a right of freedom of association under the First and Fourteenth Amendment to the United States Constitution. *Eu*, 489 U.S., at 224. That means that this Court cannot require them to promote or support Plaintiff's candidacy for the same reasons it cannot require the same of PCDEC.

e. THE CLAIMS BROUGHT IN COUNT V VI OF THE COMPLAINT IS SIMILARLY NON-JUSTICIABLE.

While Defendants maintain that ALL of the claims made in this Complaint should be barred as at all times relevant, Defendants were engaging in protected political speech, the claims of Count VI the Complaint can be dismissed upon a similar theory. In Count VI, Plaintiff throws numerous conclusory legal allegations against the wall, hoping something will stick. Plaintiff alleges that the Defendants are in violation of several civil rights laws, though upon closer inspection, it is evident these laws are entirely inapplicable to the facts asserted by Plaintiff.

Plaintiff's claims fly in the face of PCDEC, Griffith, and Sherosky's constitutional guarantees of freedom of association. Plaintiff claims rely on his misguided belief that the

Defendants are required to associate with Plaintiff, required to prefer Plaintiff as a candidate over others, and required to support Plaintiff's campaign. These assumptions are false. The PCDEC is a private organization (and its officers are private individuals) and Plaintiff's claims implicate vital rights of association guaranteed by the United States Constitution. The United States Supreme Court has explained that the "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981), note 22, p. 122, quoting L. Tribe, American Constitutional Law 791 (1978).

While Plaintiff may be unhappy that his campaign has not been supported by Defendants, there is no legal obligation for Plaintiff to receive the support he seeks. To that extent, Plaintiff's Complaint runs counter to PCDEC's Constitutional rights of association and right to manage its own internal affairs.

i. ADA Claim

Plaintiff claims, in wholly conclusory fashion, that Defendants discriminated against him on account of his suffering from Post-Traumatic Stress Disorder ("PTSD"), in violation of the ADA. See Compl. ¶ 71-72. Plaintiff claims Defendants discriminated against him in the activities of public life and engagement, and specifically regarding his political campaigning.

The ADA, however, is entirely inapplicable to Plaintiff's claims. The ADA broadly covers five groups of entities: employers, state and local governments, public transit, businesses that are open to the public, and telecommunications. See 42 U.S.C. § 12101 et. seq. PCDEC, Griffith, and Sherosky are not a state or local government, a public transit, or telecommunications entity. Likewise, the PCDEC, Griffith, and Sherosky are not Plaintiff's employer, or a business open to the public. It is clear on its face; the ADA is entirely inapplicable to the facts alleged.

ii. Civil Rights Claims

Plaintiff claims that Defendants, including PCDEC, Griffith, and Sherosky, have violated his civil rights. Specifically, Plaintiff claims that the PCDEC, Griffith, and Sherosky are discriminating against him on account of his age and sex. *See* Compl. ¶ 73. The allegations that Plaintiff was targeted on account of his age or sex are conclusory and need not be assumed true.

Plaintiff's conclusory allegation that he is being discriminated against because of his age and sex is based on his assertion that the PCDEC, Griffith, and Sherosky are supporting a younger, female candidate. *See* Compl. ¶ 73. The PCDEC is a private association and has constitutional rights to choose with whom it associates, and to choose which candidate it does, or does not, support in an election.

Plaintiff asserts that the FDP has violated the Florida Civil Rights Act ("FCRA"). *See* Compl. ¶¶ 74-75. But no provision of the FCRA would appear to apply to the FDP herein. The FDP is not Plaintiff's employer. *See* Fla. Stat. § 760.10. It is not a place of public accommodation. *See* Fla. Stat. § 760.08. Plaintiff has not identified any Florida Statute that makes it unlawful discrimination for a person or political association to choose to support one candidate over another. Likewise, Plaintiff failed to plead any fact showing that any disfavor shown to him by Defendants is on account of his age or gender.

iii. Public Employment Claims

Plaintiff claims that Defendants have violated Section 112.044, Florida Statutes, which prohibits discrimination on account of age in certain activities conducted by public employers. *See* Compl. ¶75. This provision is entirely inapplicable to the PCDEC, let alone Griffith and Sherosky in their individual capacities. The statute defines an "employer" for its purposes as "the state or any county, municipality, or special district or any subdivision or agency thereof." *See* Fla. Stat. § 112.044(2)(b). PCDEC, Griffith, and Sherosky do not fit into any of these categories. Thus, the prohibited activities provisions do not apply to the Defedants. *See* Fla. Stat. § 112.044(3) ("[I]t is unlawful for an ***employer*** to….") (emphasis added). As this provision of law does not apply to the Defendants, Plaintiff's claims based upon it must fail.

iv. Voting Rights Act of 1965 Claim

Plaintiff claims Defendants have violated the Voting Rights Act of 1965, without explanation. *See* Compl. ¶ 77. Plaintiff asserts that the Act includes provisions that impact campaign practices and "outlaws tactics that may be used to intimidate or disenfranchise voters, which can indirectly affect campaign activities." *Id*. But Plaintiff does not allege any fact to show that the PCDEC, Griffith, or Sherosky have intimidated or disenfranchised voters.

Among other prohibitions, the Voting Rights act of 1965 prohibits persons from intimidating, threatening, coercing, or attempting to intimidate, threaten or coerce, for voting, attempting to vote, or urging or aiding any person to vote. *See* 52 U.S.C. § 10307(b). Even assuming the facts alleged to be true, and taken in a light most favorable to Plaintiff, nothing in Plaintiff's Complaint shows that the PCDEC, Griffith, or Sherosky have intimidated, threatened, coerced, or attempted to intimidate, threaten, or coerce any person for voting, attempting to vote, or urging another to vote. The Act does not prohibit the PCDEC, Griffith, or Sherosky from choosing to not support Plaintiff's campaign, or from undertaking any of the alleged actions in the Complaint. Plaintiff has failed to show any violation of the Voting Rights Act of 1965 and this claim must fail.

v. Federally Protected Activities Claim

For similar reasons, Plaintiff's claim that Defendants have violated 18 U.S.C. § 245 must fail. Plaintiff states that this provision makes it a federal crime "to interfere with federally protected activities, including voting in federal elections" and that the provision "provides penalties for anyone 'who uses force or threat of force to intimidate or interfere with a person's right to vote or campaign.'" Compl. ¶ 78. But as a criminal statute, it does not provide any civil remedies for Plaintiff, and Plaintiff has no right to bring suit to enforce the provision. Further, prosecutions under the statute may only be undertaken "upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General" that such prosecution is "in the public interest and necessary to secure substantial justice…." 18 U.S.C. § 245(a)(1). Plaintiff simply has no right to bring a claim under this section.

Moreover, even if Plaintiff had a right of action under this provision, Plaintiff has failed to plead any facts to show that the PCDEC, Griffith, or Sherosky have intimidated or interfered with a person's right to vote or campaign—because they have not. Thus, Plaintiff's claim fails.

vi. Intimidation of Voters Claim and Influencing Voters Claim

Plaintiff asserts Defendants are in violation 18 U.S. Code § 594, which prohibits intimidation of voters, and 18 U.S. Code § 597, which prohibits a person from making or offering an expenditure to any person to either vote for or against any candidate, or to vote or

withhold his or her vote. *See* Compl. ¶¶ 79, 80; *see also* 18 U.S.C. §§ 594, 597. Both statutes are criminal statutes which do not provide civil remedies and for which Plaintiff has no right of action. *See Id*.

Further, even if Plaintiff had a right of action under these statutes, his claim fails. Plaintiff failed to allege any ultimate facts showing that the PCDEC, Griffith, or Sherosky have intimidated or interfered with any persons right to vote – which to be clear, the PCDEC, Griffith, or Sherosky have not done – nor did Plaintiff allege any fact showing that the PCDEC, Griffith, or Sherosky made any expenditure to any person to either vote for or against any candidate, or to vote or withhold his or her vote. Thus, Plaintiff's claim fails.

vii. Internal Bylaws Claim

Finally, Plaintiff asserts that the PCDEC and FDP bylaws have been violated, as the Defendants have promoted one candidate over another. The PCDEC (and FDP) have a right to manage its own internal affairs. Any alleged violation of internal bylaws should be managed through the internal dispute process within the PCDEC and FDP.

Interference into the internal processes of the PCDEC and FDP implicates vital rights of association guaranteed by the Constitution. As noted by the United States Supreme Court in an action challenging recommendation of the Credentials Committee at the 1972 Democratic National Convention regarding seating of delegates:

> Judicial interference in this area traditionally has been approached with great caution and restraint. (citations omitted) 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.

O'Brien v. Brown, 409 U.S. 1, 4 (1972). Such is the case here as well. The proper and exclusive forum for determining the dispute between the parties to this action lies within the PCDEC and/or FDP's internal dispute procedures, not the judiciary. Both the PCDEC and FDP have mechanisms to hear and determine the dispute between these parties. There is no legal basis to bring a claim in circuit court for a violation of PCDEC or FDP bylaws.

V. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED.

While this Court should find that this is a strategic lawsuit against public participation where all of the Defendants' alleged conduct is protected under the First Amendment, it is also true that the Plaintiff did not sufficiently plead any causes of action. Under Florida Rule of Civil Procedure 1.140(b)(6), a complaint should be dismissed if it fails to state a cause of action upon which relief can be granted. While the allegations in the complaint must be taken as true and all reasonable inferences should be made in favor of the plaintiff, the Complaint still falls short. The Complaint is replete with conclusory statements, lacks specific factual allegations, and fails to provide a clear and concise statement of the claims. The Complaint does not provide sufficient factual basis for the alleged claims of vicarious liability, conspiracy, violation of election laws, and civil rights violations.

A. The Complaint fails to state a cause of action against Sherosky for Battery (Count I).

To assert a case for battery against Sherosky, the Plaintiff must demonstrate that (1) Sherosky intended to touch the Plaintiff, (2) that Sherosky actually touched the Plaintiff, and (3) that the physical contact between the Plaintiff and Sherosky was harmful or offensive. *Chorak v. Naughton*, 409 So. 2d 35 (Fla. 3d DCA 1982); *Gatto v. Publix Supermarket, Inc.*, 387 So. 2d 377 (Fla. 3d DCA 1980).

For a battery to occur, a defendant must take some positive, affirmative action that is intended to cause contact with the plaintiff. 1 Florida Torts § 20.03 (2024). It is the intent to perform the physical contact and not the intent or desire to cause harm, that is dispositive in determining whether intent to accomplish a battery exists [*see, e.g.* McDonald v. Ford, 223 So. 2d 553, 555 (Fla. 2d DCA 1969) (gist of battery cause of action is not defendant's hostile intent, but absence of plaintiff's consent to contact). Therefore, it is irrelevant as to whether Sherosky had any desire to harm the Plaintiff.

The Complaint contains contradictory allegations as to whether Sherosky actually touched the Plaintiff. The fact allegations Complaint allege that Sherosky "forcefully knocked off the hat Plaintiff was wearing" (Amend. Compl. ¶ 34), that Sherosky invaded Plaintiff's "physical space" (Amend. Compl. ¶ 36), and most significantly, that "Sherosky's body came within five

inches of Plaintiff's face" (Compl. ¶ 36). None of these allege that Sherosky actually touched the Plaintiff, and in fact, one such allegation directly contradicts that assertion. This contradicts the conclusory legal allegation of Paragraph 58 of the Amended Complaint.

Additionally, Plaintiff's complaint fails to state—either in the pled facts or in its conclusory legal statements—that the physical contact between Plaintiff was harmful or offensive. For contact to be harmful, it must result in bodily injury. *Glickstein v. Setzer*, 78 So. 2d 374 (Fla. 1955). For contact to be offensive, it must offend a reasonable person's sense of dignity. See *Gatto v. Publix Supermarket, Inc*., 387 So. 2d 377 (Fla. 3d DCA 1980), *citing* Restatement (Second) of Torts §§ 19, 21. Examples of this kind of offensive conduct include a man continually trying to embrace a woman despite her repeated resistance to his overtures or smearing filth on another person's face. Contacts that are customary or common in social relations are not offensive contacts that will support a cause of action for battery; examples include a tap on the shoulder to attract attention, a friendly grasp of the arm, or casual pushing to make a passageway. *See* Prosser and Keeton on Torts § 9 (West 5th ed. 1984). While Defendant Sherosky maintains that he never touched Plaintiff, knocking off someone's hat (the alleged conduct per Amend. Compl. ¶ 34) at a crowded event (the St. Petersburg Pride Parade) does not rise to the level of harmful or offensive conduct.

Because the Complaint fails to clearly allege whether Sherosky actually touched the Plaintiff, and because even if true, Plaintiff's allegations of Sherosky's conduct do not rise to the level of "harmful or offensive contact," this Court should dismiss the Plaintiff's count for battery against Defendant Sherosky.

B. The Plaintiff fails to state a cause of action against Defendant Sherosky for Assault.

To establish a claim for assault against Defendant Sherosky, the Plaintiff must demonstrate that (1) that Sherosky either intended to cause the plaintiff to fear immediate injury or intended to actually injure the plaintiff; (2) that Sherosky's apparent present ability to inflict an injury caused the plaintiff to reasonably apprehend bodily injury; and (3) that either Sherosky's conduct or the circumstances made it appear that bodily injury was imminent. *Lay v. Kremer*, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982); *Sullivan v. Atlantic Federal Sav. & Loan Ass'n.*, 454 So. 2d 52 (Fla. 4th DCA 1984).

The Plaintiff merely alleges—through conclusory statements unsupported by the facts--that "Defendant Sherosky intentionally acted in a threatening manner, causing Plaintiff to have a reasonable apprehension of imminent harmful contact" and that "As a result of Defendant Sherosky's conduct, Plaintiff suffered emotional distress." Amend. Compl. ¶ 61-62. Notably, Plaintiff did not allege that Sherosky intended to cause the Plaintiff to fear immediate injury or intended to actually injure the Plaintiff. Additionally, while the Plaintiff claims he had "a reasonable apprehension of imminent harmful contact," he does not allege that Sherosky had an apparent present ability to inflict injury upon him.

The facts pled in the Complaint ultimately do not support a cause of action for assault, and therefore, this Court should dismiss Count II of the Complaint against Defendant Sherosky.

C. The Complaint fails to state a cause of action against PCDEC or Griffith for vicarious liability (Count III).

The Complaint does not allege sufficient facts to support a cause of action to establish that Defendants Griffith and PCDEC are vicariously liable for the alleged actions of Defendant Sherosky. "General principles of vicarious liability establish that a principal is responsible for the wrongful acts of its agent if the agent was either acting '(1) within the scope of [its authority], or (2) during the course of [the agency] and to further a purpose or interest of the [principal].'" *Trevarthen v. Wilson*, 219 So. 3d 69, 72 (Fla. 4th DCA 2017) (alteration in original) (quoting *Valeo v. E. Coast Furniture Co*., 95 So. 3d 921, 925 (Fla. 4th DCA 2012)). Notably, the Complaint fails to allege that Defendant Sherosky was acting (1) within the scope of his authority as Secretary of PCDEC or (2) was acting as an agent to further a purpose or interest of the PCDEC. On its face, this Count fails.

The sole allegation of how PCDEC and Griffith are vicariously liable for Sherosky's purported conduct is that "Defendants Griffith and the Pinellas Democratic Executive Committee, being in proximity to the assault incident and in positions of authority, were either aware of, condoned, or failed to intervene in the actions taken by Defendant Sherosky." (Amend. Compl. ¶ 39) and that Defendants Griffith and PCDEC have failed to discipline Sherosky (Amend. Compl. ¶ 40). While PCDEC and Griffith dispute the factual accuracy of that claim and the legal conclusions it makes, such a claim is legally insufficient to support vicarious liability.

There are no facts pled in the Complaint which support Plaintiff's conclusion that Sherosky "acted within the scope of his authority and under the apparent or actual oversight of the PDEC and the Florida Democratic Party," (Amend. Compl. ¶ 64) nor is any theory about how Defendant Griffith personally liable stated.

The Complaint's pleading that Sherosky is an officer of PCDEC (Amend. Compl. ¶ 5) is insufficient to demonstrate that his alleged battery and assault were conducted as an agent of PCDEC. A plaintiff's mere showing that an agent was on duty at the time he assailed someone does not establish that the conduct occurred within the scope of agency. *See Garcia v. Duf*fy, 492 So.2d 435, 438 (Fla. 2d DCA 1986). Instead, the agent's conduct must be "of the kind he was employed to perform," must occur "substantially within the time and space limits authorized or required by the work to be performed," and must be "activated at least in part by a purpose to serve the master." *Iglesia Cristiana La Casa Del Señor, Inc. v. L.M.*, 783 So.2d 353, 357 (Fla. 3d DCA 2001).

Plaintiff has made no such showing herein. The Plaintiff has not alleged that Sherosky was engaged by the PCDEC to perform any conduct of the kind akin to assault or battery. The alleged actions, even when assumed true, are beyond the scope of authority Sherosky would have as the Secretary of the Pinellas Democratic Executive Committee. Further, Plaintiff failed to plead any fact showing that the alleged battery was done, at least in part, to serve the purpose or interests of the PCDEC. The alleged actions of Sherosky were the actions of a private individual taken purely in his personal capacity. The alleged conduct is far outside the scope of Sherosky's official duties as PCDEC Secretary. The claim must be dismissed.

D. The Complaint fails to state a cause of action against PCDEC, Griffith, or Sherosky for civil conspiracy.

In Count IV, Plaintiff alleges that the PCDEC, Florida Democratic Party, Sherosky, and Griffith, engaged in a civil conspiracy to destroy his political campaign. See Amend. Compl. ¶¶ 65-67. A claim for civil conspiracy requires Plaintiff to prove four elements: "To state a cause of action for civil conspiracy, a plaintiff must plead '(1) an agreement between two or more parties; (2) to do an unlawful act or a lawful act by unlawful means; (3) the execution of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of said acts.' (citations omitted)." *Logan v. Morgan & Bockius LLP*, 350 So. 3d 404, 412 (Fla. 2d DCA 2022). A claim

for civil conspiracy must contain clear, positive and specific allegations; general allegations of conspiracy are not sufficient. *Parisi v. De Kingston*, 314 So. 3d 656, 661 (Fla. 3d DCA 2021); *World Class Yachts, Inc. v. Murphy*, 731 So. 2d 798, 799 (Fla. 4th DCA 1999). The Complaint, as pled, fails on all four requirements.

i. There is not an agreement between two or more parties.

Based on the pleading, it is unclear what agreements were entered into between the PCDEC, Florida Democratic Party, Sherosky, and Griffith that are the subject of this count. There is no clear, positive and specific allegations of what these agreement(s) were. In *arguendo,* if the "vetting process" was the agreement, there is also no allegation that Defendant Sherosky had any involvement in that process, that Defendant Griffith acted outside her official capacities as PCDEC Chair, or that members of the "PDEC candidate vetting committee" acted outside the scope of their official duties. Therefore, there is no second party to the "vetting process" insofar that it may be the agreement referenced by Plaintiff. Because there is no clear, positive, and specific allegation of an agreement between two or more parties, the count fails.

ii. There is no agreement to do an unlawful act or a lawful act by unlawful means occurred.

Additionally, there is no pleading sufficient to conclude that two or more parties agreed to do an unlawful act or a lawful act by unlawful means. Defendants PCDEC, Griffith, and Sherosky all have free speech rights under the First Amendment to the United States Constitution and the Florida Constitution. Plaintiff alludes to the unlawful act being defamation as Plaintiff makes conclusory statements claiming he was defamed (Compl. ¶ 13, 19, 35, 36, 40, 52, 66, 82, 84).

Therefore, the allegations of conspiratorial acts in the complaint allege nothing unlawful but merely unsubstantiated, conclusory claims of "defamation."

iii. It is unclear what the overt act in furtherance of the conspiracy was.

The Complaint does not contain clear, positive and specific allegations of what the overt act in furtherance of the conspiracy was.

iv. There is no adequate claim to damages.

Plaintiff has failed to adequately plead damages. Plaintiff's damages claims are wholly speculative. Plaintiff claims, without any support, that he has lost out on over $10 million in campaign donations, a figure that is over two and a half times the total amount raised by all candidates in the race, including the sole Republican candidate. Plaintiff failed to plead any basis for this amount, and the damages Plaintiff claims – lost campaign donations – are not reasonably ascertainable, thus the damages are not recoverable. See *Kennedy & Ely Ins., Inc. v. American Emp. Ins. Co.*, 179 So. 2d 248, 249 (Fla. 3d DCA 1965) (damages cannot be recovered if purely speculative); *Hogan v. Norfleet*, 113 So. 2d 437, 439 (Fla. 2d DCA 1959) ("Damages in a law action cannot be speculative or conjectural, but must be reasonably ascertainable.").

Based on the foregoing, Plaintiff has failed to effectively plead any of the requirements for a claim of civil conspiracy, and therefore, Count IV of the Amended Complaint should be dismissed.

E. Plaintiff fails to state a cause of action of how PCDEC, Griffith, and Sherosky violated Florida's election laws.

Plaintiff has failed to plead with any specificity what election laws were violated by the PCDEC, Griffith, and/or Sherosky, and Count V should be dismissed for failing to provide a short and plain statement identifying the facts entitling Plaintiff to relief. See Fla. R. Civ. P. 1.110(b)(2). The Complaint has failed to apprise either this Court or Defendants PCDEC, Griffith, and Sherosky with sufficient certainty of the nature of the claims alleged, thus warranting dismissal. *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 715–16 (Fla. 1st DCA 1963).

As identified above, the Complaint fails to allege that PCDEC, Griffith, and/or Sherosky performed any unlawful act. Even assuming the facts alleged to be true, the conduct of which Plaintiff complains PCDEC, Griffith, and Sherosky is alleged to have undertaken is not conduct that violates any law, let alone state or federal elections laws, which is likely why Plaintiff has failed to identify any specific election law violated. Thus, Count V should be dismissed.

F. Plaintiff fails to state a cause of action of how PCDEC, Griffith, and Sherosky violated his civil rights or the ADA.

While Defendants assert that the ADA, federal civil rights law, and state civil rights law are wholly inapplicable to the claims presented in this case, Defendant still failed to plead a cause of action if those laws were somehow applicable.

Plaintiff's claim still would fail if the ADA was applied to any of the Defendants in this context. A required element of an ADA claim is that a Plaintiff show "he or she was subjected to unlawful discrimination because of his disability." *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1255–56 (11th Cir. 2007). Plaintiff fails to allege any facts showing that he was subjected to any discrimination **because** of his having PTSD or that he was otherwise prohibited from engaging with the FDP on account of having PTSD. Thus, his claim further fails. Additionally, Plaintiff has failed to exhaust administrative remedies provided by the ADA. "Before filing an ADA complaint, a plaintiff must exhaust administrative remedies provided by the ADA." *Jones v. Bank of America*, 985 F. Supp. 2d 1320, 1330 (M.D. Fla. 2013), citing *Wilkerson v. Grinnell Corp.,* 270 F.3d 1314, 1317 (11th Cir. 2001).

G. Plaintiff fails to state a cause of action for defamation against any of the Defendants.

Plaintiff, as a political candidate, is a public figure and thus there is an increased level of scrutiny to any defamation claims he may make. To succeed on any sort of defamation claim against PCDEC, Griffith, or Sherosky, Plaintiff would not only need to prove that any of the alleged statements of fact made by PCDEC, Griffith, or Sherosky were false but would also need to demonstrate that such statements were made with "actual malice." *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002).

Under the actual malice test, a public figure plaintiff must establish that the disseminator of the information either knew the alleged defamatory statements were false, or published them with reckless disregard despite awareness of their probable falsity. *Id.* Furthermore, the claimant must prove the existence of actual malice by clear and convincing evidence. *Id.* "That is, he must be able to show—well beyond a preponderance of the evidence—that the defendants published a defamatory statement either with actual knowledge of its falsity or with a 'high degree of awareness' of its 'probable falsity.'" *Berisha v. Lawson*, 973 F.3d 1304, 1312 (11th Cir. 2020) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). Plaintiff must produce evidence that the defendants "actually entertained serious doubts as to the veracity of the published account, or

[were] highly aware that the account was probably false." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016). None of the facts pled indicate that Defendants PCDEC, Griffith, or Sherosky knew the statements they purportedly made were false or acted with reckless disregard of their probable falsity.

In the context of political campaigns, Florida courts have found that "the frequent use of ill-considered, name calling attacks" is protected even if such attacks were impolite, unfair, and should elicit an apology. *Pullum v. Johnson*, 647 So. 2d 254, 258 (Fla. 1st DCA 1994). Specifically, in *Pullum v. Johnson*, the First DCA concluded that calling a prominent citizen in the community a "drug pusher" in the context of a political debate cannot be reasonably interpreted as stating "actual facts" subject to a defamation claim. *Id.*

Describing someone as "a man of moral turpitude" (as Plaintiff alleges was the defamatory speech in Amend. Compl. ¶ 24, 43, 84), stating that he is "unfit to be a Democratic candidate" (Amend. Compl. ¶ 84), and stating that Plaintiff is "a physical threat to her and others" (Amend. Compl. ¶ 84) are necessarily statements of opinion that are not subject to defamation claims because they are statements that cannot be discernably established as true or false. *Rammsen v. Collier County Publ'g Co.*, 946 So. 2d 567, 571 (Fla. 2d DCA 2006); *Fortson v. Colangelo*, 434 F. Supp. 2d 1369, 1383 (S.D. Fla. 2006). Such statements are certainly more tame than alleging an individual who is not a candidate for office of being a "drug pusher."

Plaintiff offers no evidence or factual support regarding his allegation that Defendant Griffith stated to anyone that Plaintiff was a "a wife-beating stalker." **Additionally, Plaintiff has failed to state any defamation claim against Defendant Sherosky.**

Additionally, Plaintiff failed to meet his condition precedent of bringing a claim for defamation pursuant to Fla. Stat. § 770.01. Plaintiff alleges that Defendant Griffith, individually and in her capacity as PCDEC Chair, "made false, defamatory statements to the Tampa Bay Times and other media outlets." (Amend. Compl. ¶ 84). Essentially, Plaintiff is alleging that Defendant Griffith's purportedly libelous or slanderous statements were published or broadcast in a newspaper, periodical, or other medium. Therefore, pursuant to Fla. Stat. § 770.01, the Plaintiff is required to "at least 5 days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory." Plaintiff served no such notice. Accordingly, dismissal is

appropriate. *Canonico v. Callaway,* 26 So.3d 53, 54 (Fla. 2d DCA 2010). "Failure to comply with the notice provision of section 770.01 requires dismissal of the complaint for failure to state a cause of action." *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So.2d 1376, 1377 (Fla. 4th DCA 1997).

Besides conclusory allegations of defamation, it is not unlawful "to blacklist" a candidate from Democratic Political Action Committees or other donors. It is not unlawful to deny Plaintiff speaking opportunities at private events. It is not unlawful for a media company to publish an article that does not mention Plaintiff. It is not unlawful for other candidates to publish candidate survey polls that omit Plaintiff's name. It is not unlawful for the PCDEC or Griffith to choose not to discipline Sherosky. Likewise, it is not unlawful for the PCDEC to reject an internal complaint for failing to meet required standards.

VI. PLAINTIFF LACKS STANDING TO BRING A CIVIL ACTION TO ENFORCE CHAPTER 104 OF FLORIDA'S ELECTIONS LAW.

In Count V, Plaintiff alleges that the Defendants, including the PCDEC, Griffith, and Sherosky, have violated state and federal election laws. *See* Compl. ¶ 68. Plaintiff does specify any specific law violated in this Count. In the body of his Complaint, Plaintiff does allege that Defendants' actions were in violation of the Election Code, codified as Chapter 104, Florida Statutes.[4] *See* Compl. ¶ 54. However, Plaintiff does not specify any other specific election laws, state or federal, anywhere else in his Complaint.

The statutes cited by the Plaintiff do not provide for a private right of action, and therefore Plaintiff lacks standing. Plaintiff must have legal standing to bring his claim, and any statute-based private rights of action must be legislatively created and show textual support. *QBE Ins. Corp. v. Chalfonte Condo. Apartment Asso., Inc*., 94 So. 3d 541, 551 (Fla. 2012) (explaining that whether a statutory cause of action should be judicially implied depends on the "actual language used in the statute" and "the context in which the language lies").

While some election-related statutes provide private rights of action, *see e.g.*, §§ 97.023(3), 99.097(5), 101.161(3)(c)(1), 102.168(1) Fla. Stat, Chapter 104 does not grant any such right. Violations of are of Chapter 104 can be subject to prosecution as misdemeanors, felonies, or

[4] Nor does Plaintiff have standing to enforce federal election laws. *See* Count IV, Section D. v and v-., supra.

criminal violations of the Florida Election Code by the state attorney in the appropriate court of competent jurisdiction, *see* §106.27(1), Fla. Stat., or be subject to complaint proceedings before the Florida Elections Commission, *see* Fla. Stat. §106.25(1) ("Jurisdiction to investigate and determine violations of this chapter and chapter 104 is vested in the Florida Elections Commission."); *see also* Fla. Admin. Code R. B-1.0025.

"It is axiomatic that whether a private right of action exists for a violation of a statute is a matter of legislative intent" and "[a]bsent a specific expression of such intent, a private right of action may not be implied." *United Auto. Ins. Co. v. A 1st Choice Healthcare Sys*., 21 So. 3d 124, 128 (Fla. 3d DCA 2009)

The Legislature has not created a private right for private citizens to bring civil claims under Chapter 104. Such a right cannot be implied. Thus, Plaintiff's claims based upon Chapter 104 must be dismissed.

VII. PLAINTIFF'S CLAIMS FOR BATTERY (COUNT I) AND ASSAULT (COUNT II) ARE WHOLLY UNSUPPORTED BY THE POLICE REPORT CITED IN THE COMPLAINT.

While outside of the four corners of the Plaintiff's Complaint, this Court should also consider the St. Petersburg Police Department incident report (attached as **Exhibit 1**) as part of Defendant Sherosky's *prima facie* case that Counts I and II of this Amended Complaint are made primarily as a strategic lawsuit against public participation, and that Plaintiff does not have a meritorious claim against Mr. Sherosky.

In the Incident Report, Plaintiff was unable to identify any witnesses to the alleged battery and assault in what was a crowded area where hundreds, if not thousands, of individuals and multiple uniformed law enforcement officers were present. Additionally, Plaintiff represented that he did not suffer any injuries. Ex. 1, pg. 2,-4, 7.

Meanwhile, in this incident report, Defendant Sherosky provided the St. Petersburg Police Department (SPPD) with the names of four individuals who were in physical proximity to him at the time Plaintiff alleges the battery and assault took place. Of those four individuals, the SPPD spoke with four individuals (Denise Rodriguez, Lacy Hollings, Jennifer Griffith, and Demario Jives), all of whom confirmed that they were nearby and were aware of no battery between Mr. Sherosky and Plaintiff. As well, the police officer present in the assembly area where this incident

purportedly took place was unaware of anything happening. Ultimately, the SPPD found there was no probable cause to further investigate. In fact, when they interviewed Defendant Sherosky, Defendant Sherosky was not even read his Miranda rights because it was seen as a totally voluntary conversation and there were no incriminating statements leading the officer to believe that Mr. Sherosky committed a crime.

While the standards for civil and criminal conduct do admittedly differ, the facts contained within the Incident Report indicate that there is little factual support for Plaintiff's claims against Mr. Sherosky, which goes to further Mr. Sherosky's argument that a *prima facie* case exists that this action is a strategic lawsuit against public participation.

VIII. THE AMENDED COMPLAINT SHOULD BE DISMISSED AS A SHOTGUN PLEADING.

Florida Circuit courts routinely dismiss complaints as shotgun pleadings for failing to meet the basic pleading requirements of Florida Rule of Civil Procedure 1.110(b). *See Generation to Generation, Inc. v. State*, No. 2022-CA-980, 2023 WL 11820639, at *1 (Fla. 2nd Cir. Ct. Apr. 11, 2023) (dismissing a complaint for being "a procedurally defective 'shotgun pleading' and fail[ing] to give the remaining Defendants adequate notice of the claims lodged against them and the grounds in support thereof"); *see also U.S. Bank Nat. Ass'n v. The Grand Bellagio at Baywatch Condominium Ass'n, Inc.*, No. 16-000337-CI-020, 2016 WL 11725761, at *1 (Fla. 6th Cir. Ct. Oct. 11, 2016) (dismissing a counterclaim for commingling separate and distinct claims against multiple defendants); *Cannie v. City of Jacksonville*, No. 16-2019-CA-8617, 2022 WL 21768635, at *1 (Fla. 4th Cir. Ct. Mar. 04, 2022) (dismissing a complaint as a shotgun pleading). For these same reasons, Plaintiff's Complaint should be dismissed as an impermissible shotgun pleading.

IX. CONCLUSION

The clear *modus operandi* of this lawsuit and all of its counts is Plaintiff's gripe with the Pinellas County Democratic Executive Committee (PCDEC) and its leadership for enacting a "candidate vetting" process which Plaintiff failed, and that PCDEC's leadership are not supporting Plaintiff's candidacy. However, the Defendants are well within their protected First Amendment rights to conduct a "candidate vetting" process and not support Plaintiff's candidacy. For that reason, Plaintiff's claims should be dismissed with prejudice. Additionally, this Court should deem

this lawsuit to be a strategic lawsuit against public participation as its primary purpose is to interfere with the Defendants' ability to exercise their well-established rights to engage in political speech. If for some reason, this Court were to conclude that this is not a strategic lawsuit against public participation as it pertains to some or all Defendants, this Court should still dismiss this action for lack of subject-matter jurisdiction, lack of standing, failure to state a cause of action, and for being a shotgun pleading.

WHEREFORE, Defendants PINELLAS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, JENNIFER GRIFFITH, and MICHAEL SHEROSKY respectfully request that this Court dismiss Plaintiff's Complaint with prejudice, find that Plaintiff's Complaint constitutes a strategic lawsuit against public participation, grant Defendants the entitlement to their reasonable attorney's fees and costs, and award Defendants any other relief that this Court deems proper and just.

Dated: November 14, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served upon John William Liccione, Plaintiff *Pro Se*, via Florida E-Filing Portal on this 14th day of November, 2024.

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EXHIBIT 1

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JAMES DONELON,
PLAINTIFF,

v. **Case No. 23-008089-CI**

PINELLAS DEMOCRATIC
EXECUTIVE COMMITTEE,
DEFENDANT.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE, having come before this Court on December 4, 2023, on Defendant Pinellas Democratic Executive Committee's Motion to Dismiss. Plaintiff appeared *pro se* and counsel appeared on behalf of Defendant. This Court, having review the Motion and having heard the argument of Plaintiff and Defendant's counsel, and is otherwise duly advised in its premises, it is hereby **ORDERED AND ADJUDGED** as follows:

(1) Defendant's Motion to Dismiss for failure to state a cause of action is **GRANTED** without prejudice.

(2) Plaintiff may file an Amended Complaint on or before December 15, 2023.

(3) Notwithstanding this Court granting the Motion to Dismiss without prejudice, this Court, based upon the authorities of *Repub. Party v. Davis*, 18 So. 3d 1112 (Fla. 3d DCA 2009) and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), finds that it lacks jurisdiction to hear an action regarding the internal operations of a political party such as Defendant.

(4) If Plaintiff opts to file an Amended Complaint, Plaintiff must demonstrate in such Amended Complaint why this Court should not rely on *Repub. Party v. Davis*, 18 So. 3d 1112 (Fla. 3d DCA 2009) and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) in determining that this Court lack jurisdiction, and must specifically cite case law demonstrating that this Court has jurisdiction to establish this Court's jurisdiction.

(5) By stipulation of the parties, Defendant's counsel may upload the Proposed Order to JAWS and then email a copy of the signed Order to Plaintiff at DemDonelon@hotmail.com.

Ordered in Chambers in St. Petersburg, Pinellas County, Florida.

Electronically Conformed 12/5/2023
Thomas Ramsberger
CIRCUIT COURT JUDGE

Copies to:

-James Donelon, Plaintiff *pro se*

-George A.D. Thurlow, Esquire and George K. Rahdert, Esquire, attorneys for Defendant

St. Petersburg Police Department

EXHIBIT 2

Incident/Investigation Report

Case Number: 2024-022685

Report Type: BATTERY SIMPLE

Incident Information

Date/Time Reported	Date/Time From	Date/Time To	Officer
06/23/2024 13:35	06/22/2024 17:30	06/23/2024 13:35	(46910) ANAMUAH-MENSAH, AMALIA A

Incident Location	
480 Bayshore Dr Se, St Petersburg, FL 33701	
Case Status: FURTHER INVESTIGATION	**Case Disposition:**

Incident Report Dissemination State Attorney CASA **Other:**

Charges

1	Charge Type	Description	Statute	UCR	Att/Com
	State	SIMPLE BATTERY-TOUCH OR STRIKE	784.03(1)(A)(1)	13B	

Alcohol, Drugs or Computers Used	Location Type	Premises Entered	Forced Entry	Weapons
Alcohol Drugs Computers	PARK / WOODLAND / FIELD		Yes No	1. Personal Weapons (hands,

Entry	Exit	Criminal Activity	
		NONE/ UNKNOWN	2. 3.

Bias Motivation	Bias Target	Bias Circumstances	Hate Group

Victims

Seq. #	Type	Injuries	Residency Status	Ethnicity
1	INDIVIDUAL	None	Non-Resident	Non-Hispanic

Name(Last, First, M)	Race	Sex	DOB	Age
LICCIONE, JOHN WILLIAM	W	M	03/26/1960	64

Address	Cell Phone:	Home Phone
2826 54TH ST S APT. A, GULFPORT, FL 33707		(727) 422-2051

Employer Name/Address	Business Phone
DEMOCRATIC CONGRESS	

Victim of Crimes	Height	Weight	Hair	Eyes	Place of Birth	Occupation
1	509	0	WHI	BLU		POLITICIAN

Missing Person/Runaway Notes

Suspects

Seq. #	Type	Name(Last, First, M)
1	INDIVIDUAL	SHEROSKY, MICHAEL JOHN

AKA	Race	Sex	DOB	Age	Height	Weight
	W	M	11/20/1970	53		

Address	Cell Phone:	Home Phone
3415 ANNETTE CT, CLEARWATER, FL 33761		(727) 631-4118

Employer Name/Address	Occupation:	Business Phone
PINELLAS DEMOC COMMITTEE	SECRETARY	

Scars, Marks, Tatoos or other distinguishing features

Physical Characteristics

Suspect Details and Notes

Related Name Relationships

LICCIONE, JOHN WILLIAM	is	Acquaintance	to	SHEROSKY, MICHAEL JOHN

Incident Report Narrative

SYNOPSIS
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This report details a Late Reported Simple Battery without injuries whereby the victim and suspect are known to each other professionally. The victim alleged the suspect slapped him with an open hand in the head knocking off his hat at the float staging area at Albert Whitted Park prior to the start of the PRIDE parade during a verbal altercation. The victim said there were witnesses however he neither obtained any witness information at the time of the alleged offense nor notify officers that were nearby. Contact via telephone was made with the suspect which negated the victim`s allegations. The victim desires prosecution, however due to the lack of evidence and no witnesses probable cause was not established at the time of reporting.

SCENE DESCRIPTION
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The alleged offense was reported to have occurred at 480 Bayshore Blvd SE, Albert Whitted Park, in the parade float/vehicle staging area. This area was staffed with officers as well as bike patrol units circulating.

VICTIM STATEMENTS
(John Liccione)
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Liccione advised he is running for Congress with the Democratic Party. Liccione said there is an ongoing dispute with him and Jennifer Griffith within the Democratic Party. Liccione said he is the target of defamation from Griffith and her supporters since they learned he has a history of reported domestic violence. As such there is growing animosity within the Democratic Party between Liccione and Griffith which extends to their supporters and staff. Liccione advised he attempted to get an injunction because he had signs removed by supporters of the opposition.

Incident Report Narrative

Liccione said he was at PRIDE to march in the parade since he is running for Congressional office. He was in the designated float/vehicle holding area at Albert Whitted Park prior to the start of the parade. While in the holding area Liccione said he was approached by Michael Sherosky (provided the name Mike Sheroski phone number) who is the secretary of the Pinellas Democratic Committee and a verbal argument ensued. Liccione said Sherosky was berating him and calling him names when Liccione said to the effect, " you want to hit me." Liccione said after baiting Sherosky, he was slapped with an open hand knocking his hat off.

Liccione said there was no injury and he subsequently began recording and photographing Sherosky. Liccione said there were many people around and believed someone witnessed the incident however he did could not provide anyone`s information and said he would ask around within the party and get back to officers when he found someone.

When asked why the incident was not reported at the time, Liccione said he did not want to miss the parade. When it was relayed to Liccione that there were officers assigned to that area and throughout the event that could have addressed the issue, Liccione acknowledged seeing officers but still did not want to miss the parade.

Liccione desires prosecution.

SUSPECT STATEMENTS
(Michael Sherosky)
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Contact was made with Sherosky via telephone after leaving a voicemail. Sherosky provided his demographics which matched information obtained from DAVID.

Sherosky was obliging and said he would speak with me about the alleged incident prior to the start of the PRIDE parade.

Sherosky said he was waiting in the staging area for the parade to start when he noticed Liccione. He advised that Liccione is not to be near Griffith and he approached Liccione to tell him to not get closer to her and to stay away from her. As a result an argument began. Sherosky said Liccione began baiting him by saying, "You want to hit me? You want to hit me? You want to hit me?" Sherosky replied, "I would love to hit you." Sherosky advised despite the taunts from Liccione he did not hit him. Sherosky indicated there were police officers all around, and despite the desire to hit Liccione he did not. Sherosky said Liccione began recording at the end of the argument.

Sherosky said at one point there were three to five officers on bicycles that stopped near them. He said Liccione stopped, stood at attention and saluted.

Sherosky indicated that during campaigns all candidates have to be vetted. It was learned that Liccione had a domestic violence record and his behavior at events were concerning. As a result, candidate Griffith is fearful of him and has hired an off duty police officer/deputy to be present at their meetings in the Icot Center in Clearwater. Sherosky initially thought that hiring an off duty officer was excessive but realized it was warranted with Liccione`s behavior. Sherosky said their next meeting is the following day.

Sherosky said he did not hit Liccione and they only want him to stay away from Griffith.

OFFICER ACTIONS/OBSERVATIONS
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On this date, I arrived in full uniform to the lobby of the St. Petersburg Police Department to take a report on a late reported Simple Battery. Upon entering the lobby, Liccione was readily identifiable as he wore his campaign hat and a sport coat with a name badge.

Incident Report Narrative

I obtained Liccione`s statements and did not observe any injuries to his head/face. When Liccione was asked why he did not report at the time of occurrence to any of the number of officers present while witnesses could have been obtained he indicated he was worried about how long it would take.

I provided Liccione with a case number, my name, and informed him that without evidence and witnesses it will be he said/he said.

I then did a Law Enforcement search for the suspect with negative results. I called the number provided by Liccione for Sherosky and left a voicemail. Sherosky returned my call and he was then identified. Sherosky provided the above captioned statements and was provided my name and case number.

Due to the Totality of the Circumstances at the time of reporting Probable Cause could not be established for a Battery as there are no injuries or witnesses.

EOR/NFA

Incident Report Continuation

Supplement Information

Supplement Date	Supplement Type	Supplement Officer
06/26/2024 15:19:45	FOLLOW UP	(34546) MILLER, KENNETH S
Contact Name		
Case Status: FURTHER INVESTIGATION		**Case Disposition:**

Witnesses

Seq. #	Name (Last, First, M)	Race	Sex	DOB	Age
1	RODRIGUEZ, DENISE	W	F	03/08/1962	62

Address | **Cell Phone:** (727) 215-9708 | **Home Phone**

Employer Name/Address | **Occupation:** | **Business Phone**

Witness Type
EYE WITNESS

Witness Notes

Seq. #	Name (Last, First, M)	Race	Sex	DOB	Age
2	HOLLINGS, LACY KAY	W	F	01/06/1980	44

Address | **Cell Phone:** (213) 610-2830 | **Home Phone**
1214 MICHIGSN BLVD, DUNEDIN, FL 34698

Employer Name/Address | **Occupation:** | **Business Phone**

Witness Type
EYE WITNESS

Witness Notes

Seq. #	Name (Last, First, M)	Race	Sex	DOB	Age
3	GRIFFITH, JENNIFER JO	W	F	08/12/1972	51

Address | **Cell Phone:** | **Home Phone**
904 79TH ST S, ST PETERSBURG, FL 33707 | (727) 409-6719

Employer Name/Address | **Occupation:** | **Business Phone**

Witness Type
EYE WITNESS

Witness Notes

Property

Description	Serial Number	Make/Model
BWC OF MICHAEL`S STATEMENT		
Owner	**License / State**	**Color**
LICCIONE, JOHN WILLIAM		

Status	Status Officer	Quantity	Units of Measure	Value
BODY CAMERA	(34546) MILLER, KENNETH S	1.00	DU	$1.00

Gun Type	Caliber	Finish	Grip	Gun Stock

Condition	Gun Test	Test Type	Sight Test	Sight Type
	Yes No		Yes No	

Property Notes

Jewelry Type

Jewelry Type	Metal	Karat	Gender	Style	Size	Weight

	Stone Type	Count	Shape	Weight	Color
Stone 1		0			
Stone 2		0			

Description	Serial Number	Make/Model
CELLPHONE VIDEO FROM COMP		
Owner	**License / State**	**Color**
LICCIONE, JOHN WILLIAM		

Status	Status Officer	Quantity	Units of Measure	Value
AXON: EVIDENCE.COM	(34546) MILLER, KENNETH S	1.00	DU	$1.00

Gun Type	Caliber	Finish	Grip	Gun Stock

Condition	Gun Test	Test Type	Sight Test	Sight Type
	Yes No		Yes No	

Property Notes

Jewelry Type

Jewelry Type	Metal	Karat	Gender	Style	Size	Weight

	Stone Type	Count	Shape	Weight	Color
Stone 1		0			
Stone 2		0			

Supplement Narrative

Supplement Narrative

NARRATIVE
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This is a followup to a simple battery. On 06/26/24 I reviewed the online post by John Liccione about this incident. I then contacted the complainant for this case, John Liccione and spoke to him briefly about this incident. He informed me he had a cellphone video of the incident and I provided him a link for evidence.com. He indicated he wanted to press charges, did not suffer any injuries, and wanted follow through with this case. He later submitted the cellphone video around the time of the incident and I reviewed it. The cellphone video shows John Liccione and Mike speaking to each other before the Pride Parade started, but no assault or battery takes place on this video. I asked if anyone there would have seen this incident and he said everyone but specifically mentioned Jennifer Griffith saw it. I then responded to speak to Michael Sherosky at his residence in Clearwater in person.

I spoke to Michael at his residence and he allowed me in. I informed him this was a voluntary statement and he could terminate our conversation at any point if he wished. He was not read his Miranda Rights as this was totally voluntary and no incriminating statements leading me to believe he committed a crime were made. I activated my BWC and took his statement. For exact statements and for any clarifications please refer to the BWC. In summary, Mike provided me the background behind John and informed me he has been harrassing Jennifer Griffith who leads the Democratic Party for Pinellas. They have had to hire off duty deputies for their meetings in Clearwater because of John. Mike has witnessed interactions that are aggressive toward Jennifer by John at these meetings and doesn`t know why he is even there. Mike stated before the Pride Parade he was in the area waiting to walk in the parade when he noticed John walking toward Jennifer when he spotted her. Because of the previous interactions, he feared for her safety and immediately walked to get between the two of them. He made no contact with John and John did not make contact with him. Mike stated John pulled out his cellphone and started filming him and was accusing him of knocking his hat off. Mike stated this did not happen and believes John has some mental issues. Mike continued to participate in the parade and avoided any further action with John. Mike stated he saw the internet post from John about him being accused of assaulting him which was not true. Mike says John films everything and hopes it caught this incident to clear him.

Mike then provided me four witnesses that may or may not have seen anything but were there at the time. I contacted Jennifer Griffith and left a message for her to contact me back. I then contacted Denis Rodriguez. Denise stated she was with Mike at the Prid Parade. She did not witness any interaction between Mike and John. Denise went into the history of John and how they had to hire off duty deputies at their meetings because of his behavior. Denise does not believe Mike would hit John but would get between John and Jennifer to protect her. Denise stated everyone would have been talking about this if it really happened in the parade. Denise stated she saw John`s post on the internet about the allegations and has no idea what he is talking about.

I then spoke to Lacy Hollings. Lacy was with Mike of and on at the Pride Parade. She did not see anything like John posted about and Mike would not have done that. She did not see any interaction with Mike and John, but John records everything on his cellphone so if there is a video that would be what happened. Lacy stated he films everything with his cellphone.

The night of 6/26/24, Jennifer returned my phone call. Jennifer repeated what everyone else had told me about John`s behavior toward her and the reason she had to hire deputies for their meeting was because of his repeated harrassment. Jennifer stated she was at the Pride Parade with MIke and did not see him hit John. Jennifer stated she saw John that day and hid behind Demario to avoid him. Jennifer stated there were a ton of cops in the area and if this had happened she knows the cops were right there. All of the witnesses and people involved with this case stated there was a heavy cop presence to include cops on bikes right in this area. Jennifer stated she is working on a restraining order against John because of his repeated behavior. Jennifer stated that Mike was out of her sight at times due to the large event but it had hit John everyone would have been talking about it.

It should be noted Sgt. T. Hancock was the Sgt in the assembly area where this would have taken place. He mentioned there was nothing reported about this. There was a heavy police presence in the assembly area and John did not flag down any officer about this incident. I was also the Incident commander for the Pride Parade and nothing was reported at the station while this event was going on.

At this time this case is closed and there is no probable cause for the battery. If new witnesses or videos come forward this case will reopen. There were no cameras that would have caught this incident based on their location.

Supplement Narrative

CLOSED

Supplement Information

Supplement Date	Supplement Type	Supplement Officer
06/27/2024 12:57:07	FOLLOW UP	(34546) MILLER, KENNETH S
Contact Name		
Case Status: FURTHER INVESTIGATION		**Case Disposition:**

Witnesses

Seq. #	Name (Last, First, M)	Race	Sex	DOB	Age
4	JIVES, DEMARIO	B	M	08/22/1984	39

Address **Cell Phone:** (651) 301-4135 **Home Phone**

Employer Name/Address **Occupation:** **Business Phone**

Witness Type
EYE WITNESS

Witness Notes

Supplement Narrative

NARRATIVE
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On 6/27/24 Demario Jives returned my phone call. Demario stated he was in the Pride Parade assembly area when this incident was supposed to have taken place. Demario stated Jennifer saw John and was wanting to avoid him. Demario stated Jennifer got behind him to avoid any issues with John. Demario stated Mike was there as well as John was coming toward but he never saw any battery take place. Demario stated if someone got hit there would have been a big commotion and cops were everywhere. I took no further action.

EOR

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

IN AND FOR PINELLAS COUNTY, FLORIDA

John William Liccione,

Plaintiff,

v. **Case No.: 24-002994-CI**

Pinellas Democratic

Executive Committee, et al

Defendants.

_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS GRIFFITH, SHEROSKY, AND THE PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE'S MOTION TO DISMISS

Plaintiff John William Liccione, pro se, hereby files this response in opposition to the above-named Defendants' joined Motion to Dismiss, and states in support as follows:

I. Rebuttal to Defendants' Anti-SLAPP Argument

Defendants' use of Florida's anti-SLAPP statute as the basis for dismissal is an obvious strawman argument. Defendants assert that Plaintiff's lawsuit constitutes a Strategic Lawsuit Against Public Participation (SLAPP): This is a mischaracterization of Plaintiff's claims. Florida's anti-SLAPP statute, Fla. Stat. § 768.295, is designed to prevent lawsuits that silence free speech related to public participation. In this case, Plaintiff does not seek to silence Defendants' protected speech, but rather to address unlawful and

wrongful behavior, including physical assault and battery, defamation, election and campaign interference, and violation of his civil rights.

Defendants are free to criticize Plaintiff or make non-malicious, non-defamatory public statements regarding their negative opinions of him. However, physical violence, defamatory statements made with actual malice, intentional interference in lawful campaigning activities, campaign sign theft, voter suppression or intimidation, and civil rights violations are not protected by the First Amendment or any Florida statute.

This case traces back to a now 15-month pattern of escalating misconduct which crossed the line into fully actionable behavior when Defendant Jennifer Griffith made false and per se defamatory statements to a Tampa Bay Times reporter on or before October 29, 2023, where she branded Plaintiff as a man of "moral turpitude." Further, she referred to a previous defamatory Tampa Bay Times article from September 15 2023 as her justification for having failed him in her "candidate vetting process," which had ended some six months prior in June of 2023.

Since then, Defendants escalated their efforts to interfere with Plaintiff's campaign by engaging in physical and verbal harassment of him, physical confrontation, campaigning interference, battery and assault, and campaign sign theft. By referring to the Tampa Times September article whose headline claimed that Plaintiff had a "checkered past" and that had faced "assault" and other criminal charges, without acknowledging his not guilty verdict and his case dismissals, Griffith painted Plaintiff in a false light as a wife-beating stalker to the voters and the public at large, knowing full well he had been exonerated, out of actual malice and hatred.

Political violence and election interference do not constitute protected speech, as Defendants suggest. Snatching a campaign sign, harassing a candidate in a public college building as he was speaking to voters, and physically battering and assaulting a Democratic Congressional candidate at a Pride Parade, are not lawful exercises of free speech. Rather, they are direct violations of Plaintiff's constitutional and civil rights and other tortious acts that give rise to Plaintiff's claims.

Defendants knew that painting Plaintiff in a false light as a wife-beater stalker was a Congressional campaign death sentence. In the alternative, Defendant Griffith could have simply chosen to tell the media that yes, Plaintiff had filed to run as a Democrat, yes, he was the first to declare was the only Democrat who had yet to file, and stopped there. In response to further questioning by the Times reporter, she could have simply focused on other potential candidates. She could have said the party neither positively endorses, nor negatively endorses any candidates in a contested primary. She did not have to disclose to the reporter that there was an alleged candidate vetting process, or that Liccione had allegedly failed the process, or why. She did not have to disclose that the party would not recognize or promote him as a candidate. She was under no obligation to say anything negative or anything at all about Liccione other than perhaps acknowledging that he had filed to run as a Democrat. Instead, she branded him with the moral turpitude label and effectively called him a wife-beater and passed the buck to the Tampa Bay Times. This is a clear indication of per se defamation and actual malice.

II. Rebuttal to Defendants' Arguments Regarding Failure to State a Claim

A. Battery and Assault Claims

Defendants argue that Plaintiff has failed to state claims for battery and assault, asserting that no physical injury occurred and relying on the police report. However, Plaintiff's complaint provides detailed allegations that satisfy the elements of both torts under Florida law.

Battery: Plaintiff alleges that Defendant Michael Sherosky knocked his hat off without his consent at the St. Petersburg Pride Parade and that he was shocked and offended by it. Florida law only requires unwanted physical contact offensive to a reasonable person to establish battery, not physical injury. By knocking Plaintiff's hat off, Sherosky committed the intentional, harmful contact that forms the basis of Plaintiff's claim for battery. This action was both offensive and unwanted, and thus qualifies as battery under Florida law.

Further, a new witness, who is a member of the PDEC, has come forward and will testify that at a PDEC meeting after the Pride Parade, Sherosky bragged to two other members that he had knocked Plaintiff's hat off and that Liccione "was lucky he didn't do worse." This testimony corroborates Plaintiff's account and demonstrates the intentional and malicious nature of Defendant Sherosky's actions.

Assault: Plaintiff alleges that Sherosky's aggressive conduct, including his verbal threats and close physical proximity (within five inches of Plaintiff's face), placed Plaintiff in reasonable fear of imminent harm. Florida law defines assault as creating a reasonable apprehension of imminent harmful or offensive contact. By aggressively approaching Plaintiff and confirming his desire to strike him, Sherosky's actions created

a reasonable fear of harm, which constitutes assault. Plaintiff recorded portions of the incident, which capture Sherosky's admissions of his aggressive behavior, further supporting Plaintiff's claim.

B. Defamation Per Se and Actual Malice

Plaintiff's defamation claim arises from Defendant Jennifer Griffith's false statements to the Tampa Bay Times that Plaintiff was a man of "moral turpitude," made in November of 2023. Under Florida law, defamation per se includes false statements that accuse someone of engaging in criminal or morally repugnant behavior, considered acts of moral turpitude. These statements are inherently defamatory and do not require proof of special damages.

Defamation Per Se: Griffith's use of the term "moral turpitude" was a knowingly false statement of fact that directly impugns Plaintiff's character and fitness to run for public office. This statement falsely suggested that Plaintiff had engaged in serious unethical or criminal conduct, which would naturally expose him to hatred, contempt, or ridicule, which, in fact, it did as alleged. Under Florida defamation law, this constitutes defamation per se, as it inherently damages Plaintiff's reputation.

Actual Malice: Plaintiff is a public figure and must demonstrate that the defamatory statements were made with actual malice—that is, with knowledge of falsity or reckless disregard for the truth (see ***New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).*** Plaintiff has adequately pled actual malice by showing that Griffith recklessly ignored exculpatory evidence, including Plaintiff's court records exonerating him of previous charges. Despite Plaintiff's full disclosure of this information, Griffith falsely labeled him a man of moral turpitude, knowing these statements were untrue or with

reckless disregard for their truth, and knowing that she would be quoted by the Times reporter in his article.

Griffith's Ongoing Pattern of Misconduct: The lawsuit alleges unlawful campaign interference, defamatory statements, and harassment. It demonstrates an intentional, malicious effort to destroy Plaintiff's reputation and candidacy, further supporting the claim of actual malice.

C. Violation of Civil Rights and Election Interference

Civil Rights Violations: Defendants' discriminatory conduct towards Plaintiff violates federal civil rights laws and the Americans with Disabilities Act (ADA). Plaintiff has a recognized disability (PTSD) under the ADA, and Defendants' actions, including exclusion from party events, defamation, and physical harassment, directly interfered with Plaintiff's rights to equal participation in public and political life.

The ADA protects individuals from discrimination in public accommodations and activities. Defendants' pattern of behavior—refusing to recognize Plaintiff's candidacy, excluding him from events, and engaging in physical and verbal harassment—demonstrates a concerted effort to deny Plaintiff his rights based on his disability and sex, in violation of the ADA and the Civil Rights Act of 1964.

Election Interference: Defendants violated both Florida election law (Chapter 104) and federal election laws by engaging in a pattern of conduct that interfered with Plaintiff's lawful campaign activities. Removing campaign signs, by Defendant Griffith, physically harassing Plaintiff during his campaign events at a hotel and in a state college hallway, and spreading knowingly false and defamatory information through the media, constituted unlawful interference designed to harm Plaintiff's campaign. Defendants'

conduct is expressly prohibited by statutes that ensure candidates are able to campaign free from undue interference or intimidation.

D. Conspiracy

Plaintiff has adequately alleged a conspiracy among Defendants to destroy his candidacy through unlawful means, including defamation, battery, and election interference. To state a claim for civil conspiracy under Florida law, Plaintiff must allege an agreement between two or more parties to commit an unlawful act or a lawful act by unlawful means, and that an overt act was taken in furtherance of that agreement.

Plaintiff's allegations describe a coordinated effort among Defendants Griffith, Sherosky, and the PDEC to undermine his campaign by excluding him from party resources, defaming him, and harassing him and intimidating and blocking voters from engaging with him during campaign events. This concerted action led to direct financial, reputational, and emotional harm to Plaintiff, satisfying the elements of a civil conspiracy claim.

III. Defendants' and Their Witnesses' Unsupported Factual Allegations

Defendants' motion contains unsupported factual allegations that are not part of the case record and are not backed by sworn affidavits or evidence, in violation of Florida Rule of Civil Procedure 1.140. In one example, in the footnotes on Page 1 of the Motion they assert that Defendant Griffith and Sherosky hold unpaid volunteer positions with the PDEC. These statements are unsupported by any sworn affidavits or evidence and are merely speculative assertions designed to minimize their liability. Further, it is noted that they have not actually alleged that they were not paid by a third party other than PDEC to destroy Plaintiff's campaign. In another example, the witnesses in the

attached police report were not sworn witnesses, they were all associates of the Defendants, and there is no sworn affidavit attached by any of the witnesses nor even of the Defendants.

This absence of supporting evidence and sworn affidavits should be noted by the Court. These unsupported factual allegations in the narrative in Defendants' motion, as well as in unsworn statements made by the people who Defendants offered up as friendly witnesses who were interviewed by the St Petersburg police and included in their police report, should not be relied upon in considering the Motion to Dismiss. Assessment of the credibility of the Defendant's witnesses under oath who are subject to cross examination, is a matter for a jury as the proper finders of fact, not the judge considering a motion to dismiss. As such, the entire police report and all references to its contents should be stricken, as well as all other alleged facts not within the court record.

IV. Campaign Interference and Violation of Plaintiff's Constitutional Rights

Defendant Griffith's actions when she swiped Plaintiff's campaign sign at the St. Petersburg College Epicenter, then harassed him after he replaced it, then brought over a security guard to stop his campaigning, constitutes unlawful campaign interference. Plaintiff's sign, which read simply, "*John Liccione for Congress, Building Florida, Saving America, voteliccione.org*", was a form of protected political speech under the First Amendment. By removing this sign, Griffith interfered with Plaintiff's ability to campaign and violated his constitutional rights.

Griffith's interference did not stop there. When Plaintiff returned to the hallway to replace his sign, stood next to it, and resumed campaigning, Griffith approached him

and harassed Plaintiff while he was attempting to engage voters as they left her PDEC meeting room. Thus, he lost the opportunity to speak to most of the voters as they left, and Plaintiff alleges that this was by design. She then escalated her interference further by enlisting the help of a college security officer in an effort to have Plaintiff's sign removed and to prevent him from lawfully campaigning on public property over which she had no authority to demand anything, let alone a campaign sign removal by a Democratic Congressional candidate she happens to hate.

This conduct by Griffith constitutes election interference and a violation of Plaintiff's First Amendment rights as well. Griffith, by using her position as Chair of the PDEC to block Plaintiff's political speech and lawful campaigning activities, as well as acting in her personal capacity as an alleged "unpaid volunteer," sought to suppress Plaintiff's message and prevent other voters from hearing about his candidacy. Election interference of this kind is unlawful under Florida Statutes Chapter 104 (Election Code: Violations; Penalties), as well as federal election laws, which protect candidates' rights to campaign without undue interference.

V. The Sham Candidate Vetting Process – A Cover Story Adopted in Response to Plaintiff's Candidacy Applied Only to Plaintiff

Plaintiff argues that Defendants' alleged "candidate vetting process" was nothing more than a sham, designed specifically to target and destroy Plaintiff's candidacy by unlawful means just as their favored candidate, Whitney Fox, had entered the race. It is a catch-phrase cover story used first as a sword to destroy Plaintiff's candidacy, and now as a shield to escape liability for their unconstitutional discriminatory behavior and their other tortious and unlawful acts.

Defendants have invoked this catch phrase “candidate vetting process,” as a mantra over and over, but they offer no evidence or sworn affidavits that such a candidate vetting process actually exists, when precisely it was enacted, why it was enacted, what it consists of, whether it was applied to Plaintiff’s opponents, whether other candidates were afforded due process to rebut any negative issues raised, and what precisely was it that they allegedly found that supposedly indicated Plaintiff was a man of “moral turpitude.”

What if, as an example, the Defendants had decided that they wanted a young white female candidate to run against the Republican incumbent Anna Luna, who is a young, white Congresswoman, as opposed to an older male candidate? Or a protestant instead of a Catholic? Or a white woman instead of a black man? Or a non-PTSD-disabled candidate versus a disabled one. Or a female domestic violence survivor versus a male domestic violence survivor.

If there was a candidate vetting process at all, and if it was lawful under state and federal lawy, and if it was applied lawfully and equally to all candidates, the burden is on Defendants to allege it under sworn oath by affidavit, and in discovery, and by producing their internal records and communications in support of their statements in their motion. Their failure to do so in their motion to dismiss speaks volumes. The absence of any attached sworn affidavits from defendants or witnesses speaks volumes.

Prior to Plaintiff informing Defendant Griffith of his intent to run in the early spring of 2023 at a PDEC meeting, neither the PDEC nor Griffith had ever implemented any sort of candidate vetting process. They claim they got the “vetting process” from somewhere, that other Party organizations use it, but they don’t say where and they don’t say who.

They provide no such evidence. They want the Court to simply take their unsworn word for it in their motion to dismiss.

Immediately after Plaintiff declared his candidacy to Griffith, she and PDEC officers such as Sherosky, conspired to pre-exclude Plaintiff as a party-recognized candidate, and their scheme was to use a "candidate vetting process" cover story to shield them from liability for what they were about to do to Plaintiff.

The vetting process, hastily adopted by the PDEC after Plaintiff informed them he was running, was opaque, remains opaque, and targeted Plaintiff and only him. Plaintiff was requested to submit a "candidate vetting form", which he did, fully disclosing the not guilty at trial verdict and the dismissal of charges against him in relation to false and disproven domestic violence accusations. At least one other candidate was not asked to submit such a vetting form, by his own admission in public. Plaintiff offered to provide Griffith with all relevant court records proving his exonerations. However, Griffith cut off all communications with Plaintiff, willfully refusing to accept his proof or consider the exonerating evidence he told her he would provide: His expunged case records.

Defendants knew that Plaintiff had been more likely than not falsely accused by his ex-wife, that he had been wrongfully imprisoned, and that he had been exonerated. They also knew that Plaintiff was a PTSD-disabled male domestic violence survivor, but chose to ignore these facts and instead engaged in a campaign to publicly defame him as a man of "moral turpitude."

Plaintiff argues had he been a female PTSD-disabled domestic violence survivor who had been falsely accused of domestic violence by her husband and later exonerated, particularly if she had been the only one in the marriage who had been hospitalized with

visual evidence of bruising and possible poisoning as noted in the candidate's hospital records as Plaintiff was, Defendants would have championed her as a symbol of grit, determination, and courage: A champion of the Me Too Movement. Instead, Defendants chose to disbelieve the man, and to instead believe the ex-wife, on the basis of sex. They considered him still guilty after being proven innocent. Plaintiff argues that this is the *actual* basis for their malice and outright hatred towards Plaintiff. It is noted that per the Pinellas CASA website home page, 1 in 3 women have experienced domestic violence while 1 out of 4 men have also experienced domestic violence.

What was done in the way of a criminal background investigation of Plaintiff? A simple Google search where they found his wife's false accusations but not his not-guilty-at-trial verdict sheet? Did they access Maryland Case Search and find there were no public records indicating criminal convictions? We don't know because they are not saying: And none of them have signed sworn affidavits.

They used Plaintiff's ex-wife's false accusations as a sword to destroy his candidacy out of malice, hate, and unlawful discrimination. Now they are using their status as a political organization and as champions for female domestic violence victims as a shield to avoid accountability for their tortious acts. They destroyed Plaintiff's reputation by branding him a man of moral turpitude—an act of per se defamation out of malice and with reckless disregard for the truth, and clear discrimination based on his sex and disability. These are reasonable inferences the court can make from the facts and circumstantial evidence as pleaded by Plaintiff.

Further, Plaintiff argues that had Defendant Michael Sherosky been accused of assault and battery at the St. Pete pride parade by a *female* Democratic Congressional candidate

while she was campaigning with voters in the pride parade assembly area, Griffith and the PDEC would have *immediately* removed him from his position as Secretary: They would have *assumed* the female candidate was telling the truth. Their failure to act to discipline Sherosky in *this* instance reveals the unlawful discriminatory nature of their actions, their actual malice and hatred towards Plaintiff.

This sham vetting process, coupled with the disparate treatment of Plaintiff as compared to other candidates and the basis of his sex and disability, constitutes a violation of Plaintiff's civil rights under Florida and federal law.

VI. Florida Volunteer Protection Act (Fla. Stat. § 768.1355) Does Not Apply

Defendants' reliance on the Florida Volunteer Protection Act (FVPA) to shield Griffith and Sherosky from liability fails to past muster as a matter of law and should be rejected. The Pinellas Democratic Executive Committee (PDEC) does not qualify as a tax-exempt nonprofit organization under 26 U.S.C. § 501(c), the statute referenced in the FVPA. Relevant subsections of 26 U.S.C. § 501(c), including:

- 501(c)(3): Charitable organizations.
- 501(c)(4): Social welfare organizations.
- 501(c)(6): Business leagues and chambers of commerce.

Political organizations like the PDEC do not fall within these categories, and thus, cannot claim immunity under the FVPA.

Furthermore, even if the FVPA did apply, it does not protect volunteers in cases of willful or criminal misconduct, gross negligence, or intentional harm. Plaintiff's complaint alleges intentional misconduct by Griffith and Sherosky, including

harassment, interference with Plaintiff's campaign, physical assault, and defamation—all of which are intentional acts and render them ineligible for protection under the FVPA.

Further, Political party chairs and other executives, whether paid employees or not, are party leaders who recruit volunteers, supervise volunteers, and fire volunteers, and paid employes, including those who maintain the Party's website and what gets published on it.

VII. Rebuttal to Battery and Assault Police Report Arguments

Defendants' reliance on the police report to dismiss Plaintiff's claims of battery and assault is misplaced and unsupported by the facts. The police report does not provide conclusive evidence of the events, the witness statements were unsworn, and the investigation itself was flawed. Plaintiff addresses the following points:

Witness Credibility and Bias: The witnesses interviewed in the police report are associates of Defendants Griffith and Sherosky. These witnesses were provided by Sherosky and Griffith themselves, raising serious concerns about their impartiality and credibility. Given their proximity to Sherosky and their personal connections, these individuals may have tailored their testimony to align with his version of events. They must be subject to testimony under oath and cross examination before a jury. The lack of independent, unbiased witnesses further calls the objectivity of the police report into question.

Lack of Independent Witnesses: Despite the police report noting that hundreds, if not thousands, of people were present at the pride parade, the police only interviewed the four witnesses cherrypicked by Griffith and Sherosky, all of whom are PDEC or

PDEC-sanctioned Democratic Club members or officers. No effort was made to interview independent, neutral bystanders who may have observed the incident, despite many of them being visibly identifiable in Plaintiff's video footage. This oversight significantly undermines the completeness and reliability of the investigation, especially given the crowded environment where independent observations were likely. Further, the alleged witnesses are not even claiming that they saw Liccione there. They are not claiming that they saw Liccione and Sherosky standing next to each other, or even speaking to each other. Not seeing an alleged crime is not proof that a crime wasn't committed.

Physical Injury Not Required for Battery or Assault: Defendants argue that the absence of physical injury negates the battery and assault claims. This is legally incorrect. Under Florida law, battery only requires unwanted and offensive physical contact, and assault requires that the Plaintiff be placed in reasonable apprehension of imminent harm. Physical injury is not a requirement to sustain either claim. Plaintiff's allegations of unwanted offensive contact and fear of imminent harm are sufficient to maintain the claims.

The Criminal and Civil Standards of Review are Different: Police Report Does Not Establish Facts: The police report is merely a summary of a preliminary investigation which included non-sworn statements made by Defendants Griffith, Sherosky, and their own associates. The absence of probable cause for criminal charges does not preclude success in a civil action, where the burden of proof is lower. The report simply reflects the initial findings based on a limited investigation consisting of

unsworn interviews of Defendant-favorable alleged witnesses, and the police's failure to pursue the matter further, does not negate the occurrence of battery or assault.

Given the biased witnesses, lack of independent testimony, and the fact that the police report was an initial investigation rather than a conclusive finding, the Defendants cannot rely on the report to dismiss Plaintiff's claims.

A New PDEC Witness Who is Not an Acolyte of Griffith Has Emerged Claiming an Admission of Guilt From Sherosky and Bragging About His Battery at Pride Parade: Plaintiff proffers to the Court under attached sworn affidavit that a witness has come forward who is a long-time member of PDEC. The witness was present at a PDEC meeting where he witnessed Sherosky bragging to two other PDEC members about having knocked Plaintiff's hat off his head at the pride parade, and that he (Sherosky) had said that "he (Liccione) was lucky he didn't get worse."

XIII. The State Actor Doctrine Application to PDEC, Griffith, and Sherosky

Plaintiff asserts that the State Actor Doctrine applies to the Pinellas Democratic Executive Committee (PDEC), its Chair Jennifer Griffith, and member Michael Sherosky, due to their reliance on state resources and involvement in state-supported events. Specifically:

Smith v. Allwright, 321 U.S. 649 (1944): In Smith v Allwright, the U.S. Supreme Court applied the Fifteenth Amendment to address racial discrimination in primary elections conducted by the Texas Democratic Party. The case focused on the Democratic Party's policy of excluding African American candidates from participating fairly or at all in its primary elections.

The Fifteenth Amendment states that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This amendment prohibits states from denying or limiting the right to vote based on race. In Smith, the Supreme Court held that the primary election, although conducted by a political party, was an essential part of the state's electoral process. Therefore, the Texas Democratic Party's actions in administering the primary election were considered state action, making them subject to the Fifteenth Amendment as applied to a racial minority candidate for public office.

The Court ruled that, because the primary election was a critical step in the state's election process, the racial exclusion in that election was unconstitutional under the Fifteenth Amendment. This decision was pivotal because it established that political parties, when conducting functions central to public governance (like primary elections), are acting as state agents and must uphold constitutional protections against racial discrimination against candidates. The ruling invalidated "white primary" practices that had previously been used to disenfranchise African American voters in Southern states, marking a significant step toward enforcing the Fifteenth Amendment in voting rights.

Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) - Use of State-Owned Venue for PDEC Meetings: The PDEC holds its monthly membership meetings at the St. Petersburg College Epicenter in Clearwater, a facility owned by the State of Florida, within which Plaintiff attempted to lawfully campaign outside the PDEC meeting room. By utilizing state property for recurring official functions, the PDEC benefits from state resources in much the same way as private entities that use public spaces under a lease

or other formal agreement. This setup mirrors **Ludtke v. Kuhn,** where the court found state action in the New York Yankees' operational practices, exclusion of female reporters form the lockerrooms, on the basis of sex, within the publicly owned Yankee Stadium. Similarly, PDEC's regular use of state-owned facilities places its actions within the realm of state action subject to Constitutional protections.

Reliance on State Actors for Primary Elections: The PDEC and the Democratic Party in Pinellas County rely entirely on state actors, specifically the Pinellas County Supervisor of Elections and the Florida Department of State, Division of Elections, to administer and conduct their primary elections. These elections are fully funded by the taxpayers of Florida, further entangling the Democratic Party's primary election activities with state resources and authority. By outsourcing the conduct and management of the primary election to Pinellas County and Florida state actors, the PDEC subjects its operations to the requirements of the state actor doctrine, much like the entwinement seen in Smith v. Allwright.

Griffith's Actions as a De Facto State Agent: At the PDEC meeting at the St Petersburg College Epicenter, Griffith attempted to enforce what she claimed was a "college policy" prohibiting campaign signage in and around the Epicenter grounds. Acting in her capacity as PDEC Chair, Griffith purported to enforce these rules against Plaintiff's campaign materials, effectively placing herself in the role of a state actor as a security and policy enforcer. Plaintiff challenged Griffith's authority, arguing that she lacked legitimate state-delegated power to enforce such regulations. Griffith's actions at a state-owned venue, under the pretense of exercising state authority, constitute state action under ***Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)***,

where actions of a private entity held within a publicly-owned facility were deemed state actions due to the "symbiotic relationship" with a government agency.

Defendants' Involvement in the City-Managed St. Petersburg Pride Parade: The St. Petersburg Pride Parade is a public event run and supported by the City of St. Petersburg, which provides financial, logistical, and police security for crowd control and safety. Both Griffith and Sherosky, as representatives of PDEC, participated in this city-supported event as did Plaintiff. In the parade assembly area, Sherosky acted as a security figure on behalf of Griffith and the PDEC members, attempting to control who could engage or be prevented from engaging with the PDEC group and their supporters. He specifically targeted Plaintiff, and only Plaintiff. This conduct parallels the actions in Smith v. Allwright, where the U.S. Supreme Court ruled that when a political party uses state resources and authority to perform election-related functions, its actions become subject to constitutional scrutiny. Here, the PDEC's participation in a publicly managed City event aligns with the principle that state-supported functions by a political entity, such as voter outreach and public parade participation, are subject to constitutional review.

In summary, based on Smith v. Allwright, Ludtke v. Kuhn, and Burton v. Wilmington Parking Authority, the PDEC, Griffith, and Sherosky's interactions with state facilities, enforcement of purported state policies, reliance on state actors for election administration, and involvement in publicly managed events qualify as state action. Therefore, their conduct toward Plaintiff, including alleged discrimination and interference, should be considered under the protections afforded by the Constitution.

IX. Conclusion

In light of the above arguments and supporting facts, Plaintiff respectfully requests that this Court deny Defendants Griffith, Sherosky, and the Pinellas Democratic Executive Committee's Motion to Dismiss. Plaintiff has sufficiently alleged facts and legal grounds to proceed to discovery, where further evidence can be gathered, and to trial, where a jury can assess the credibility of witnesses and evaluate Defendants' liability for the alleged harms.

WHEREFORE, Plaintiff respectfully requests that the Court deny Defendants Griffith, Sherosky, and the Pinellas Democratic Executive Committee's Motion to Dismiss and allow this case to move forward to discovery and trial.

`

Respectfully submitted,

John Liccione
Plaintiff, Pro Se
6800 Gulfport Blvd S, Ste 201-116
South Pasadena, FL 33707
443-698-8156
jliccione@gmail.com

CERTIFICATE OF SERVICE

I, John William Liccione, Plaintiff, on this 7th day of November 2024, hereby certify that the forgoing Plaintiff's Response to Defendants' Motion to Dismiss were e-served on all defendants through their attorney George Thurlow via the Court's e-file and e-serve system.

John W. Liccione

IN THE CIRCUIT COURT OF THE 6TH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

John William Liccione,
Plaintiff,
v.
Pinellas Democratic Executive Committee
Florida Democratic Party **Case No. 24-002994-CI**
Michael John Sherosky
Jennifer W Griffith,
Defendants.

Motion to Stay Proceedings
and
Notice to Court of New Federal Lawsuit and With Motion to Move This Case to the US District Court of the Middle District of Florida and Merge the 2 Cases

Plaintiff hereby gives notice to this Court that on Friday, August 23, 2024, he filed an election ballot fraud lawsuit in the US District Court of the Middle District of Florida, Tampa Division, and that he has moved to have this case transferred to federal court and merged with his federal case. Federal case no. 8:24-cv-02005-SDM-NHA, ***John W. Liccione vs Julie Marcus, et al.***

Plaintiff notifies this court that the grounds for transferring this case are two-fold. First, Plaintiff alleges that the wrongful actions by defendants alleged in *this* case were part of a 14-month-long criminal conspiracy by defendants in this case, to engage in voter suppression, voter intimidation, political violence, civil rights violations, and other tortious and criminal acts. Second, Plaintiff alleges in his federal case that the actions of these defendants represent the final

set of acts in furtherance of the criminal conspiracy to suppress the votes for Plaintiff and other candidates in his Congressional primary by way of ballot fraud, voter/candidate intimidation, and other election and civil rights violations. It is also noted that in his federal case, Plaintiff is accusing both Democratic and Republican party and government officials in this long-running criminal conspiracy.

Plaintiff's 95-page federal complaint is attached hereto as EXHIBIT A.

Given the above, Plaintiff moves that the Court issue a temporary stay in these proceedings pending a determination by the federal court as to whether this case will be transferred and merged with Plaintiff's federal case.

Respectfully Submitted,

John W Liccione
Plaintiff, Pro se
6800 Gulfport Blvd S. Ste 201-116
South Pasadena, FL 33707
443-698-8156
jliccione@gmail.com

Certification of Service

Plaintiff hereby certifies that on this 26th day of August, 2024, this Motion to stay along with a copy of the attached federal complaint were e-served upon the attorneys representing the 4 defendants on August 26, 2024 via both email and through Florida's e-file and serve system.

John W Liccione

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,
Plaintiff,

v. Case No. 24-002994-CI

PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE,
FLORIDA DEMOCRATIC PARTY,
MICHAEL JOHN SHEROSKY,
JENNIFER W. GRIFFITH,
Defendants.
_____/

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STAY PROCEEDINGS

Defendants, PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE, MICHAEL JOHN SHEROSKY, and JENNIFER W. GRIFFITH, by and through their undersigned counsel, hereby submit this Memorandum in Opposition to Plaintiff's Motion to Stay Proceedings (Doc # 17, filed August 26, 2024), and in support thereof, state as follows:

1. In his Motion, Plaintiff seeks to have this Court stay proceedings in this instant case because he filed a lawsuit in the United States District Court of the Middle District of Florida (Case No. 8:24-cv-020005-SDM-NHA) on August 23, 2024, Defendant Griffith is a party in that lawsuit, and that he sought to have this case transferred to federal court.
2. The legal reality that a Plaintiff is not permitted to remove a case that he filed in state court into federal court. That right belongs exclusively to the Defendants. Accordingly, the federal court denied Plaintiff's Motion to transfer this case into federal court. See **Exhibit A**.
3. Rather, the Plaintiff's federal lawsuit is merely another strategic lawsuit against public participation that he has opted to file against Ms. Griffith and the Chair of Defendant Florida Democratic Party (Nikki Fried) and

non-parties to this instant case, the Pinellas County Supervisor of Elections (The Honorable Julie Marcus) and Supervisor Marcus's Chief Deputy.

4. In his Order (attached as **Exhibit A**), the Honorable Judge Steven D. Merryday found that as it pertains to the federal lawsuit, "Nothing in the complaint establishes either a likelihood of success on the merits . . . or the reason that notice is impractical" and that there is "no prospectively admissible fact supporting relief."
5. The fact that there is no basis for removal of this case to federal court, that the Plaintiff's Motion to Remove this case to federal court has already been denied by the federal court, and that there is "no prospectively admissible fact supporting relief" means that this Court should deny the Plaintiff's Motion to Stay Proceedings and continue with haste in ultimately disposing with this case.
6. Defendants request that this Court deny this Motion based upon the written submissions, but will agree to have this heard at the October 1, 2024 hearing should this Court opt to hear this Motion.

Wherefore, Defendants, PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE, MICHAEL JOHN SHEROSKY, and JENNIFER W. GRIFFITH, respectfully request that this Court enter an order denying Plaintiff's Motion to Stay Proceedings and grant Defendants any other relief that this Court deems proper and just.

Dated: August 28, 2024

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
FBN 1019960

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice has been served upon Mark Herron, Esquire and Steven Cary, Esquire, counsel for Defendant Florida Democratic Party, via Florida E-Filing Portal, and upon John William Liccione, Plaintiff *pro se*, via Florida E-Filing Portal and via US Mail to 6800 Gulfport Boulevard South, Suite 201-116, South Pasadena, FL 33707 on this 28th day of August, 2024.

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
FBN 1019960
Rahdert & Mortimer, PLLC
535 Central Avenue, Suite 200
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Phone: (727)823-4191
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Email: gthurlow@rahdertlaw.com
service@rahdertlaw.com
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Attorney for Defendants,
PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE,
GRIFFITH, and SHEROSKY

EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN WILLIAM LICCIONE,

Plaintiff,

v. CASE NO. 8:24-cv-2005-SDM-NHA

JULIE MARCUS, et. al.,

Defendants.
_____/

ORDER

A candidate in the Democrat congressional primary, John Liccione allegedly received from an anonymous person "using the codename 'Tampa Girl'" an online message that purported to reveal the details of a scheme to manipulate the August 20, 2024 primary election. Based solely on Tampa Girl's message, the plaintiff sues an array of officials and requests a temporary restraining order to "prevent the certification of the August 20, 2024."

Under Local Rule 6.01(a), a motion for a temporary restraining order must include:

> (1) "Temporary Restraining Order" in the title;
> (2) specific facts — supported by a verified complaint, an affidavit, or other evidence — demonstrating an entitlement to relief;
> (3) a precise description of the conduct and the persons subject to restraint;
> (4) a precise and verified explanation of the amount and form of the required security;
> (5) a supporting legal memorandum; and
> (6) a proposed order.

Liccione's motion, imbedded in the complaint, fails to include a precise and verified explanation of the amount and form of the required security, fails to include a supporting legal memorandum, and fails to include a proposed order.

Also, under Local Rule 6.01(b) the legal memorandum must establish:

> (1) the likelihood that the movant ultimately will prevail on the merits of the claim,
> (2) the irreparable nature of the threatened injury and the reason that notice is impractical,
> (3) the harm that might result absent a restraining order, and
> (4) the nature and extent of any public interest affected.

Nothing in the complaint establishes either a likelihood of success on the merits (an anonymous, hearsay message from "Tampa Girl" supplies no prospectively admissible fact supporting relief) or the reason that notice is impractical. Liccione's facially insufficient motion for a temporary restraining order and all other pending motions (Docs. 3, 4, 5, 6) are **DENIED**.

ORDERED in Tampa, Florida, on August 26, 2024.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT OF THE 6TH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

John William Liccione,
Plaintiff,
v. **Case No.: 24-002994-CI**

Pinellas Democratic Executive Committee;

Michael John Sherosky - in his official capacity
as Secretary of PDEC and in his personal capacity;
Jennifer W Griffith - in her official capacity
as Chair of PDEC and in her personal capacity**;**
Defendants.

_____/

PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

COMES NOW, Plaintiff, **John William Liccione,** pro se, and respectfully moves this Court for leave to file his Second Amended Complaint in the above-captioned matter pursuant to Florida Rule of Civil Procedure 1.190(a), and states as follows:

1. **Introduction and Basis for Amendment**

   Plaintiff filed the original Complaint in this action on July 3, 2024. Plaintiff filed a second complaint in the 6th Circuit Court on September 9, 2024, Liccione v Julie Marcus, et al, Case no. 24-003939-CI, that also included Jenniffer Griffith as one of the defendants for her subsequent wrongful acts performed after July 3 2024. Since that filing, new information, and relevant facts and new wrongful acts have emerged, and certain claims and parties have been adjusted to better

reflect the scope and specifics of Plaintiff's claims. At a recent hearing on November 12th before Judge Patricia Muscarella in Case No. 24-003939-CI, Judge Muscarella, in consultation with Judge Ramsberger, who is presiding over this case, together decided sua sponte that the claims against Defendant Griffith in 24-003939-CI should be combined with this case for purposes of judicial efficiency. Plaintiff consented to the transfer of Defendant Griffith and it was so ordered by Judge Muscarella. This occurred just a few days after Plaintiff had filed his First Amended Complaint in this case, which has now become outdated. This then sets the stage for this Motion and for the Court to grant it.

2. **Summary of Likely Changes to be addressed in the 2nd Amended Complaint**

The Second Amended Complaint will incorporate the following changes currently being considered:

a. **Addition of New Counts**

1. **Defamation:** A new Count VII for Defamation was added in the First Amended Complaint, and will retained.
2. **Violation of Plaintiff's First Amendment Rights to Free Speech and to Peaceably Assemble:** Plaintiff alleges that Defendant Griffith swiped his campaign sign from the St Petersburg College epicenter hallway. The sign was a form of political speech and read: "*John Liccione for Congress: Building Florida, Saving America; voteliccione.org*". Then she interfered with Plaintiff's rights to peaceably assemble and to make his political speech in publicly owned facilities at the college and at a St.

Petersburg Pride parade, when he was attempting to "peaceably assemble" with voters and to make his political speeches to them.

b. **Removal of a Party**: The Florida Democratic Party was removed as a Defendant in this action. (Voluntarily dismissed by Plaintiff)

c. **Removal of Request for Injunctive Relief**: Plaintiff will eliminated his request for injunctive relief.

d. **Inclusion of Additional Facts**: The 2nd Amended Complaint will contain updated factual allegations, including events and misconduct by the Defendants and damage suffered after the initial Complaint's filing.

3. **Legal Standard for Granting Leave to Amend**

Under Florida Rule of Civil Procedure 1.190(a), "leave of court [to amend a pleading] shall be given freely when justice so requires." Florida courts generally permit amendments liberally, especially when amendments enable the case to be adjudicated on its merits and do not cause undue prejudice or delay. The proposed amendments are made in good faith to clarify Plaintiff's claims and include relevant new facts, to include new claims, and for purposes of combination and consolidation of two cases, and they do not unfairly prejudice Defendants or delay the proceedings. In this particular case, it is both Judge Muscarella and Judge Ramsberger themselves that have acted sua sponte to have Defendant Griffith removed from Case 24-003939-CI and those new claims against be incorporated into this case. It would be inappropriate and prejudicial to Plaintiff for this Court to *not* grant him leave to file a Second Amended Complaint under the circumstances.

4. **No Prejudice or Delay to Defendants**

   Granting leave to amend will not result in any undue prejudice or delay for Defendants. The primary changes will reflect Plaintiff's additional defamation claim and 1st Amendment violation claims, mail ballot fraud claims, and the removal of the Florida Democratic Party as a party, and the injunctive relief sought, along with relevant updates to factual allegations that occurred post-filing.

5. **Good Faith and Justice Require Amendment**

   Plaintiff respectfully submits that justice requires the filing of a Second First Amended Complaint, which accurately reflects the current facts and claims in this case. The amendment is sought in good faith to ensure the fair and complete adjudication of all issues.

WHEREFORE, Plaintiff, **John William Liccione**, respectfully requests that this Court grant this Motion for Leave to File a Second Amended and set deadlines for filing and responses thereto at the currently scheduled November 21, 2024 case management hearing.

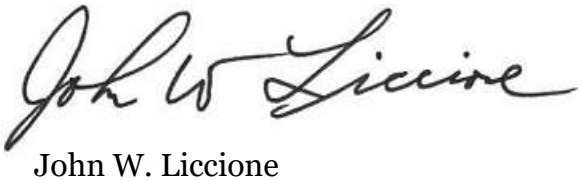
Respectfully submitted,

/s/ John W. Liccione
John W. Liccione
Pro Se Plaintiff
6800 Gulfport Blvd S, Ste 201-116
South Pasadena, FL 33707,
443-698-8156
jliccione@gmail.com

CERTIFICATE OF SERVICE

I, John William Liccione, hereby certify that a true and correct copy of the foregoing Motion for Leave to File Second Amended Complaint was e-served on all defendants through their attorney George Thurlow via the Court's e-file and e-serve system on this 17th day of November 2024.

Respectfully submitted,



John W. Liccione

IN THE CIRCUIT COURT OF THE 6TH JUDICIAL CIRCUIT

IN AND FOR PINELLAS COUNTY, FLORIDA

John William Liccione,
Plaintiff,
v. **Case No.: 24-002994-CI**

Pinellas Democratic Executive

Committee (PDEC), et al;

Defendants.

_____/

PLAINTIFF'S MOTION TO STRIKE APPEARANCE OF ATTORNEY GEORGE THURLOW

COMES NOW the Plaintiff, **John William Liccione**, pro se, and respectfully moves this Honorable Court to strike the appearance of Attorney **George Thurlow**, counsel for Defendant Jennifer W. Griffith, and states as follows:

I. Nature of the Motion

1. Plaintiff seeks an order striking the appearance of Attorney George Thurlow on the grounds that he is a material necessary eyewitness to certain of the wrongful acts alleged in Plaintiff's First Amended Complaint that are alleged to have occurred at the St. Petersburg/Clearwater Marriott on July 13, 2024 where a Democratic Congressional debate event, and Plaintiff's own campaign event, were held down the hall from each other. As such, his testimony is integral to Plaintiff's claims of conspiracy, election interference, and voter intimidation and coercion.

2. Additionally, Attorney Thurlow's appearance in this case occurred on July 30, 2024, after the alleged events, precluding the application of attorney-client privilege to his observations. Attorney Thurlow himself confirmed, unprompted, during his initial phone call with Plaintiff, that he himself had attended the July 13th congressional debate.

II. Relevant Facts

Attorney Thurlow's Involvement as an Eyewitness

3. Plaintiff alleges in his First Amended Complaint that on July 13, 2024 an incident occurred involving Defendants at the St. Petersburg Clearwater Marriott during and after a congressional debate hosted by the Pinellas Democratic Executive Committee (PDEC), just down the hall from Plaintiff's own campaign event.

4. During Attorney Thurlow's first phone call with Plaintiff, he voluntarily stated, without prompting, that he was in attendance at the July 13th congressional debate.

5. Attorney Thurlow's firsthand knowledge of the events that transpired is critical to establishing key facts in this case.

Timing of Attorney Thurlow's Entrance

6. The incident in question at the Mariott occurred on the night of **July 13, 2024**, and Attorney Thurlow did not enter his appearance as counsel until **July 30, 2024**.

7. Attorney Thurlow's observations at the event are not protected by attorney-client privilege and are subject to discovery and testimony.

Conflict of Interest/Roles

8. As a material and necessary witness to these events, Attorney Thurlow's role as legal counsel conflicts with his role as witness.

III. Legal Basis for the Motion

Rule 4-3.7(a), Florida Rules of Professional Conduct:

9. The Rule states that: "*A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client*."

10. *Allstate Ins. Co. v. English*, 588 So. 2d 294 (Fla. 2d DCA 1991). This case sets the standard for disqualification where an attorney is a necessary witness.

11. Bar Opinion: Florida Bar Ethics Opinion 90-4 also address such attorney conflicts under Rule 4-3.7(a).

Necessity of Testimony:

12. Attorney Thurlow's attendance at the event and his interactions with Defendants and other attendees, the venue staff, the police, and other individuals make his testimony indispensable to Plaintiff's claims.

13. His firsthand knowledge of the alleged events and the actions of Defendants and others present, and their impact on voters attending including their being allegedly blocked from accessing Plaintiff's down-the-hall campaign event, is critical for determining the facts of this case.

Timing and Attorney-Client Privilege: Because the Marriot incident occurred prior to Attorney Thurlow's appearance in this case on July 30, 2024, no attorney-client privilege attaches to his observations before, during, and immediately after the event.

Further, Mr Thurlow's communications with any attendee at the July 13th Marriot event, including all non-defendants, are not privileged.

Prejudice to Plaintiff: Allowing Attorney Thurlow to serve as counsel while simultaneously being a necessary witness would prejudice the Plaintiff's ability to fairly litigate the case and could create confusion for the jury. Attorney Thurlow's dual role creates an unavoidable appearance of impropriety and undermines the integrity of the proceedings.

IV. Relief Sought

WHEREFORE, Plaintiff respectfully requests this Honorable Court to:

A. Strike the appearance of Attorney George Thurlow as counsel for Defendant Jennifer W. Griffith.

B. Direct that Attorney Thurlow, nor anyone from his law firm, shall not act as advocate for any party in this case.

C. Grant any other relief this Court deems just and proper.

Respectfully submitted,

/s/ John W. Liccione
John W. Liccione, Plaintiff, Pro se
6800 Gulfport Blvd S.
South Pasadena, FL 33707
jliccione@gmail.com
443-698-8156

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon all Defendants through their attorney George Thurlow via the Court's e-file and e-serve portal on this 18th day of November, 2024.

s/ John W. Liccione
John W. Liccione

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,
Plaintiff,

v. Case No. 24-002994-CI

PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE,
MICHAEL JOHN SHEROSKY,
JENNIFER W. GRIFFITH,
Defendants.
_____/

COMPANION WITH:
Case No. 24-003939-CI

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE APPEARANCE OF ATTORNEY GEORGE THURLOW

Defendants, PINELLAS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE ("PCDEC"), JENNIFER W. GRIFFITH ("GRIFFITH"), and MICHAEL JOHN SHEROSKY ("SHEROSKY"), by and through their undersigned counsel, hereby submit this response in opposition to Plaintiff's, JOHN WILLIAM LICCIONE, Motion to Strike Appearance of Attorney George Thurlow, and in support thereof states as follows:

1. Plaintiff seeks to strike the appearance of Defendants' attorney George Thurlow on the grounds that Defendants' attorney attended an event—a debate hosted by PCDEC--which attended by approximately 300 people, and thus is a "material necessary eyewitness."
2. Disqualifying an attorney is a matter of no small consequence, and as a result the party seeking disqualification must demonstrate prejudice that can be cured only by disqualification. See *Caruso v. Knight*, 124 So. 3d 962 (Fla. 4th DCA 2013). It is considered an "extraordinary remedy." *Singer Island v. Budget Constr. Co.*, 714 So. 2d 651, 652 (Fla. 4th DCA 1998)
5. While captioned a Motion to Strike, the Plaintiff's Motion is in essence a Motion to Disqualify Counsel. Motions to disqualify should be viewed with some skepticism, because they are often filed for improper purposes such as harassment. *Id.*
6. Fla. Bar Reg. R. 4-3.7 generally states that "A lawyer shall not act as advocate **at a trial** in which the lawyer is likely to be a **necessary** witness on **behalf** of the **client**,"

(emphasis added) providing a number of exceptions. Without waiving other meritorious arguments, the Defendants maintain that the exception that "disqualification of the lawyer would work substantial hardship on the client" applies.

7. This matter is not currently set for trial and there are currently pending pre-trial motions that are dispositive.
8. Mr. Thurlow is not a necessary witness of this event. A lawyer is not a necessary witness when there are other witnesses available to testify to the same information. *Allstate Ins. Co. v. English*, 588 So. 2d 294, 295 (Fla. 2d DCA 1991); *Steinberg v. Winn-Dixie Stores,* 121 So. 3d 622, 624-25 (Fla. 4th DCA 2013). Hundreds of other people could testify to the same matters as Mr. Thurlow, including but not limited to representatives of his client.
9. Mr. Thurlow's clients are the Defendants, not Mr. Liccione. Therefore, this rule is not relevant or dispositive as Defendants have no intention of calling Mr. Thurlow as a witness.
10. Additionally, "The requirement that a lawyer withdraw when he expects to be a witness was not intended to permit an opposing party to call him as a witness and disqualify him from serving as counsel." *AlliedSignal Recovery Trust v. AlliedSignal, Inc*., 934 So. 2d 675, 680 (Fla. 2d DCA 2006); *see also Devins v. Peitzer*, 622 So. 2d 558, 558 (Fla. 3d DCA 1993) (holding that defendant's announced intention to call plaintiff's counsel as a witness is not a basis for disqualification).
11. Mr. Thurlow's attendance at this debate was in furtherance of his ongoing legal representation of PCDEC. PCDEC first retained Mr. Thurlow and his firm, RAHDERT & MORTIMER, PLLC, to represent them in another matter in approximately August 2023, and the firm, and primarily Mr. Thurlow, has represented PCDEC ever since. Attorney-client privilege would apply to any conversations between Mr. Thurlow, other attorneys in his firm, and representatives of PCDEC concerning potential or actual legal representation during that period. Mr. Thurlow and his clients first became aware of this instant lawsuit on or around July 8, 2024.
12. Plaintiff is also disclosing contents of a conversation that, to the best of counsel's recollection, was a privileged settlement communication.

WHEREFORE, Defendants respectfully request that this Court deny Plaintiff's Motion to Strike Appearance of Attorney George Thurlow and grant Defendants any other relief that this Court deems proper and just.

Dated: November 20, 2024

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
FBN 1019960

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served upon John William Liccione, Plaintiff *pro se*, via Florida E-Filing Portal and via US Mail to 6800 Gulfport Boulevard South, Suite 201-116, South Pasadena, FL 33707 on this 20th day of November, 2024.

/s/ George A.D. Thurlow
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Attorney for Defendants,
PINELLAS DEMOCRATIC EXECUTIVE COMMITTEE,
GRIFFITH, and SHEROSKY

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIVIL DIVISION
SECTION 7

JOHN WILLIAM LICCIONE,
Plaintiff,
v. Case No. 24-002994-CI

JULIE MARCUS, et al.,
Defendants.
_____/

PLAINTIFF'S NOTICE OF RECEIPT OF EXTORTIVE DEATH THREAT AND THREAT OF FINANCIAL PENALTIES AND REQUEST FOR RELIEF

1. Plaintiff John Liccione hereby gives this Court notice that on November 15 2024, he received an email (referred to herein as "*The GoneGetGaetz email*") stating his life is in danger and that he may be arrested and prosecuted by the incoming Trump administration (presumably by the new attorney general Matt Gaetz), if he doesn't drop his election fraud/interference lawsuits and shut his mouth and stop leveling political attacks on Donald Trump, Matt Gaetz, Anna Paulina Luna, and Lauren Boebert. It tells Plaintiff to expatriate himself to another country.

2. The *GoneGetGaetz* email refers to President Elect Donald Trump's nominee for US Attorney General Matt Gaetz. The sender used a single use "burner" email account gonegetgaetz@proton.me, which was deactivated immediately after the email was sent.

3. The email reads as follows and is attached as EXHIBIT A:

gonegetgaetz <gonegetgaetz@proton.me> Thu, Nov 14, 2024 at 12:12 PM
To: "jliccione@gmail.com" <jliccione@gmail.com>

"For reasons which will become apparent, I need to stay anonymous. It has come to my attention that you are on lists which will be used by the incoming administration. You should not be surprised, given your activities and posting history. Remember your Gaetz/Boebert/Luna posting? It was noted. Remember your Putin posts? Remember your video at the Russian embassy? All of that was noted. It is unclear what exactly these lists will be used for, but it can't be good. I suspect it will be for arrest or detainment. Perhaps expulsion. Perhaps worse. If you have the ability, you need to leave. There is a movement to expat to **[COUNTRY 1]** *and regroup there. Consider that. I strongly urge you to go silent. No more political posts. No more calling the police. No more political rallies. No more lawsuits. No more political musical performances. If you do these things, you will be found and taken. I am sure of this. They are trying to simplify the chess board by removing pieces. You are a piece that is easy to remove and no one will notice, will they? Keep yourself safe by taking action today. These are dark days and darker days are ahead. No one can help you if you won't help yourself first. You won't get any further communications as long as you are in the US. We will find you, should you expatriate. Good luck, Patriot."*

4. Today, just 5 days later, numerous media outlets including the New York Times and The Hill are reporting that a hacker had hacked into an attorney-shared document cache containing sworn testimony from the two women that have been accusing Matt Gaetz of having sex with one of them at a party when she was 17 years old. (See EXHIBIT B).

5. Coincidentally, earlier this morning, Pinellas County Attorney, Andrew Keefe, a colleague of Attorney Kirby Kreider, and both who represent Defendant

Julie Marcus (and her deputy Dustin Chase) in their official capacities as Pinellas County Supervisor of Elections officials in Plaintiff's federal election fraud lawsuit (8:24-cv-02005-SDM-NHA), and Julie Marcus in related case 24-003939-CI, contacted Plaintiff and threatened to file for "substantial" attorney's fees if Plaintiff refused to dismiss his state and federal lawsuits against his clients, "*soon*." Attorney Keefe indicated that the attorney's fees are already substantial and that they will continue to mount if Plaintiff refuses to dismiss these cases "with prejudice, soon."

6. From Plaintiff's perspective, the "*GoneGetGaetz*" email is a veiled threat craftily written to appear as if coming from a helpful friend.

7. From Plaintiff's perspective, particularly as a pro se litigant, he is reasonably in fear for his safety, freedom, and financial well-being.

8. The pressure to drop this election fraud lawsuit and the related federal lawsuit has now reached a fever pitch. It appears that the "they" referred to in the e-mail will perhaps stop at nothing to ensure the massive mail ballot fraud Plaintiff has alleged caused his primary loss, and now has gotten Trump and Anna Paulina Luna re-elected, is not exposed, so as to ensure the 2024 Presidential and Congressional election results are not overturned.

9. With only 62 days until Donald Trump is sworn in as the 47th President of the United States, and with Matt Gaetz facing possible Senate confirmation as AG and perhaps will get a temporary recess appointment by Trump on 1/21/2024, Plaintiff now has every expectation that the pressure on him to dismiss his election fraud lawsuits for no financial consideration will only increase in frequency and severity.

The Hacking of the Judicial Process

10. Plaintiff is under extreme duress now, and as such, any settlement agreements he may be extorted or otherwise coerced to entering into with Defendants Jennifer Griffith, Michael Sherosky, or the Pinellas Democratic Executive Committee, an agreement which may require him to dismiss this case with prejudice without any financial consideration for the substantial damages he has suffered, will be deemed unenforceable under Federal or state law, given the circumstances.

The Current Case Posture

11. There is a Case Management Hearing currently scheduled for November 21, 2024 at 3:00PM via teleconference (or Zoom). All outstanding pleadings will allegedly be heard at this hearing, although, only 30 minutes have been allotted.

12. Plaintiff has just filed a motion for leave to file a Second Amended Complaint due to the Court's decision to transfer all claims against Defendant Griffith in Case No. 24-003939-CI over to Case No. 24-002994-CI.

13. Thus, now pending before the Court are the following:

a. Plaintiff's Motion for Leave to File a Second Amended Complaint
b. Plaintiff's Motion to Strike Appearance of Defendants' Attorney George Thurlow
c. Plaintiff's Motion to Compel Discovery Against Defendants Jennifer Griffith (and Cathy Salustri Loper)
d. Defendants Motion to Dismiss First Amended complaint (not yet ripe for consideration – moot if leave granted to file 2nd amended complaint)
e. Defendant Griffith's Motion for Sanctions

Conclusion

14. Due to the GoneGetGaetz email threats; (2) the sudden phone call from County Attorney Andrew Keefe threatening to file for substantial attorney's fees if Plaintiff doesn't dismiss this case and the other federal case against Julie Marcus; coupled with (3) these new public disclosures of the hacking of Matt Gaetz' alleged child victim's and eyewitness' sworn testimony document trove, the Court must intervene to preserve the integrity of the judicial process given the stakes involved.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Refer these matters to the State Attorney and the Florida Department of Law Enforcement for criminal investigation.

B. Other such relief as the Court considers appropriate.

Respectfully Submitted,

John W Liccione, Plaintiff, pro se
6800 Gulfport Blvd S.
Ste 201-116
South Pasadena, FL 33707
443-698-8156
Jliccione@gmail.com

CERTIFICATE OF SERVICE

I, John William Liccione, Plaintiff, pro se, hereby certify that on this 19th day of November, 2024, I did serve this Notice via the Court's e-file and serve portal on **George Thurlow,** attorney for Defendants Jennifer Griffith, Michael Sherosky, and the Pinellas Democratic Executive Committee.

John W Liccione

EXHIBIT A

The GoneGetGaetz Email

Liccione vs Marcus, et al

Gmail John Liccione <jliccione@gmail.com>

Lists

1 message

gonegetgaetz <gonegetgaetz@proton.me> Thu, Nov 14, 2024 at 12:12 PM
To: "jliccione@gmail.com" <jliccione@gmail.com>

For reasons which will become apparent, I need to stay anonymous. It has come to my attention that you are on lists which will be used by the incoming administration. You should not be surprised, given your activities and posting history. Remember your Gaetz/Boebert/Luna posting? It was noted. Remember your Putin posts? Remember your video at the Russian embassy? All of that was noted. It is unclear what exactly these lists will be used for, but it can't be good. I suspect it will be for arrest or detainment. Perhaps expulsion. Perhaps worse. If you have the ability, you need to leave. There is a movement to expat to [redacted] and regroup there. Consider that. I strongly urge you to go silent. No more political posts. No more calling the police. No more political rallies. No more lawsuits. No more political musical performances. If you do these things, you will be found and taken. I am sure of this. They are trying to simplify the chess board by removing pieces. You are a piece that is easy to remove and no one will notice, will they? Keep yourself safe by taking action today. These are dark days and darker days are ahead. No one can help you if you won't help yourself first. You won't get any further communications as long as you are in the US. We will find you, should you expatriate. Good luck, Patriot.

EXHIBIT B

The Hill article on the hacking of Matt Gaetz' Document Trove Containing Sexual Assault Victim/Witness Testimony

Liccione v Marcus, et al

HOUSE

Hacker gains access to testimony in Gaetz investigations: reports

BY REGINA ZILBERMINTS -11/19/24 12:45 PM ET

A hacker gained access to witness testimony related to investigations into former Rep. Matt Gaetz (R-Fla.), who resigned from Congress last week after President-elect Trump tapped him for attorney general, multiple news outlets reported Tuesday.

The unidentified person, using the name “Altam Beezley,” downloaded the information on Monday afternoon, according to The New York Times, which was the first to report on the breach.

The Times and CBS News reported that the file is part of a civil defamation case. The Times also reported it includes sealed files from the Justice Department and House Ethics Committee.

The materials do not appear to have been made public. Interest in the files may be at an all-time high, given Gaetz's looming confirmation process.

The Ethics Committee has been investigating Gaetz for years over allegations of sexual misconduct and illicit drug use, among other claims. Gaetz, whom the Justice Department declined to charge after investigating the same matters, has vigorously denied wrongdoing.

The Florida Republican resigned from Congress as the release of the Ethics Committee's report was imminent, a source familiar with the matter told The Hill last week.

While the panel doesn't generally release information about former lawmakers, the committee is facing mounting pressure to make its findings public.

Senators on both sides of the aisle have said they would like to see the report as they mull whether to confirm Gaetz as the nation's top prosecutor, and on Monday Rep. Susan Wild (D-Pa.), the top Democrat on the Ethics Committee, said she thinks the report should be released.

Updated at 1:18 p.m. EST

TAGS GAETZ CONFIRMATION FIGHT MATT GAETZ SUSAN WILD TRUMP CABINET

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,

Plaintiff,

vs.

JULIE MARCUS, in her official capacity as Pinellas County Supervisor of Elections, et. al.,

Defendants.
_____/

Case No.: 24-003939-CI
Companion Case with
Case No.: 24-002994-CI

ORDER GRANTING COURT'S ORE TENUS MOTION TO CONSOLIDATE
***** DIRECTIONS TO THE CLERK OF COURT *****

THIS CAUSE came before the Court on November 12, 2024 upon the Court's *ore tenus* Motion to Consolidate ("Motion"), and the Court, having considered the Motion, the case file, the applicable law, the agreement of the parties, and being otherwise fully advised in the premises, the Court hereby **FINDS** as follows:

1. This matter concerns the following cases currently pending in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida: *John William Liccione vs. Julie Marcus, et. al.*, Case No. 24-003939-CI, Section 7, the Honorable Patricia Muscarella presiding ("Section 7 Case") and *John William Liccione vs. Pinellas Democratic Executive Committee*, Case No. 24-002994-CI, Section 19, the Honorable Thomas Ramsberger presiding ("Section 19 Case").

2. Defendant, JENNIFER GRIFFITH ("Ms. Griffith") is a party in both of the aforementioned cases. The operative complaints in both cases involve considerable factual and legal overlap as to Ms. Griffith.

3. Florida Rule of Civil Procedure 1.270(a) states the following:

> **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

4. At the case management hearing on November 12, 2024 in the Section 7 Case, the Court proposed transferring and consolidating all claims against Ms. Griffith in the Section 7 Case to the previously-filed Section 19 Case as a means of promoting judicial economy in accordance with Rule 1.270(a). The parties stipulated to the Court's proposal.

5. Because the Section 7 Case and the Section 19 Case involve common questions of law and fact involving Ms. Griffith, it would be an inefficient use of party and judicial resources to litigate these related disputes before different trial court judges. Both cases will proceed more efficiently with a single trial court judge presiding over the claims against Ms. Griffith. Accordingly, the efficient administration of justice requires reassignment of the Section 7 Case claims against Ms. Griffith to the Section 19 Case. Said transfer will not delay either action as the cases were filed within 65 days of each other and involve a similar procedural posture, nor will said transfer result in any substantial inconvenience, delay, or expense for the parties or the Court.

Accordingly, it is

ORDERED and ADJUDGED:

1. The Court's Motion is hereby **GRANTED** pursuant to Fla. R. Civ. P. 1.270(a) and in accordance with the stipulation made by all parties at the November 12, 2024 hearing. Hereinafter, Section 19 of this Court shall have jurisdiction over the claims made against Ms. Griffith in the Section 7 Case. All future matters concerning claims made against Ms. Griffith shall be addressed to Section 19 of this Court.

2. The Pinellas Clerk of Court is **DIRECTED** to docket this Order in both Case No.

24-003939-CI and Case No. 24-002994-CI.

DONE and ORDERED in Chambers, in Clearwater, Pinellas County, Florida this ___ day of November, 2024.

Electronically Conformed 11/20/2024
Honorable Patricia A. Muscarella
Patricia Muscarella
Circuit Civil Judge

Copies furnished to:

Parties served by email

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Counsel for Defendant, Mark Weinkrantz

Parties served by U.S. mail

Patrick Heinzen
1785 40th Ave. N.
St. Petersburg, FL 33714
Defendant

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,

Plaintiff,

vs. Case No.: 24-003939-CI

JULIE MARCUS, in her official capacity
as Pinellas County Supervisor of Elections,
et. al.,

Defendants.
_____/

ORDER GRANTING COURT'S MOTION TO STAY

THIS CAUSE came before the Court on November 12, 2024 upon the Court's Motion to Stay ("Motion") dated November 4, 2024, and the Court, having considered the Motion, the case file, the applicable law, the argument of counsel, and being otherwise fully advised in the premises, the Court hereby **FINDS** the following:

1. On August 23, 2024, Plaintiff filed a federal lawsuit in the Middle District of Florida, Case No.: 8:24-cv-02005-SDM-NHA ("the federal lawsuit").

2. On September 3, 2024, Plaintiff initiated the instant lawsuit. The federal lawsuit and the instant lawsuit contain many of the same defendants. Additionally, there is significant factual overlap between the two actions.

3. "Generally, when a state lawsuit is filed that involves the same nucleus of facts as a previously filed federal lawsuit, principles of comity and the desire to avoid inconsistent results require the stay of the subsequently filed state action until the prior filed federal action has been adjudicated." *Roche v. Cyrulnik*, 337 So. 3d 86, 88 (Fla. 3d DCA 2021) (citations omitted).

4. It is "an abuse of discretion to refuse to stay a subsequently filed state court action

in favor of a previously filed federal action which involves the same parties and the same or substantially similar issues." *OPKO Health, Inc. v. Lipsius*, 279 So. 3d 787, 791 (Fla. 3d DCA 2019) (citation omitted).

5. For this general rule of comity to apply, the causes of action asserted in the two cases need not be identical nor must the two actions have identical parties. *Roche*, 337 So. 3d at 88 (citations omitted).

6. The federal lawsuit and the instant lawsuit involve the same nucleus of facts, namely allegations of election fraud by the various Defendants as to the August 20, 2024 Democratic primary election for Florida's 13th Congressional District.

7. Counsel for Defendants stipulated to staying the instant litigation pending the outcome of the federal lawsuit assuming the following conditions were observed: 1) claims against Defendant, JENNIFER GRIFFITH would be transferred to Section 19 and joined with Plaintiff's prior lawsuit (See Order Granting Court's Ore Tenus Motion To Consolidate); 2) all Defendants who asserted an anti-SLAPP defense did not waive their right to an expedited hearing if such is necessary upon resolution of the federal lawsuit (see section 768.295(4), Fla. Stat. (2024)).

8. Although Plaintiff has objected to the issuance of a stay, the Court finds that the above-provided rule of comity applies and requires the Court to stay the instant action until the federal lawsuit has been adjudicated.

Accordingly, it is

ORDERED and ADJUDGED:

1. The Court's Motion is hereby **GRANTED.**

2. Plaintiff is required to file a copy of the final judgment for the federal lawsuit with this Court within **FIVE (5) DAYS** of the final judgment's date of entry.

3. The Court shall conduct a case management conference in the instant matter within **THIRTY (30) DAYS** of the entry of final judgment in the federal lawsuit to determine which, if any, of Plaintiff's claims in the instant lawsuit require adjudication by this Court. The Court shall hear any remaining anti-SLAPP defenses, if any, at said case management conference.

DONE and ORDERED in Chambers, in Clearwater, Pinellas County, Florida this ___ day of November, 2024.

Electronically Conformed 11/20/2024
Patricia Muscarella

Honorable Patricia A. Muscarella
Circuit Civil Judge

Copies furnished to:

Parties served by email

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Counsel for Defendant, Mark Weinkrantz

Parties served by U.S. mail

Patrick Heinzen
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St. Petersburg, FL 33714
Defendant

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,
Plaintiff,

v. Case No. 24-003939-CI

JULIE MARCUS, in her official capacity
as Pinellas County Supervisor of Elections, *et al*,
Defendants.
_____/

DEFENDANT JENNIFER GRIFFITH'S MOTION TO DISMISS AMENDED COMPLAINT

Defendant, JENNIFER GRIFFITH ("Griffith"), in her official capacity as Chair of the Pinellas County Democratic Executive Committee ("PCDEC"), hereby moves this Honorable Court to dismiss Plaintiff's Amended Complaint with Prejudice for lack of subject matter jurisdiction, failure to state a cause of action upon which relief may be granted, and pursuant to Fla. Stat. § 768.295 (Florida's "anti-SLAPP" statute), , and in support thereof states as follows:

I. INTRODUCTION

Griffith is the current Chair of the PCDEC and has served in that capacity since December 2022. She is included as a party to this lawsuit because Plaintiff alleges that she is "responsible for the oversight of Democratic Party in Pinellas County, including certain of the unlawful activities alleged" in the Amended Complaint (Amend. Compl. ¶ 5). To be very clear, this is an incorrect premise; PCDEC is a private, non-governmental organization that has no authority whatsoever to enforce laws or regulate elections. Rather, Plaintiff's primary motive for filing this lawsuit (which is the third lawsuit he filed against Griffith in a two-month period) is because PCDEC, a private organization which has freedom of speech and freedom of association rights, did not invite him to participate in a debate for the Democratic Party primary election (Amend. Compl. ¶¶ 12-13). Likewise, Defendant Marcus has nothing to do with PCDEC's events. None of the factual allegations besides those involving the debate (Amend. Compl. ¶¶ 12-17) have any connection to Griffith, or anything that may be in her control. Simply put, this

lawsuit is filed against Griffith solely as retaliation for her and PCDEC executing their constitutional rights and freedoms.

This Court should dismiss Plaintiff's Amended Complaint for lack of subject matter jurisdiction because the entirety of Plaintiff's Amended Complaint as it pertains to Griffith is premised upon her and PCDEC's exercise of their constitutional rights. The actions of PCDEC—which is recognized as a county-level political party under Florida law—and its internal governing procedures and right to associate with whom it desires, all of which are non-justiciable before this Court. However, even if this Court were to find that it has subject-matter jurisdiction over some or all counts of Plaintiff's Amended Complaint, this Court should still dismiss it as it fails to state a cause of action upon which relief may be granted and because it is a shotgun pleading.

Because this lawsuit aims to quiet the political speech of PCDEC and Griffith, Griffith requests that this Court deem this lawsuit to be a strategic lawsuit against public participation (SLAPP) that is prohibited under Florida's anti-SLAPP statute, Fla. Stat. § 768.295. Fla. Stat. § 768.295(3) states that "A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue." Plaintiff filed this lawsuit against Griffith because PCDEC and Griffith have exercised their constitutional right of free speech in connection with a public issue—namely the Democratic Primary for Florida's 13th Congressional District—in a way that has not been beneficial to Plaintiff's political campaign.

I. THE LEGAL STANDARD FOR A MOTION TO DISMISS—GENERALLY AND UNDER FLA. STAT. § 768.295

While a Motion to Dismiss generally requires a Court to simply accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant, the 2d DCA has held that a Motion to Dismiss based upon the anti-SLAPP statute requires the trial court to do more. *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 314 (Fla. 2d DCA 2019); *Davis v. Mishiyev*, 339 So. 3d 449, 453 (Fla. 2d DCA 2022).

Rather, in a Motion to Dismiss based upon the anti-SLAPP statute, the Defendant must demonstrate a *prima facie* case that the anti-SLAPP statute applies—in that the Plaintiff's suit was based on some activity that would qualify as an exercise of the Defendant's First Amendment rights in connection to issues of public importance. *Id*. Then, the burden of proof shifts to the Plaintiff to demonstrate that the Defendants' activity was actionable and that the claims are not primarily based upon the Defendants' exercise of their first amendment rights. *Davis*, 339 So. 3d, at 453. This procedure serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss. *Gundel*, 264 So. 3d, at 314.

Denial of a Motion to Dismiss on anti-SLAPP grounds is an appealable non-final order. Notably, in *Gundel v. AV Homes, Inc.*, the 2d DCA quashed a trial court order denying a Motion to Dismiss, For Judgment on the Pleadings, or For Summary Judgment because the allegations contained within the pertinent counterclaim were too vague to permit the trial court to determine whether the alleged conduct was protected free speech. *Id*. at 315.

A prevailing party to a Motion to Dismiss under Fla. Stat. § 768.295 is entitled to the award of their reasonable attorney's fees and costs. Griffith requests that this Court grant her entitlement to her reasonable attorney's fees and costs under Fla. Stat. 768.295.

II. THERE IS A *PRIMA FACIE* CASE THAT PLAINTIFF'S LAWSUIT APPEARS TO BE A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION.

Of the forty-eight (48) paragraphs of factual allegations made in the Amended Complaint, only Paragraphs 5, 12-17, and 20 pertain to Griffith in any way. Paragraph 5 merely alleges who Griffith is, and Paragraph 20 makes numerous conclusory legal allegations without any factual support. Paragraphs 12-17 are the **sole** factual allegations directed at Griffith, and all of those allegations pertain to the debate hosted by PCDEC that Plaintiff was not invited to.

The decision to not invite Plaintiff to participate in PCDEC's debate is an act of speech and a decision implicating the freedom of association. This decision was Griffith and PCDEC's exercise of their First Amendment rights in connection to an issue of public importance—the Democratic Primary in Florida's 13th Congressional District. There is no legal barrier against

political parties taking internal steps affecting their own process for the selection of candidates. *Tashjian v. Repub. Party*, 479 U.S. 208, 224 (1986). That includes a political party opting not to provide a platform to a particular candidate. Additionally, the United States Supreme Court has held that political parties making endorsements in primary elections is protected political speech that may not be restricted by state or federal law. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223-29 (1989). Certainly, this right would also extend to individual leaders of political parties.

Based on this clear showing that Defendants engaged in protected First Amendment speech, **Plaintiff now has the burden to demonstrate that the conduct of the Defendants was actionable.** Based on the allegations set forth in the Complaint, none of the alleged conduct of the Defendants is actionable. Therefore, this Court should dismiss Plaintiff's Complaint, find that it is a strategic lawsuit against public participation intended to have a chilling effect on the Defendants' ability to exercise their First Amendment rights, and grant Defendants' entitlement to their reasonable attorney's fees and costs pursuant to Fla. Stat. § 768.295.

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION

a. Plaintiff lacks standing to bring forth Counts I, III, IV, and VII

Count I—Fla. Stat. § 104.041

Count I cites a criminal statute that does not provide a private right of action by an individual against an alleged violator of the statute. Setting aside the lack of jurisdiction and standing to enforce criminal provisions of the Florida Election Code, Plaintiff does not allege any action by Griffith in the vain of "perpetrating or attempting to perpetrate or aid in the perpetration of any fraud in connection with any vote cast, to be cast, or attempted to be cast" as described by the statute. Fla. Stat. § 104.041 (2024). The sole allegation against Griffith is that she had some sort of supervisory duty, which is not established in fact or law and in fact does not exist. None of these allegations demonstrate a violation of section 104.041, Florida Statutes, even in a light most favorable to Plaintiff. Accordingly, Count II should be dismissed for failure to state a cause of action against Griffith.

Count III—Violation of 52 U.S.C. § 20511

Similar to Count I, Plaintiff attempts through a private civil action to have this Court impose criminal penalties upon Griffith. That is plainly not permissible.

Count IV—Civil Rights Violation under 42 U.S.C. § 1983

To bring a claim under 42 U.S.C. § 1983, a Plaintiff must have standing to do so. Standing requires the plaintiffs to allege enough facts to establish injury-in-fact, causation, and redressability. *Ladies Mem'l Ass'n v. City of Pensacola,* 34 F.4th 988, 992 (11th Cir. 2022). An injury in fact for standing purposes is a "legally protected interest" that is both "concrete and particularized" and "actual or imminent" (internal quotation marks and citations omitted)). *Id.* at 992-93.

Second, the Plaintiff must demonstrate that there is a "causal connection" between his injury and the conduct of which he complains—*i.e.*, the injury must be "fairly traceable" to the defendant's challenged actions and not the result of "the independent action of some third party not before the court." *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021), quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)*;* see also *Spokeo, Inc. v. Robins*, 578 U.S. 856 (2016).

Finally, the Plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (quotation marks omitted). A mere recitation that the Government is violating one's constitutional rights is not concrete enough to establish standing. *Ladies Mem'l Ass'n*, 34 F.4th at 993.

Plaintiff has failed to plead an injury-in-fact against Griffith. Plaintiff has no legally protected interest to participate in PCDEC events or to have PCDEC promote his candidacy. There is also no causal connection between Plaintiff not being invited to a forum hosted by PCDEC (or by any role Griffith purportedly played in “supervising” other candidates) and his election loss. Plaintiff complains of not being invited to attend an event with approximately 300-400 attendees as the reason he lost his Congressional election, when he received approximately 27,000 fewer votes than the first-place candidate in his primary election. Additionally, any role Griffith played in “supervising” candidates and their conduct was merely voluntary and of no legal significance.

Finally, by Plaintiff's own admission, it is not likely that any of the alleged events would have changed the outcome of Plaintiff's election. In fact, in a YouTube video posted by Plaintiff, he admits the following: "I lost. I was last place with four [present] uh so I'm pretty sure I didn't win irrespective of ballot you know fake ballots" and described both Defendant Whitney Fox and second-place finisher Sabrina Bousbar as "good candidates." "The Takedown of Anna Paulina Luna" Episode 5: "Tampa Girl" YouTube, https://www.youtube.com/watch?v=WS8EfbZbC80 (last visited Sep 14, 2024) at 1:45-2:02.

Count VII: "Voter Intimidation and Voter, Suppression, Civil Rights Violations" under Fla. Stat. § 104.0615, § 104.061, the federal Voting Rights Act of 1965, the Civil Rights Act of 1957, and Title 118, Section 594

While imprecisely pled, Fla. Stat. § 104.0615 and § 104.061 are both criminal statutes that do not provide for private rights of action. The same can be said for 18 U.S.C. § 594 (Title 118, Section 594). Additionally, "[A]n unsuccessful candidate attempting to challenge the election results does not have standing under the Voting Rights Act." *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989).

b. Any cognizable cause of action against Griffith and her decision to not invite Plaintiff to the debate is necessarily a non-justiciable matter of political party governance.

There is no legal barrier against political parties taking internal steps affecting their own process for the selection of candidates. *Tashjian v. Repub. Party*, 479 U.S. 208, 224 (1986). *Tashjian* and *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222-24 (1989) control.

In *Eu*, the U.S. Supreme Court struck down California's legal ban on political parties making endorsements in primary elections on the grounds that it was an unconstitutional restriction on free speech. Specifically, the U.S. Supreme Court found that restricting a political party's governing body from "stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought" is an unconstitutional restriction on speech because it "directly hampers the ability of a party to spread its message and voters seeking to inform themselves about the candidates and campaign issues." *Eu*, 489 U.S., at 223.

Eu further held that **political parties have the right to identify the people they wish to associate with,** and select a standard bearer who "best represents the party's ideologies and preferences." *Id.* at 224. This is due to political parties having the freedom of association under the First and Fourteenth Amendments to the United States Constitution. *Id.* at 223. This decision was resolute, with the Court going as far as saying that restrictions on speech are "particularly egregious where the State censors the political speech a political party shares with its members." *Id.* at 223-24. The debate which Plaintiff complains about was an event where a political party shared political speech with its members. It is non-justiciable to attempt to censor such speech through litigation.

Restricting political parties from this right "suffocates" them because it prevents parties from promoting candidates "'at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community'." *Id.* at 224, quoting *Tashjian v Republican Party of Connecticut,* 479 US 208, 216 (1986).

Even when taken as true, Plaintiff alleges that PCDEC found that Plaintiff did not pass their vetting process and accordingly denied Plaintiff a stage for his candidacy, while promoting other candidates. Based on clear legal precedent, Plaintiff was well within its constitutional rights to make that decision and promote any candidates it so desires.

Along these lines, in the recent case of *Donelon v. Pinellas Democratic Executive Committee*, Pinellas County Case No. 23-008089-CI, this Court dismissed the Plaintiff's Complaint, which concerned the elections process for PCDEC's Credentials Committee, on the grounds that based upon the authorities of *Repub. Party v. Davis*, 18 So. 3d 1112 (Fla. 3d DCA 2009) and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court lacked jurisdiction to hear an action regarding the internal operations of a political party such as PCDEC. PCDEC maintains that its candidate vetting process is a matter of internal operation that is non-justiciable by this Court.

IV. PLAINTIFF FAILS TO STATE A COGNIZABLE CAUSE OF ACTION AGAINST GRIFFITH

To state a cause of action, the Plaintiff must "set[] forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain… (2) **a short and plain statement of the ultimate facts showing that the pleader**

is entitled to relief…" Fla. R. Civ. P. 1.110 (b) (emphasis added). Florida is not a notice pleading jurisdiction and "it is not enough merely to advise the defendant of the theory of the action." See *Cunningham v. Fla. Dept. of Children & Families*, 782 So. 2d 913, 919 (Fla. 1st DCA 2001). Dismissal is appropriate when a plaintiff has failed to properly and separately plead each element of the cause of action. See *Kislak v. Kreedian*, 95 So. 2d 510 (Fla. 1957) (complaint must properly inform the Defendant of the specific cause against it).

The pleading requirements for fraud and conspiracy—which are involved in many of Plaintiff's causes of action—are heightened. "It is well established that '[t]he plaintiff must raise a prima facie case of fraud, rather than 'nibble at the edges of the concept' through speculation and supposition." *Tikhomirov v. Bank of N.Y. Mellon*, 223 So. 3d 1112, 1116) (Fla. 3d DCA 2017). Moreover, pursuant to Rule 1.120, Fla. R. Civ. P., "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit." Plaintiff's Complaint is based entirely on speculation and supposition and fails to meet the pleading threshold necessary to assert fraud.

The bare factual allegations that concern Griffith—who is the Chair of a non-governmental, private organization which has free speech rights and free association rights—which are in Paragraphs 12-17 of the Amended Complaint do not support **any** of Plaintiff's causes of action against Griffith. There is no factual allegation—other than a baseless allegation that Griffith somehow has "supervisory" authority—that Griffith played any role in the counting of votes.

Additionally, it does not appear as though Plaintiff has pled the essential elements for any of his causes of actions to the extent such causes of action are cognizable and have private rights of action. Defendant Griffith will address these for the counts that are cognizable private causes of action.

Count II—Conspiracy to Commit Election Fraud

In Count IV, Plaintiff alleges that the PCDEC, Florida Democratic Party, Sherosky, and Griffith, engaged in a civil conspiracy to destroy his political campaign. See Compl. ¶¶ 65-67. A claim for civil conspiracy requires Plaintiff to prove four elements: "To state a cause of action for civil conspiracy, a plaintiff must plead '(1) an agreement between two or more parties; (2) to do an

unlawful act or a lawful act by unlawful means; (3) the execution of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of said acts.' (citations omitted)." *Logan v. Morgan & Bockius LLP*, 350 So. 3d 404, 412 (Fla. 2d DCA 2022). A claim for civil conspiracy must contain clear, positive and specific allegations; general allegations of conspiracy are not sufficient. *Parisi v. De Kingston*, 314 So. 3d 656, 661 (Fla. 3d DCA 2021); *World Class Yachts, Inc. v. Murphy*, 731 So. 2d 798, 799 (Fla. 4th DCA 1999). The Complaint, as pled, fails on all four requirements.

i. There is not an agreement between two or more parties.

Based on the pleading, it is unclear what agreements were entered into between the PCDEC, Florida Democratic Party, Sherosky, and Griffith that are the subject of this count. There is no clear, positive and specific allegations of what these agreement(s) were. In *arguendo,* if the "vetting process" was the agreement, there is also no allegation that Defendant Sherosky (or the Florida Democratic Party) had any involvement in that process, that Defendant Griffith acted outside her official capacities as PCDEC Chair, or that members of the "PDEC candidate vetting committee" acted outside the scope of their official duties. Therefore, there is no second party to the "vetting process" insofar that it may be the agreement referenced by Plaintiff. Because there is no clear, positive, and specific allegation of an agreement between two or more parties, the count fails.

ii. There is no agreement to do an unlawful act or a lawful act by unlawful means occurred.

Additionally, there is no pleading sufficient to conclude that two or more parties agreed to do an unlawful act or a lawful act by unlawful means. None of the acts Griffith is alleged to have participated in constitute "election fraud"; the allegations concern Griffith and the PCDEC's conduct at a private, pre-election event where no voting occurred.

iii. It is unclear what the overt act in furtherance of the conspiracy was.

The Complaint does not contain clear, positive and specific allegations of what the overt act in furtherance of the conspiracy was.

iv. There is no adequate claim to damages.

Plaintiff has failed to adequately plead damages. Plaintiff's damages claims are wholly speculative. Plaintiff claims, without any support, that he has lost out on a Congressional salary of $175,000 and seeks over $1 million in damages. Plaintiff failed to plead any basis for this amount, and the damages Plaintiff claims – a speculative salary– are not reasonably ascertainable, thus the damages are not recoverable. See *Kennedy & Ely Ins., Inc. v. American Emp. Ins. Co.*, 179 So. 2d 248, 249 (Fla. 3d DCA 1965) (damages cannot be recovered if purely speculative); *Hogan v. Norfleet*, 113 So. 2d 437, 439 (Fla. 2d DCA 1959) ("Damages in a law action cannot be speculative or conjectural, but must be reasonably ascertainable.").

Based on the foregoing, Plaintiff has failed to effectively plead any of the requirements for a claim of civil conspiracy, and therefore, Count II of the Amended Complaint should be dismissed.

Count V: Computer Fraud and Abuse Act Violation (18 U.S.C. § 1030)

While 18 U.S.C § 1030 provides a private right of action if one of several acts are committed, there is no affirmative allegation that Griffith (or any of the other Defendants) accessed Plaintiff's computer—a necessary element. It is unclear who may have committed the alleged events in Paragraphs 39-42 of the Amended Complaint.

Count VI: Intentional Interference with Prospective Economic Advantage

In Florida, the legal claim of Intentional Interference with Prospective Economic Advantage (also known as "tortious interference with a business relationship" or "tortious interference with a prospective advantage") requires proving several elements. The claim is often raised when a third party intentionally disrupts a business relationship or opportunity. The elements a plaintiff must establish in Florida are:

1. **Existence of a Business Relationship**: The plaintiff must prove the existence of a business relationship with a third party that offers the probability of future economic benefit, even if the relationship is not formalized by a contract. However, this relationship

must be more than speculative, meaning it has to be a real, existing, or identifiable relationship.

2. **Defendant's Knowledge of the Relationship**: The defendant must have actual knowledge of the relationship between the plaintiff and the third party. It is not sufficient for the defendant to be merely aware of the possibility of a relationship.

3. **Intentional and Unjustified Interference by the Defendant**: The defendant must have intentionally acted to disrupt or interfere with the business relationship, and this interference must be unjustified. An unjustified interference usually means that the defendant had no legitimate reason or privilege to interfere with the relationship, such as competition in a free market.

4. **Damage to the Plaintiff as a Result of the Interference**: The plaintiff must demonstrate that they suffered actual damages or losses due to the defendant's interference. This could include lost profits, lost contracts, or other economic harm resulting directly from the disruption.

Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 814 (Fla. 1994). Damages may not be recovered on a speculative relationship. *Id.* at 815. There must also be specifically identifiable customers who were the subject of the alleged interference. See *Sarkis v. Pafford Oil*, 697 So. 2d 524, 526 (Fla. 1st DCA 1997) (affirming trial court's dismissal of complaint alleging tortious interference because "[t]he amended complaint d[id] not identify the customers who were the subject of the alleged interference."). The interference must also be "direct and intentional" and "without justification." *Lawler v. Eugene Wuesthoff Memorial Hosp. Ass'n*, 497 So. 2d 1261, 1263 (Fla. 5th DCA 1986) (holding that interference must be direct and intentional); see *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A*., 742 So. 2d 381 (Fla. 4th DCA 1991).

Plaintiff fails to plead the existence of a business relationship or that the Defendants' knew of any such relationship. No customers are specifically identifiable. Plaintiff's damages are entirely speculative. And, Griffith's conduct was fully justified; it was the exercise of her First and Fourteenth Amendment rights. Therefore, this Count also fails.

V. CONCLUSION

The *modus operandi* of this lawsuit and the other lawsuits that Plaintiff has filed against Ms. Griffith is to punish her and the PCDEC for exercising their First and Fourteenth Amendment rights by declining to provide Plaintiff's candidacy for Congress with a platform. The allegations made against Ms. Griffith in this Complaint are baseless, already the subject of other lawsuit, and any claim of conspiracy is without any factual support. Therefore, this Court should dismiss this lawsuit with prejudice and award Ms. Griffith and PCDEC entitlement to their reasonable attorney's fees and costs incurred in defending against this frivolous and retaliatory lawsuit that has no basis in fact and law.

WHEREFORE, Defendant, JENNIFER GRIFFITH, respectfully requests that this Court enter an Order Dismissing Plaintiff's Amended Complaint with prejudice, award Plaintiff her reasonable attorney's fees and costs, and grant Defendant any other relief this Court deems proper and just.

Dated: October 2, 2024

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
FBN 1019960

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served upon John William Liccione, Plaintiff *Pro Se*, via Florida E-Filing Portal email to jliccione@gmail.com, and Ryan D. Barack, Esquire, Michelle E. Nadeau, Esquire, Kirby Z. Kreider, Esquire, and James B. Lake, Esquire via Florida E-Filing Portal e-mail on this 2nd day of October, 2024.

/s/ George A.D. Thurlow

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

JOHN WILLIAM LICCIONE,
Plaintiff,
v. **Case No. 24-003939-CI**
JULIE MARCUS, et al.,
Defendants.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT JENNIFER GRIFFITH'S

MOTION TO DISMISS

AND

REQUEST FOR HEARING

Plaintiff John Liccione, pro se, submits this response in opposition to Defendant Jennifer Griffith's (Griffith) Motion to Dismiss the Plaintiff's First Amended Complaint (Amended Complaint). Griffith's motion is fundamentally flawed, relying on unsupported facts, allegations, mischaracterizations, and a misapplication of relevant legal standards. Contrary to Defendant's claims, Plaintiff has alleged sufficient facts to establish a plausible basis for each cause of action against Griffith, including claims of voter intimidation, campaign interference, mail ballot fraud, conspiracy, and the implementation of a sham candidate vetting process, hastily instituted just after Plaintiff announced his candidacy in the spring of 2023. Defendant's conduct, as described in the complaint, extends far beyond the scope of constitutionally protected rights to speech and association, instead involving unlawful acts aimed at interfering with Plaintiff's campaign and manipulating the electoral process. For these reasons, Defendant's

motion to dismiss should be denied in its entirety, allowing Plaintiff to proceed to discovery, present evidence, and litigate these significant issues.

1. Griffith's Sham Candidate Vetting Process

Defendant Griffith claims Plaintiff's exclusion from the debate and other party materials was due to a pre-existing "candidate vetting process" that he allegedly failed. Plaintiff asserts that if such a process exists, it must be applied equally to all candidates without discrimination based on sex, disability, or other unlawful criteria, and without corrupt or criminal motive or for criminal purposes. Defendant has provided no evidence that a vetting process existed before or after Plaintiff's candidacy was announced, nor that it was applied equally to all five candidates. Plaintiff alleges the process was selectively applied to exclude him, and only him, in violation of Democratic party policies, of their own values, and unlawfully.

Griffith does not argue that Plaintiff's political positions, values, or history conflict with Democratic Party values. Instead, she falsely and baldly asserted publicly that Plaintiff is a man of moral turpitude, without providing any basis for this claim. Plaintiff, has no criminal convictions and was found not guilty at trial in 2018 after being wrongfully accused and imprisoned as a PTSD-disabled male domestic violence survivor. He contends that Griffith's assertion is unsupported and defamatory, as Griffith was well aware during the alleged "vetting process" of Plaintiff's not-guilty-at-trial verdict.

Plaintiff alleges that no such vetting process existed until after he informed Griffith of his candidacy in the early spring of 2023. Plaintiff argues it was a sham, created to exclude him while giving the other four candidates unfettered access to party resources,

speaking engagements, and promotional opportunities, without subjecting them to the same scrutiny, while affording them the due-process opportunity to rebut negative background information.

No Pre-existing Vetting Process: The so-called vetting process conveniently appeared only after Plaintiff announced his candidacy, and Plaintiff alleges it was designed specifically to exclude him under the color of a Party policy that did not exist and had never before been applied to any Democratic candidate. Griffith has produced no records, documents, or minutes to substantiate the existence of this process before Plaintiff's candidacy was known, or even after. Plaintiff further alleges the process was applied only to him and not to the other candidates, demonstrating its discriminatory and pretextual nature.

A Broader Conspiracy: This sham vetting process is part of a broader conspiracy to interfere with Plaintiff's campaign and suppress his candidacy. Plaintiff's exclusion from the July 13th debate was not an isolated incident: It was part of a coordinated, 15-month effort by Griffith and her co-conspirators, which escalated well beyond the scope of first amendment protected activities. The Court must accept these well-pleaded allegations as true at the motion to dismiss stage (Conley v. Gibson, 355 U.S. 41 (1957)).

2. Griffith's Strawman Argument

Plaintiff acknowledges that the Democratic Party, as a private political organization, has the (non-absolute right) to adopt a candidate vetting process: as long as it is lawful and applied equally to all candidates irrespective sex, disability, race, age, and other categories of persons who are guaranteed protection from discrimination under law. It

is not an unfettered, "absolute right" any more than free speech and the right to bear arms are absolute rights. Defendant's claim that Plaintiff is arguing otherwise is a strawman argument that Plaintiff has not made. Plaintiff is not challenging the Party's right to create a lawful vetting process - equally applied – and with due process equally given to all candidates.

3. Mischaracterization of Constitutional Protections

Defendant Griffith argues that Plaintiff's claims infringe on her rights to freedom of speech and association when in fact, it was Plaintiff's free-speech rights that were violated by Griffith. Plaintiff has alleged that Defendant's actions involve wrongful acts beyond the protection of the First Amendment. The U.S. Supreme Court has held that certain forms of conduct, such as fraud, intimidation, and coercion, are not protected by the First Amendment (*Wisconsin v. Mitchell*, 508 U.S. 476 (1993)). In particular, the alleged acts of blocking access to Plaintiff's campaign event and physically obstructing Plaintiff's communication with voters, as well as the theft of his campaign sign, fall outside the scope of protected activities. In United States v. Alvarez, 567 U.S. 709 (2012), the court ruled that false statements are not categorically protected under the First Amendment in the context of the Stolen Valor Act. In Schenck v. United States, 249 U.S. 47 (1919) the court held that speech creating a clear and present danger is not protected by the First Amendment, particularly in the context of coercive speech or speech encouraging unlawful acts.

The Political Speech on Plaintiff's Campaign Sign: Plaintiff's campaign sign, which read, **"*John Liccione for Congress: Building Florida, Saving America*,"** and "***voteliccione.org***" is a clear form of political speech protected by the

First Amendment. Unless Griffith is prepared to argue that "building Florida and saving America" are anathema to Democratic Party values, there was nothing remotely objectionable on Plaintiff's campaign sign that warranted her harassment and sign snatching. The content of this message on the sign directly communicated Plaintiff's overarching political vision for Florida and America at large, making it a critical part of his campaign communication. Defendant Griffith's act of removing this specific sign—while not touching the signs of any of the four other candidates—demonstrates that it was the political message along with his name and campaign website address on the sign, and *only* his sign, that triggered her unlawful action. This selective removal and campaign interference indicates that Griffith's intent was to suppress Plaintiff's political speech, rather than an honest attempt to exercise her own right to free expression. Such conduct falls outside the scope of constitutionally protected activities and constitutes unlawful interference with Plaintiff's campaign speech and his attempts to lawfully interact with voters.

Moreover, 52 U.S.C. § 10307(b) directly applies to the allegations in this case. This federal statute prohibits any form of intimidation, threats, or coercion that interferes with a person's ability to vote or participate in election-related activities and the political process in general. Defendant's obstruction of the hallway at Plaintiff's after-debate event, preventing voters from engaging with Plaintiff's campaign, is a direct violation of this statute. These acts are designed to suppress electoral participation and restrict access to political information, constituting voter intimidation and coercion.

In addition, under the *Reed v. Town of Gilbert* (576 U.S. 155 (2015)) ruling, while the case specifically involved content-based restrictions on speech, it affirms that political

speech and access to political information are critical under the First Amendment. Defendant's actions in barring voters from engaging with Plaintiff, from seeing his campaign signs, and interfering with his ability to communicate clearly to voters, violate these fundamental protections.

4. Physical Voter Intimidation and Coercion

Plaintiff has provided specific factual allegations of physical voter intimidation and coercion, including:

- **Blocking the Hotel Ballroom Hallway:** Defendant Griffith and her agents on July 13, 2024 at the St Petersburg/Clearwater Mariott Hotel, conspired to physically block her debate attendees from accessing Plaintiff's after-debate event and coerced them into exiting the hotel down the back exit stairwell. This conduct, aimed at interfering with Plaintiff's right to campaign freely, and voters' right to engage with him as a candidate in person, violates both state and federal laws prohibiting voter intimidation and coercion. (*52 U.S.C. § 10307(b); Fla. Stat. § 104.0615*).
- **Campaign Sign Theft and Harassment at St. Petersburg College:** Defendant Griffith personally removed Plaintiff's campaign sign in front of witnesses, followed by a public confrontation in the hallway instigated by her, that was aimed at preventing Plaintiff from engaging with voters and from seeing his campaign sign message. Then she continued to interfere by bringing a college security guard to where he was campaigning, on false pretenses, in an effort to stop him from campaigning and to remove his sign. These actions constitute

both voter intimidation and interference with lawful campaigning activities, which go beyond protected political speech.

5. Pattern of Escalating Misconduct Well Beyond Protected Speech, Assembly

Defendant's argument that her actions are protected as part of her freedom of speech and association ignores the broader pattern of escalating misconduct over Plaintiff's entire 15-month campaign. Plaintiff has alleged a systematic, deliberate, and *escalating* effort to interfere with his campaign, involving acts of voter intimidation and coercion, conspiracy to commit fraud, and campaign interference. This pattern includes not only exclusion from debates. It escalated well beyond into physical acts of intimidation, and harassment, and voter intimidation, based on clear bias against Plaintiff, which clearly fall outside any constitutional protection (*Wisconsin v. Mitchell*, 508 U.S. at 484).

6. Allegations of Conspiracy to Commit Mail Ballot Election Fraud Bolstered by Evidence

Plaintiff has sufficiently pled a conspiracy involving Defendant and others to commit election fraud, including the fraudulent submission of mail ballot orders over the Internet, and the marking of blank ballots without voter consent. These allegations are bolstered by specific evidence, including a whistleblower communique corroborating the fraudulent activities and a massive, singular, one-day spike in mail ballot orders. On June 23, 2024, Florida's publicly available mail ballot order records reflected an massive and never again seen spike of over 219,000 mail ballot orders on a Sunday—a highly suspicious and abnormal occurrence without precedent, that further supports Plaintiff's claims of mail ballot fraud. Under both federal and state law, such conduct constitutes

fraud and violates election laws. (*52 U.S.C. § 20511; Fla. Stat. § 104.041*). Defendant's motion to dismiss these claims is without merit.

7. Misapplication of Anti-SLAPP Statute: No Prima Facia Case Established

Defendant has failed to meet the burden of demonstrating a prima facie case under Florida's anti-SLAPP statute, which is intended to protect legitimate free speech or petitioning activity in connection with public issues. Plaintiff's allegations, including voter intimidation, campaign interference, conspiracy, and election fraud, fall squarely outside the scope of protected speech and cannot be shielded by the anti-SLAPP statute (*Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019)).

For a defendant to succeed under anti-SLAPP protections on a motion to dismiss, they must first make a prima facie showing that Plaintiff's claims are solely based on Defendant's exercise of their right to free speech or petitioning activity in connection with a public issue. To meet the burden of a prima facie anti-SLAPP claim at this stage, the Defendant must establish that:

a. <u>The Plaintiff's Lawsuit Based Solely on the Defendant's Exercise of First Amendment Rights:</u> Defendant has not presented sufficient evidence or even argument to demonstrate that Plaintiff's claims arise solely from constitutionally protected activities. The allegations in the complaint—including conspiracy, voter intimidation, coercion, physical interference, fraudulent mail ballot mass production, and improper conduct at Plaintiff's campaigning venues—fall squarely outside the scope of protected free speech. These actions, as described by Plaintiff, represent criminal and civil misconduct, which cannot be shielded by anti-SLAPP protections. Further, no affidavits or documented evidence were provided by the

Defendant to substantiate that the activities in question were constitutionally protected expressions related to a public issue, as required to invoke anti-SLAPP.

b. "The Lawsuit is Without Merit and Filed to Suppress Free Speech:" The defendant must also prove that the plaintiff's claims lack merit and were brought primarily to intimidate or silence the defendant's speech and right to freely assemble in connection to a public issue. Defendant has not met this burden. Plaintiff argues that blocking the hotel hallway so Griffith's debate attendees could be physically herded down a back exit stairwell to prevent them from attending Plaintiff's after-debate party after her "exclusive' debate (sans Liccione) was over, is neither protected speech, nor protected assembly or association. It prevented individual voters, en masse, from *peaceably assembling with Plaintiff* at his just-down-the-hall campaign event. Griffith is accusing Plaintiff of that for which she is clearly guilty.

Plaintiff's complaint is based on numerous specific allegations of wrongful conduct—such as conspiring to fraudulently order and mark mail-in ballots, orchestrating physical barriers at campaign events, battery, and conspiracy to suppress lawful political participation—that are cognizable legal claims. These claims address specific, unlawful acts by the Defendant and her agents that directly harmed Plaintiff's campaign and cannot be reasonably construed as an attempt by Plaintiff to restrict legitimate free speech.

The Florida Second District Court of Appeal has clarified that a prima facia showing requires clear evidence that Plaintiff's claims are directly related to and primarily aimed

at constitutionally protected activities. Gundel v. AV Homes, Inc., 264 So. 3d 304, 314 (Fla. 2d DCA 2019) states that the defendant must first present sufficient factual evidence showing that the plaintiff's lawsuit is based on protected First Amendment activity (such as free speech in connection with a public issue) before the burden shifts to the plaintiff. In this case, Defendant has failed to provide such evidence, relying instead on conclusory statements without supporting documentation or sworn affidavits.

c. Improper Motive by Plaintiff: Defendant's anti-SLAPP claim also fails to establish that Plaintiff's motive was primarily to suppress free speech rather than to remedy further wrongful acts, that directly impacted his campaign and the election at large, *at scale*. Plaintiff's allegations pertain to tangible, unlawful actions taken by Defendant and her agents that resulted in real harm to Plaintiff's ability to run an effective campaign. Without providing any factual basis for Plaintiff's alleged improper motive, Defendant's claim remains unsupported.

The court in Davis v. Mishiyev, 339 So. 3d 449, 453 (Fla. 2d DCA 2022), reinforced that a prima facie case under anti-SLAPP requires more than assertions; it requires actual evidence showing that the plaintiff's claims are primarily based on an exercise of constitutionally protected rights such as free speech. Here, the defendant has provided no affidavits, documents, or any evidence demonstrating that Plaintiff's claims were aimed solely at suppressing lawful free speech or assembly, rather than addressing specific unlawful behavior. Davis v. Mishiyev reinforces that anti-SLAPP motions require evidence, not just assertions, and defendants must make a prima facie showing that the lawsuit targets protected speech or petitioning activity. The burden shifts to the

plaintiff only if the defendant provides such evidence. Conclusory statements or bare assertions by the defendant, without evidence and supporting affidavits, are insufficient to shift the burden under anti-SLAPP statutes.

8. The Supervisory Role of Defendant Griffith

Defendant Griffith's claim that she lacks supervisory power over party members is without merit. As Party Chair and the Democratic Party Boss in Pinellas county, Griffith exercises significant control over party operations and activities. Plaintiff has sufficiently alleged that her role as Chair involved directing the actions that interfered with Plaintiff's campaign, including voter suppression tactics and fraudulent mail ballot activities. Griffith cannot evade responsibility for the actions of party members under her leadership, let alone her own wrongful acts.

9. Pattern of Misconduct

When considered as a whole, the allegations in the complaint describe a coordinated and deliberate effort by Defendant and her co-conspirators to obstruct Plaintiff's campaign through unlawful means. Defendant's reliance on the anti-SLAPP statute and First Amendment protections ignores the broader context of misconduct aimed at manipulating the electoral process and suppressing lawful political participation. (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

10. Conclusion

Defendant Griffith's conduct, as alleged, goes far beyond constitutionally protected free speech and association rights. Plaintiff has presented substantial allegations of voter intimidation, conspiracy, mail ballot fraud, campaign interference, and the implementation of a sham candidate vetting process aimed at excluding Plaintiff, and

only Plaintiff. These allegations are legally sufficient to proceed to discovery. Griffith's allegations are unsupported by sworn affidavit and evidence. The burden of proof is on Griffith to prove that her candidate vetting process existed, that it wasn't adopted just after Plaintiff announced his candidacy to target him and only him, that it was applied equally, and that due process was equally afforded to all 5 candidates. Griffith has not produced any such admissible evidence. There is no sworn affidavit attached to her motion to dismiss (nor to her recently-served Motion to Sanction Plaintiff). For these reasons, the Court must deny Defendant's motion to dismiss and allow Plaintiff to proceed to discovery, and to present evidence in support of these serious claims.

WHEREFORE, Plaintiff respectfully requests that the Court deny Defendant Jennifer Griffith's Motion to Dismiss.

REQUEST FOR HEARING

Plaintiff requests a hearing on Defendant Griffith's this motion to dismiss.

Respectfully Submitted,

John W Liccione
6800 Gulfport Blvd S.
Ste 201-116
South Pasadena, FL 33707
443-698-8156
Jliccione@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this on the 16th day of October 2024, the foregoing document was filed with the Clerk of the Circuit Court by using the Florida Courts E-Filing Portal and simultaneously served through the E-Portal to GEORGE A.D. THURLOW, ESQ., Attorney for Defendant JENNIFER GRIFFITH, at gthurlow@rahdertlaw.com, tmccreary@rahdertlaw.com and service@rahdertlaw.com, RYAN D. BARACK, ESQ. and MICHELLE E. NADEAU, ESQ., Attorney for Defendant WHITNEY FOX, at rbarack@employeerights.com, JAMES B. LAKE, ESQ., Attorney for Defendant CATHY SALUSTRI LOPER, at jlake@tlolawfirm.com, and Defendant Mark Weinkrantz via postage prepaid first-class mail at 4738 Belden Circle, Palm Harbor, FL 34685.

Respectfully Submitted,

John W Liccione

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,
Plaintiff,

v. Case No. 24-003939-CI

JULIE MARCUS,
JENNIFER GRIFFITH,
WHITNEY FOX,
MARK WEINKRANTZ,
CATHY SALUSTRI LOPER,
PATRICK HEINZEN,
OTHER UNKNOWN CO-CONSPIRATORS,
Defendants.
_____/

DEFENDANT GRIFFITH'S MOTION FOR SANCTIONS

Defendant, JENNIFER GRIFFITH ("Griffith"), by and through her undersigned counsel, and pursuant to Fla. Stat. § 57.105 and Florida Rules of Civil Procedure 1.140 and 1.150, hereby move this Honorable Court for the entry of an order imposing sanctions against Plaintiff, JOHN WILLIAM LICCIONE, and in support thereof state as follows:

I. INTRODUCTION

This instant lawsuit is the third lawsuit that Plaintiff has filed against Griffith in a two-month period. None of these lawsuits have had any legal or factual merit, and have simply been retaliation by Plaintiff, who was a candidate in the Democratic Primary for Florida's 13th Congressional District, against those who did not support his candidacy and in two of these cases, the elections officials who administered the primary election which he lost in a landslide. Ms. Griffith is merely the Chair of a county-level political party; she has no role in administering elections, and as the Chair of a county-level political party, she and her political party have the right to decide whether or not to provide a platform to a particular candidate under the First Amendment to the United States Constitution. This Court should uphold Ms. Griffith's clear right to engage in political speech, and sanction the Plaintiff for filing numerous frivolous lawsuits that seek to interfere or punish Ms. Griffith for exercising her constitutional rights.

II. FACTUAL BACKGROUND

1. Plaintiff was a candidate in the Democratic Primary for Florida's 13th Congressional District in the August 20, 2024 election.
2. Defendant Griffith has been the Chair of the Pinellas County Democratic Party ("PCDEC") since December 2022. PCDEC is a county-level affiliate of the Florida Democratic Party ("FDP").
3. In spring 2023, PCDEC decided to enact a "vetting process" for all Democratic candidates to determine which candidates PCDEC would provide a platform for in terms of being featured on PCDEC's website and at events. This is a very common process for political parties to utilize, and in fact, PCDEC referenced policies and legal guidance from at least three other counties in crafting its policy.
4. In June 2023, Plaintiff was informed that he did not meet the standards of PCDEC's vetting process based upon his background check and behavior, and was asked to stay away from party events (a request which Plaintiff did not oblige to on multiple occasions).
5. As confirmation of PCDEC's observations during the vetting process, the *Tampa Bay Times* ran a story on September 18, 2023[1] titled "Anna Paulina Luna's first congressional challenger has checkered past" making reference to Plaintiff having faced "trespassing and assault charges." The story makes mention of Plaintiff being "initially deemed incompetent to stand trial and involuntarily hospitalized."
6. Since being informed of his failing the vetting process in June 2023, Plaintiff made numerous social media and blog posts that chastised PCDEC and Griffith.
7. After an incident that Plaintiff alleged occurred between him and an officer of PCDEC[2], and PCDEC exercising its right to association by declining to invite Plaintiff to a Congressional debate, Plaintiff filed a lawsuit against Griffith, PCDEC, the PCDEC Secretary, and the Florida Democratic Party on July 3, 2024 (Case No. 24-002994-CI, hereinafter "*Liccione v. PCDEC*").

[1] https://www.tampabay.com/news/florida-politics/2023/09/18/john-liccione-anna-paulina-luna-congress-district-13-pinellas-democrat/

[2] In spite of Plaintiff's allegation that this incident occurred, he was unable to produce any witness to the St. Petersburg Police Department to support the complaint he filed.

8. In both social media posts and in his Complaint in *Liccione v. PCDEC*, Plaintiff mentions that he has sought two restraining orders against Griffith. While Griffith was never served with court documents from these proceedings—presumably because the Court denied Plaintiff's petition which means the Respondent is never served and there is no publicly available online record—she does not contest Plaintiff's allegations that he attempted to file these two actions against her.
9. On August 12th, 2024, Griffith (along with PCDEC and PCDEC Secretary Michael Sherosky) filed a Motion to Dismiss in *Liccione v. Griffith* under Florida's anti-SLAPP statute (Fla. Stat. § 768.295) on the grounds that (1) the primary purpose of Plaintiff's lawsuit was to quiet the protected political speech of Griffith and PCDEC; (2) that Griffith and PCDEC have a well-defined legal right to express their opinions on the qualifications of candidates for political office, such as the Plaintiff; and (3) that the other issues raised in the lawsuit were not properly pled and are non-justiciable, especially as it pertains to non-state actors such as Griffith and PCDEC. This Motion to Dismiss is set for hearing before the Honorable Thomas Ramsberger on October 1, 2024, and Defendant Griffith will supplement this Motion with the Court's ruling on the issues presented in the Motion to Dismiss.
10. After having notice of this legal defense, Plaintiff opted to include Griffith as a party to a federal lawsuit he filed on August 23, 2024 (*Liccione v. Marcus, et al*, United States District Court for the Middle District of Florida Case No. 8:24-cv-2005-SDM-NHA, hereinafter the "Federal Lawsuit"). Defendants Marcus, Fox, and Weinkrantz are also parties to the Federal Lawsuit. The Federal Lawsuit raised similar factual allegations, and attempted to plead similar causes of action, to this instant lawsuit, and sought Emergency Injunctive Relief based upon the unverified statements of "Tampa Girl." This instant lawsuit also relies upon the unverified statements of "Tampa Girl."
11. On August 26, 2024, The Honorable United States District Judge Steven D. Merryday entered an Order denying injunctive relief in the Federal Lawsuit. A copy of that order is attached as **Exhibit 1** to this Motion.
12. In his Order, Judge Merryday characterized the Federal Lawsuit as being:

> A candidate in the Democrat congressional primary, John Liccione allegedly received from an anonymous person "using the codename 'Tampa Girl'" an online message that purported to reveal the details of a

> scheme to manipulate the August 20, 2024 primary election. Based solely on Tampa Girl's message, the plaintiff sues an array of officials and requests a temporary restraining order to "prevent the certification of the August 20, 2024.

13. Judge Merryday's Order further concluded that "Nothing in the [Federal Lawsuit] establishes either a likelihood of success on the merits (an anonymous, hearsay message from 'Tampa Girl' supplies no prospectively admissible fact supporting relief)."
14. After Plaintiff (1) was served a copy of a Motion to Dismiss in *Liccione v. PCDEC* setting forth a cogent argument that Griffith's conduct was protected First Amendment Activity and (2) a Federal Judge found that there is "no prospectively admissible fact," including the anonymous statement from "Tampa Girl" support Plaintiff obtaining injunctive relief, Plaintiff opted to file this lawsuit—which is substantially similar to the Federal Lawsuit and contains overlapping allegations to those in *Liccione v. PCDEC*—on September 3, 2024.

III. THE THRESHOLD FOR SANCTIONS

15. Fla. Stat. § 57.105 governs sanctions that may be imposed on a litigant for raising unsupported claims or defenses. The statute states:

> (1) Upon the court's initiative or motion of any party, the court **shall** award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on **any claim or defense** at **any time** during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
> (b) Would not be supported by the application of then-existing law to those material facts.

(emphasis added)

16. A party who does not have knowledge as to whether his or her claim or defense is supportable in fact and in law is required to make reasonable efforts to obtain such knowledge. See *Bowen v. Brewer*, 936 So. 2d 757 (Fla. 2d DCA 2006).
17. Attorney's fees awarded under Fla. Stat. § 57.105 are calculated from the time it was known or should have been known that the claim had no basis in fact or law. Thus, where

a claim was frivolous from the outset, the fee award should consider the defense of the claim from the beginning and not from the date of the filing of the motion for attorney's fees. See *Wood v. Haack*, 54 So. 3d 1082 (Fla. 4th DCA 2011).

18. Florida courts also have the ability to impose non-monetary sanctions.
19. The Florida Supreme Court has found it appropriate to sanction pro se litigants such as Plaintiff who "have abused the judicial process and otherwise misused [the] Court's limited judicial resources by filing frivolous, non-meritorious, or otherwise inappropriate filings" by prohibiting them from initiating further proceedings before the Court by prohibiting them from filing future pleadings, motions, or other requests unless such requests were signed by an attorney in good standing. *Lomax v. Taylor*, 143 So. 3d 920 (Fla. 2014).
20. The Second DCA, while recognizing the importance of access to the Courts, has found it appropriate to sanction pro se individuals by restricting their filing access in order to "prevent abusive filings" and stop "repetitious and frivolous pleadings." Harris *v. Gattie*, 263 So. 3d 829, 831 (Fla. 2d DCA 2019)
23. Sanctions may be imposed even when dismissal with prejudice is deemed too severe a remedy. *Rares v. Campbell*, 661 So. 2d 408 (Fla. 3d DCA 1995).

IV. EVEN AS A *PRO SE* LITIGANT, PLAINTIFF SHOULD HAVE BEEN AWARE THAT THIS INSTANT CASE HAD NO FACTUAL OR LEGAL MERIT BEFORE HE FILED IT.

24. Before filing any of his lawsuits, Plaintiff should have ascertained whether his theory was supported by any prospectively admissible fact or by law.
25. Even if Plaintiff did not bother ascertaining whether *Liccione v. PCDEC* was supported by fact or law before filing, he should have reviewed the law cited in the Motion to Dismiss which was served upon him well before he opted to file two other cases, including this instant action.
26. Even if Plaintiff did not bother ascertaining whether the Federal Lawsuit was supported by fact or law before filing, Plaintiff knew or should have known of Judge Merryday's Order in the Federal Lawsuit, which used exceptionally clear language to communicate that there were not material facts necessary to establish Plaintiff's claims, and that

anonymous statements from "Tampa Girl" were not admissible evidence. In spite of a federal judge making that finding, Plaintiff still opted to advance this cause based upon the same materials.

V. THE APPROPRIATE SANCTION AGAINST PLAINTIFF WOULD BE THE AWARD OF REASONABLE ATTORNEY'S FEES AND COSTS, AND A PROHIBITION AGAINST FILING FURTHER ACTIONS AGAINST DEFENDANT GRIFFITH.

27. Upon the clear language of Fla. Stat. § 57.105(1), this Court must award Griffith her reasonable attorney's fees and costs should it reach the conclusion that Plaintiff knew or should have known that his case (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts.
28. Plaintiff should have known that his case was not supported by the material facts necessary to support his claim or defense by August 26, 2024, the date Judge Merryday entered his order making that abundantly clear. And in reality, Plaintiff should have known that before filing either of his two previous lawsuits.
29. The monetary sanction of the award of attorney's fees in this case alone is insufficient. Based upon the clear fact that Plaintiff filed three cases against Griffith in a two month period, and that Plaintiff has represented that he filed two other cases against Griffith earlier this year, Plaintiff has apparently filed five (5) cases against Griffith this year, none of which have had any legitimacy.
30. It is also unknown whether a judgment for attorney's fees against Plaintiff, as a pro se litigant, would be collectable. That warrants serious consideration of alternative remedies.
31. The result of Plaintiff having filed five (5) lawsuits against Griffith—three (3) of which required hiring an attorney for a response—is that Griffith has had to expend time and money responding to these frivolous lawsuits.
32. In fact, it has come to the point where if Griffith hears a knock on the door early in the morning, Griffith and her family assume that it is Plaintiff attempting to serve her with yet another frivolous lawsuit.

33. This extreme abuse of process by Plaintiff as it pertains to Ms. Griffith deems a bar on filing pro se lawsuits—either in full or solely as it pertains to Ms. Griffith and the organizations she is affiliated with—as an appropriate and necessary sanction. Plaintiff is clearly not deterred by a Judge merely finding that his case is without merit; Plaintiff has shown that when that happens, he just goes to file another lawsuit.

VI. CONCLUSION

Plaintiff has clearly engaged in prohibited litigation tactics by filing an action against Griffith which knew was unsupported by fact and law, and in fact was informed of that by a Federal Judge in advance of filing. Pursuant to Fla. Stat. § 57.105(1), this Court should award Griffith her reasonable attorney's fees and costs incurred in defending this action. Given Plaintiff's pattern of filing frivolous actions pro se against Ms. Griffith, this Court should also impose a non-monetary sanction upon Plaintiff restricting his ability to file further pro se pleadings directed at Ms. Griffith.

Dated: September 16, 2024

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
FBN 1019960

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served upon John William Liccione via e-mail to JLiccione@gmail.com and by FedEx to 2826 54th Street South, Unit A, Gulfport, FL 33707 (Tracking # 778591286635) on this 16th day of September, 2024.

/s/ George A.D. Thurlow
George A.D. Thurlow, Esquire
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Attorneys for Defendant,
GRIFFITH

EXHIBIT 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN WILLIAM LICCIONE,

Plaintiff,

v. CASE NO. 8:24-cv-2005-SDM-NHA

JULIE MARCUS, et. al.,

Defendants.
_____/

ORDER

A candidate in the Democrat congressional primary, John Liccione allegedly received from an anonymous person "using the codename 'Tampa Girl'" an online message that purported to reveal the details of a scheme to manipulate the August 20, 2024 primary election. Based solely on Tampa Girl's message, the plaintiff sues an array of officials and requests a temporary restraining order to "prevent the certification of the August 20, 2024."

Under Local Rule 6.01(a), a motion for a temporary restraining order must include:

> (1) "Temporary Restraining Order" in the title;
> (2) specific facts — supported by a verified complaint, an affidavit, or other evidence — demonstrating an entitlement to relief;
> (3) a precise description of the conduct and the persons subject to restraint;
> (4) a precise and verified explanation of the amount and form of the required security;
> (5) a supporting legal memorandum; and
> (6) a proposed order.

Liccione's motion, imbedded in the complaint, fails to include a precise and verified explanation of the amount and form of the required security, fails to include a supporting legal memorandum, and fails to include a proposed order.

Also, under Local Rule 6.01(b) the legal memorandum must establish:

> (1) the likelihood that the movant ultimately will prevail on the merits of the claim,
> (2) the irreparable nature of the threatened injury and the reason that notice is impractical,
> (3) the harm that might result absent a restraining order, and
> (4) the nature and extent of any public interest affected.

Nothing in the complaint establishes either a likelihood of success on the merits (an anonymous, hearsay message from "Tampa Girl" supplies no prospectively admissible fact supporting relief) or the reason that notice is impractical. Liccione's facially insufficient motion for a temporary restraining order and all other pending motions (Docs. 3, 4, 5, 6) are **DENIED**.

ORDERED in Tampa, Florida, on August 26, 2024.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JOHN WILLIAM LICCIONE,
Plaintiff
v. Case No. 24-003939-CI
JULIE MARCUS,
JENNIFER GRIFFITH, et al,
Defendants.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT GRIFFITH'S

MOTION FOR SANCTIONS

INTRODUCTION

1. Plaintiff, **John William Liccione ("Liccione")**, pro se, submits this response in opposition to **Defendant Jennifer Griffith's ("Griffith") Motion for Sanctions**. The motion not only lacks merit but is also procedurally deficient. Defendant Griffith has failed to provide a sworn affidavit to authenticate the factual allegations on which her motion relies, violating established procedural requirements. As shown below, without such verification, Defendant's motion lacks credibility and should be denied in its entirety.

LEGAL STANDARD

2. Sanctions are an extraordinary remedy reserved for instances of clear bad faith or serious abuse of judicial process. **See Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991)**. Under **Florida Statutes § 57.105**, sanctions may only be imposed when a party or their attorney knowingly files a claim that lacks any factual or legal basis. Courts in Florida must exercise caution in imposing sanctions, as they are appropriate

only in cases involving indisputable and egregious conduct. **See Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)**.

3. **Thompson v. Citizens Nat'l Bank of Leesburg, 433 So. 2d 32 (Fla. 5th DCA 1983)**, is central to understanding the procedural requirements for any motion introducing new facts. In Thompson, the court emphasized that motions based on facts not present in the record must be supported by an affidavit or sworn testimony to authenticate those facts. A motion that lacks supporting affidavits or verified evidence is thus considered procedurally deficient. Defendant's failure to provide this fundamental evidentiary support in her motion is a critical procedural flaw that undermines her credibility and warrants denial of her motion for sanctions.

The E. Jean Carrol v. Donald Trump Defamation Cases are Analogous to Griffith's Pattern of Continuing and Escalating Misconduct

4. A relevant case precedent can be applied here from the E. Jean Carroll v. Donald Trump defamation cases in New York. After Carroll initially won $5 million in damages for defamation and sexual abuse, Trump refused to stop and escalated his defamatory remarks. As a result, Carroll filed another defamation lawsuit, leading to an additional $83.3 million jury award for both punitive and compensatory damages in January 2024. This illustrates how ongoing harmful behavior from a defendant, despite previous legal consequences, can justify successive lawsuits. Similarly, Plaintiff's continued legal actions were necessary to address Defendant Griffith's ongoing interference and misconduct after the first lawsuit was filed on July 3, 2024. Instead of ceasing her unlawful actions, Defendant Griffith intensified her interference with Plaintiff's campaign, including efforts to physically block voters from attending his campaign event on July 13, 2024, engaging in mass mail ballot fraud, and further acts of

defamation. These acts escalated leading up to the August 20, 2024, election necessitating additional legal action from Plaintiff.

ARGUMENT AND MEMORANDUM OF LAW

I. The Procedural Deficiencies in Defendant's Motion Are Fatal Under Thompson

4. Defendant Griffith's motion relies on numerous factual allegations that are not present in the case record and lack the necessary affidavit or sworn testimony for authentication. According to **Thompson v. Citizens Nat'l Bank of Leesburg**, the absence of a supporting affidavit makes the motion procedurally deficient and undermines its foundation. In Thompson, the court held that unsupported factual assertions, when presented without verification, lack the procedural integrity required to be considered by the court. Griffith's failure to adhere to this procedural standard is fatal to her motion and should result in its denial. **See Thompson, 433 So. 2d at 34**.

5. Defendant's motion introduces a range of allegations—regarding Plaintiff's supposed motives, campaign conduct," and purported interactions with PCDEC— plus her alleged "candidate vetting process that are speculative, unsupported by the case record, and unaccompanied by any sworn affidavit. Such a procedural omission directly contravenes the precedent established in Thompson, which underscores that factual claims not contained within the case record must be substantiated by an affidavit to establish credibility. Defendant's reliance on unverified claims reflects a failure to meet Florida's procedural standards, rendering her motion unfit for consideration.

II. Defendant's Motion Is Rife with Speculative Allegations Unsupported by Evidence

6. Griffith's motion mischaracterizes the nature and status of Plaintiff's active lawsuits, asserts unsupported claims regarding Plaintiff's campaign and personal conduct, and makes inaccurate statements about Plaintiff's prior legal history. Each of these points introduces extraneous facts not present in the case record, and Griffith has not provided the affidavit required to authenticate such assertions under Florida motion practice.

A. Misleading Claims on the Status of Plaintiff's Lawsuits

7. Defendant Griffith incorrectly asserts that Plaintiff has filed five frivolous lawsuits against her. This is factually misleading. In reality, two actual lawsuits which seek damages are currently active and await substantive hearings and pre-trial rulings, with the first case scheduled for a hearing on Defendant's Motion to Dismiss on **November 21, 2024**. The second case was referred by the U.S. District Court in Tampa to a magistrate judge and placed on a fast-track docket under the Federal IDEAS program. This procedural action underscores that the court does not view Plaintiff's tort and election fraud and interference claims as frivolous, and Griffith's portrayal of these cases is disingenuous and unsupported by evidence.

B. False Assertions Regarding Plaintiff's Campaign Conduct

8. Griffith alleges that Plaintiff engaged in disruptive behavior following the PCDEC candidate vetting process. Contrary to Defendant's claims, Plaintiff's interactions with PCDEC were respectful and professional, including a $1,200 donation to support a PCDEC event, which was later refunded. Plaintiff's "behavior," as Griffith inaccurately describes, was limited to attendance at standard PCDEC meetings and events where he introduced himself and disclosed his candidacy for public office. Defendant's

unsupported characterization of Plaintiff's alleged misconduct is unsubstantiated, and she has not provided any affidavit or sworn testimony to verify these claims.

9. Defendant also alleges that Plaintiff attended PCDEC events after being "asked to stay away," a claim that is patently false. Plaintiff received no such directive, either verbally or in writing, and was simply informed that he could not publicly speak at PCDEC events. During the July 13, 2024, Candidate Debate, Plaintiff did not attend PCDEC's debate but instead held his own campaign event at the same venue down the hall at the St. Petersburg/Clearwater Marriott hotel. Plaintiff alleges that Griffith obstructed attendees from his event in front of Pinellas Park police officers and the hotel events manager, by physically blocking the hallway, constituting voter intimidation and campaign interference. Griffith's account of these events is unsupported by any verified evidence or affidavit.

C. Mischaracterization of Plaintiff's Legal History

10. Griffith references an October 2023 Tampa Bay Times article concerning Plaintiff's "checkered past" to introduce irrelevant information about dismissed charges and expunged records. This attempt to invoke Plaintiff's past as a pretext for attacking his credibility is both misleading and without relevance to the current litigation. Defendant knew or should have known that Plaintiff was exonerated and had his records expunged, making her portrayal misleading. Griffith's characterization of Plaintiff as possessing a "checkered past" is defamatory and lacks any affidavit to substantiate these claims.

III. The Lack of a Supporting Affidavit Undermines the Motion's Credibility

11. Griffith's failure to include a sworn affidavit to support her factual claims violates the procedural requirements clearly set forth in **Thompson v. Citizens Nat'l Bank**

of Leesburg. The absence of verified evidence not only undermines the credibility of her motion but also denies the Court a reliable foundation upon which to evaluate the factual merits of her allegations. Without an affidavit, Griffith's motion is procedurally deficient, lacking the integrity required to substantiate her request for sanctions. **See H.L. Brown, III, P.A. v. George S. Koulianos, D.O., P.A., 930 So. 2d 808 (Fla. 2d DCA 2006)** (affidavits required to support motions based on evidence outside the case record).

IV. Plaintiff's Claims Are Not Frivolous or Filed in Bad Faith

12. Griffith has not demonstrated that Plaintiff's claims lack merit or were filed in bad faith. Plaintiff's allegations address substantive issues of voter intimidation, campaign interference, defamation, and election fraud, and earlier unlawful acts such as campaign sign snatching, battery and assault, each of which warrants judicial consideration. Courts have consistently held that multiple filings do not equate to an abuse of process if each filing addresses discreet and specific instances of misconduct. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (sanctions inappropriate where a claim has arguable support in law or fact).

V. Defendant's Attempt to Use Multiple Filings as Grounds for Sanctions Is Unfounded

13. Griffith's argument that Plaintiff's successive filings warrant sanctions is baseless. Each filing responds to a specific instance of campaign interference, voter obstruction, or defamation, election fraud, and underscores the ongoing nature of Griffith's cumulative interference in Plaintiff's campaign. Defendant has failed to meet the burden under **Florida Statutes § 57.105**, which requires a lack of both legal and factual support for the imposition of sanctions. Plaintiff's filings are substantiated by credible

claims requiring judicial review, and Griffith's attempt to portray these actions as frivolous is unsupported by any verified evidence.

CONCLUSION

14. Defendant Griffith's Motion for Sanctions is procedurally and substantively deficient, failing to comply with the evidentiary requirements established in **Thompson v. Citizens Nat'l Bank of Leesburg, 433 So. 2d 32 (Fla. 5th DCA 1983)**, which mandates that motions introducing extrinsic facts must be supported by a sworn affidavit or verified evidence. The absence of such an affidavit renders Griffith's motion procedurally flawed, undermining its credibility and admissibility.

15. Griffith's reliance on unsupported factual assertions also violates Florida's established standards for motion practice, as reinforced in **H.L. Brown, III, P.A. v. George S. Koulianos, D.O., P.A., 930 So. 2d 808 (Fla. 2d DCA 2006)**, which emphasizes that affidavits are essential for motions that present facts outside the record. Without verified evidence, Griffith's motion lacks the procedural integrity required for consideration.

16. Plaintiff's claims are not frivolous or made in bad faith; rather, they seek redress for substantial grievances involving voter intimidation, defamation, and campaign interference—legitimate issues warranting judicial consideration. As the U.S. Supreme Court explained in **Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990)**, sanctions are inappropriate when a claim has arguable support in law or fact, highlighting that Defendant's reliance on sanctions is premature and unfounded. Further, under **Florida Statutes § 57.105**, sanctions are an extreme measure

requiring clear evidence that both legal and factual support are absent, a burden Griffith has failed to meet.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Deny Defendant's Motion for Sanctions in its entirety;

B. Other relief as the court deems appropriate.

Respectfully submitted,

John W Liccione, Plaintiff
6800 Gulfport Blvd S, Ste 201-116
South Pasadena, FL 33707
443-698-8156
jliccione@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this on the 28st day of October 2024, the foregoing document was filed with the Clerk of the Circuit Court by using the Florida Courts E-Filing Portal and simultaneously served through the E-Portal to GEORGE A.D. THURLOW, ESQ., Attorney for Defendant JENNIFER GRIFFITH, JAMES B. LAKE, ESQ., Attorney for Defendant CATHY SALUSTRI LOPER, and via postage pre-paid 1st class mail to: Defendant Patrick Heinzen at 4200 54th Ave S #1382, St. Petersburg, FL 33711, and Defendant Mark Weinkrantz at 4738 Belden Circle, Palm Harbor, FL 34685.

John W. Liccione

Eu v. San Francisco County Democratic Cent. Comm.

Supreme Court of the United States
December 5, 1988, Argued ; February 22, 1989, Decided
No. 87-1269

Reporter

489 U.S. 214 *; 109 S. Ct. 1013 **; 103 L. Ed. 2d 271 ***; 1989 U.S. LEXIS 1042 ****; 57 U.S.L.W. 4251

EU, SECRETARY OF STATE OF CALIFORNIA, et al. v. SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE et al.

Prior History: [****1] APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: 826 F. 2d 814, affirmed.

Core Terms

election, endorsements, political party, ban, candidates, central committee, chair, parties, governing body, voters, compelling state interest, regulation, restrictions, provisions, residents, campaign, northern, prevents, burdens, leaders, rights, freedom of association, associational rights, internal affairs, term of office, factionalism, composition, limits, rotate

Case Summary

Procedural Posture

Defendant state officials challenged the decision of the United States Court of Appeals for the Ninth Circuit, which granted summary judgment to plaintiff political parties on their claims that California state election laws that prohibited the political parties from endorsing candidates and regulated their internal affairs violated their free speech and free association rights under the United States Constitution.

Overview

California had a complex set of laws that governed political parties in the state, including a ban on the political parties' ability to endorse primary candidates and regulations on their internal affairs. The political parties filed suit against the state officials to block the enforcement of these laws. The district court granted summary judgment to the political parties, which the circuit court affirmed. On further appeal, the Court affirmed. The Court held that the ban on primary endorsements violated

the free speech and free association rights of the political parties because it directly hampered the ability of the political parties to spread its message without advancing a compelling state interest. The Court held that the regulations over the internal affairs of the political parties violated the political parties' free association rights because it directly affected who would represent the parties.

Outcome

The Court affirmed the decision of the court of appeals, which had declared California's ban on primary endorsements by the political parties and regulation of the internal affairs of the political parties unconstitutional.

LexisNexis® Headnotes

Constitutional Law > Congressional Duties & Powers > Elections > Time, Place & Manner Restrictions

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > General Overview

HN1[] **Elections, Time, Place & Manner Restrictions**

A State's broad power to regulate the time, place, and manner of elections does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. To assess the constitutionality of a state election law, the courts first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

Constitutional Law > Bill of

Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

HN2[] **Freedom of Speech, Political Speech**

Debate on the qualifications of candidates is integral to the operation of the system of government established by our Constitution. Indeed, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. Free discussion about candidates for public office is no less critical before a primary than before a general election. In both instances, the election campaign is a means of disseminating ideas as well as attaining political office.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

HN3[] **Freedom of Speech, Political Speech**

A highly paternalistic approach limiting what people may hear is generally suspect, but it is particularly egregious where the State censors the political speech a political party shares with its members.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN4[] **Fundamental Freedoms, Freedom of Association**

It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. 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 identify the people who constitute the association and to select a standard bearer who best represents the party's ideologies and preferences.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN5[] **Freedom of Speech, Political Speech**

Maintaining a stable political system is, unquestionably, a compelling state interest.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

HN6[] **Freedom of Speech, Political Speech**

Certainly the State has a legitimate interest in fostering an informed electorate. However, a State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. While a State may regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption, there is no evidence that California's ban on party primary endorsements serves that purpose.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

HN7[] **Fundamental Freedoms, Freedom of Association**

A political party's determination of the structure which best allows it to pursue its political goals, is protected by the Constitution. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

HN8[] **Fundamental Freedoms, Freedom of Association**

A State indisputably has a compelling interest in preserving the integrity of its election process. Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. For example, a State may impose certain eligibility requirements for voters in the general election even though they limit parties' ability to garner support and members. A State may impose restrictions that promote the integrity of primary elections.

Lawyers' Edition Display

Decision

California law banning endorsement of primary candidates by parties' governing bodies held to violate parties' speech and association rights under Federal Constitution's First Amendment.

Summary

Provisions of the California Elections Code (1) forbade the official governing bodies of political parties from endorsing candidates in party primaries, (2) restricted the organization and composition of such official governing bodies, (3) limited the term of office for a party's state central committee chair, and (4) required that the chair rotate between residents of northern and southern California. Various county central committees of the Democratic and Republican parties, and other groups and individuals active in partisan politics in California, brought an action in the United States District Court for the Northern District of California against state officials responsible for enforcing the Code. The plaintiffs contended that the provisions in question deprived political parties and their members of the rights of free speech and free association guaranteed by the Federal Constitution's First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the United States Court of Appeals affirmed (792 F2d 802). On appeal, the United States Supreme Court vacated and remanded (479 US 1024, 93 L Ed 2d 820, 107 S Ct 864) for further consideration in light of its decision in Tashjian v Republican Party of Connecticut (1986) 479 US 208, 93 L Ed 2d 514, 107 S Ct 544. After supplemental briefing, the Court of Appeals concluded that its previous decision was supported by the Tashjian decision, supra, and accordingly reinstated its judgment affirming the District Court's decision (826 F2d 814).

On appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Brennan, White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy, JJ., it was held that (1) the provision concerning endorsement of primary candidates (a) infringed upon the free speech rights of parties and their members, because it directly hampered the ability of a party to spread its message and hamstrung voters seeking to inform themselves about the candidates and the campaign issues, (b) infringed upon political parties' freedom of association, because the provision prevented parties from promoting candidates at the crucial juncture at which the appeal to common principles may be translated into concerted action and, hence, to political power in the community, and (c) could

not be justified as advancing the state's compelling interests in maintaining a stable political system, protecting primary voters from confusion and undue influence, or preserving party stability; and (2) the provisions regulating the parties' internal affairs (a) burdened the freedom of association of political parties and their members, because such provisions limited a party's discretion in how to organize itself, conduct its affairs, and select its leaders, and (b) could not be justified as serving compelling state interests in preserving the integrity of the election process, insuring the democratic management of a party's internal affairs, or preventing regional friction.

Stevens, J., concurring, joined the court's opinion, but expressed the view that such phrases as "compelling state interest" were too convenient and result-oriented to be helpful for constitutional analysis.

Rehnquist, Ch. J., did not participate.

Headnotes

CONSTITUTIONAL LAW §940.5 > freedom of speech and association -- party endorsement of primary candidates -- > Headnote:

LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]***LEdHN[1G]***[] [1G]***LEdHN[1H]***[] [1H]***LEdHN[1I]***[] [1I]***LEdHN[1J]***[] [1J]

A state elections code provision that forbids the official governing bodies of political parties from endorsing candidates in party primaries violates the free speech rights, guaranteed by the Federal Constitution's First and Fourteenth Amendments, of political parties and their members, because the provision, which affects speech that is at the core of the electoral process and of the First Amendment freedoms, directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues; such a provision infringes upon political parties' freedom of association protected by the First and Fourteenth Amendments, because the provision prevents parties from promoting candidates at the crucial juncture at which the appeal to common principles may be translated into concerted action and, hence, to political power in the community; such a provision may not be justified as advancing the state's compelling interests in maintaining a stable political system and protecting primary voters from confusion and undue influence, where the state does not

adequately explain how the provision advances those interests; nor may the provision be justified as serving a compelling state interest in party stability, since preserving party unity during a primary is not a compelling state interest.

CONSTITUTIONAL LAW §940.5 > freedom of association -- regulation of party's internal structure -- > Headnote:

LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]***LEdHN[2D]***[] [2D]***LEdHN[2F]***[] [2F]

State statutory provisions that (1) restrict the organization and composition of the official governing bodies of political parties, (2) limit the term of office for a party's state central committee chair, and (3) require that the chair rotate between residents of northern and southern parts of the state burden the freedom of association, guaranteed by the Federal Constitution's First and Fourteenth Amendments, of political parties and their members, because such provisions limit a party's discretion in how to organize itself, conduct its affairs, and select its leaders; such provisions cannot be justified as serving a compelling state interest in preserving the integrity of the election process, where the state does not show that the provisions are necessary to insure the order and fairness of elections; such provisions cannot be justified as serving a compelling state interest in the democratic management of a party's internal affairs, where state intervention is not necessary to prevent the derogation of the civil rights of party adherents, because the state has no interest in protecting the integrity of the party against the party itself; the provisions regulating the party chair cannot be justified as preventing regional friction, because a state cannot substitute its judgment for that of a party as to the desirability of a particular internal party structure.

CONSTITUTIONAL LAW §940.5 > First Amendment -- validity of state regulations -- > Headnote:

LEdHN[3][] [3]

A state's broad power to regulate the time, place, and manner of elections does not extinguish the state's responsibility to observe the limits established by the rights of the state's citizens under the Federal Constitution's First Amendment; to assess the constitutionality of a state election law, a

court first examines whether the law burdens rights protected by the First and Fourteenth Amendments; if the challenged law burdens the rights of political parties and their members, the law can survive constitutional scrutiny only if the state shows that the law advances a compelling state interest and is narrowly tailored to serve that interest.

CONSTITUTIONAL LAW §940.5 > freedom of speech -- election campaigns -- primaries -- > Headnote:

LEdHN[4][] [4]

The Federal Constitution's First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office; for First Amendment purposes, free discussion about candidates for public office is no less critical before a primary than before a general election, since in both instances, the election campaign is a means of disseminating ideas as well as attaining political office.

CONSTITUTIONAL LAW §933 > First Amendment -- censorship -- political speech -- > Headnote:

LEdHN[5][] [5]

A state's highly paternalistic approach limiting what people may hear is generally suspect under the Federal Constitution's First Amendment, but it is particularly egregious where the state censors the political speech that a political party shares with its members.

CONSTITUTIONAL LAW §940.5 > freedom of association -- political parties -- > Headnote:

LEdHN[6][] [6]

Partisan political organizations enjoy freedom of association protected by the Federal Constitution's First and Fourteenth Amendments; such 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 identify the people who constitute the association and to select a standard bearer who best represents the party's ideologies and preferences.

CONSTITUTIONAL LAW §940.5 > right of

association -- > Headnote:

LEdHN[7][] [7]

Imposing limitations on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is a restraint on the federal constitutional right of association.

CONSTITUTIONAL LAW §940.5 > free speech and association -- political stability -- informed electorate -- > Headnote:

LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]

For purposes of the rule that a state's burden on the rights to free speech and free association can survive constitutional scrutiny only if a compelling governmental interest is served, maintaining a stable political system is a compelling state interest, and a state has a legitimate interest in fostering an informed electorate.

ELECTIONS §2 > flow of political information -- > Headnote:

LEdHN[9][] [9]

A state may properly regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption.

APPEAL §1331.5 > what reviewable -- > Headnote:

LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

On appeal from a United States Court of Appeals decision that affirmed a United States District Court judgment holding that a state's election code provisions violated the free speech and associational rights of political parties, the United States Supreme Court will not disturb the District Court's ruling that the central committees of various political parties had authorization and capacity to bring and maintain the litigation, where the Court of Appeals did not disturb this ruling.

CONSTITUTIONAL LAW §940.5 > freedom of association -- political parties -- > Headnote:

LEdHN[11][] [11]

A political party's determination of the structure which best allows it to pursue its political goals is

protected by the Federal Constitution; freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders.

CONSTITUTIONAL LAW §940.5 > associational rights -- integrity of election process -- regulation of parties -- > Headnote:

LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]

For purposes of the federal constitutional requirement that laws burdening the associational rights of political parties and their members serve a compelling state interest, a state has a compelling interest in preserving the integrity of its election process; toward that end, a state may properly enact laws that interfere with a political party's internal affairs when necessary to insure that elections are fair and honest; for example, a state may properly impose certain eligibility requirements for voters in the general election, even though they limit the ability of political parties to garner support and members, where such requirements are necessary to insure that elections are fair and honest; however, a state cannot justify regulating a party's internal affairs without showing that such regulation is necessary to insure an election that is orderly and fair.

APPEAL §1331.5 > what reviewable -- > Headnote:

LEdHN[13A][] [13A]***LEdHN[13B]***[] [13B]

On appeal from a United States Court of Appeals decision holding that a state's election code provisions, purportedly designed to curb friction within political parties, violate the parties' free speech and associational rights, the United States Supreme Court need not address the contention that the challenged laws weaken rather than strengthen parties, where the Supreme Court finds that the state has no compelling interest in curbing intraparty friction as long as the electoral process remains fair and orderly.

Syllabus

Section 11702 of the California Elections Code (Code) forbids the official governing bodies of political parties to endorse or oppose candidates in primary elections, while § 29430 makes it a misdemeanor for any candidate in a primary to claim official party endorsement. Other Code sections dictate the organization and composition of

parties' governing bodies, limit the term of office for a party's state central committee chair, and require that the chair rotate between residents of northern and southern California. Various party governing bodies, members of such bodies, and other politically active groups and individuals brought suit in the District Court, claiming, *inter alia*, that these Code provisions deprived parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the Court of Appeals affirmed.

Held: The challenged California election laws are invalid, since they burden the [****2] First Amendment rights of political parties and their members without serving a compelling state interest. Pp. 222-233.

(a) The ban on primary endorsements in §§ 11702 and 29430 violates the First and Fourteenth Amendments. By preventing a party's governing body from stating whether a candidate adheres to the party's tenets or whether party officials believe that the candidate is qualified for the position sought, the ban directly hampers the party's ability to spread its message and hamstrings voters seeking to inform themselves about the candidates and issues, and thereby burdens the core right to free political speech of the party and its members. The ban also infringes a party's protected freedom of association rights to identify the people who constitute the association and to select a standard-bearer who best represents the party's ideology and preferences, by preventing the party from promoting candidates at the crucial primary election juncture. Moreover, the ban does not serve a compelling governmental interest. The State has not adequately explained how the ban advances its claimed interest in a stable political system or what makes California so peculiar that it [****3] is virtually the only State to determine that such a ban is necessary. The explanation that the State's compelling interest in stable government embraces a similar interest in party stability is untenable, since a State may enact laws to prevent disruption of political parties from without but not from within. The claim that a party that issues primary endorsements risks intraparty friction which may endanger its general election prospects is insufficient, since the goal of protecting the party against itself would not justify a State's substituting its judgment for that of the party. The State's claim that the ban is necessary to protect primary voters from confusion and undue influence must be

viewed with skepticism, since the ban restricts the flow of information to the citizenry without any evidence of the existence of fraud or corruption that would justify such a restriction. Pp. 222-229.

(b) The restrictions on the organization and composition of the official governing bodies of political parties, the limits on the term of office for state central committee chairs, and the requirement that such chairs rotate between residents of northern and southern California cannot be [****4] upheld. These laws directly burden the associational rights of a party and its members by limiting the party's discretion in how to organize itself, conduct its affairs, and select its leaders. Moreover, the laws do not serve a compelling state interest. A State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure that elections are orderly, fair, and honest, and California has made no such showing. The State's claim that it has a compelling interest in the democratic management of internal party affairs is without merit, since this is not a case where intervention is necessary to prevent the derogation of party adherents' civil rights, and since the State has no interest in protecting the party's integrity against the party itself. Nor are the restrictions justified by the State's claim that limiting the term of the state central committee chair and requiring that the chair rotate between northern and southern California help to prevent regional friction from reaching a critical mass, since a State cannot substitute its judgment for that of the party as to the desirability of a particular party structure. Pp. 229-233. [****5]

Counsel: Geoffrey L. Graybill, Jr., Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were John K. Van de Kamp, Attorney General, Richard D. Martland, Chief Assistant Attorney General, and N. Eugene Hill, Assistant Attorney General.

James J. Brosnahan argued the cause for appellees. With him on the brief was Cedric C. Chao. *

Judges: Marshall, J., delivered the opinion of the Court, in which all other Members joined, except Rehnquist, C. J., who took no part in the consideration or decision of the case. Stevens, J., filed a concurring opinion, post, p. 233.

Opinion by: MARSHALL

Opinion

* *Stuart R. Blatt* filed a brief for the Libertarian National Committee as *amicus curiae*.

[*216] [***277] [**1016] JUSTICE **MARSHALL** delivered the opinion of the Court.

LEdHN[1A][⬆] [1A] ***LEdHN[2A]***[⬆] [2A]The California Elections Code prohibits the official governing bodies of political parties from endorsing candidates in party primaries. It also dictates the organization and composition of those bodies, limits [***278] the term of office of a party chair, and requires that the chair rotate between residents of northern and southern California. The Court of Appeals for the Ninth Circuit held that these provisions [****6] violate the free speech and associational rights of political parties and their members guaranteed by the First and Fourteenth Amendments. 826 F. 2d 814 (1987). We noted probable jurisdiction, 485 U.S. 1004 (1988), and now affirm.

I

A

The State of California heavily regulates its political parties. Although the laws vary in extent and detail from party to party, certain requirements apply to all "ballot-qualified" parties. [1] [****7] The California Elections Code (Code) provides that the "official governing bodies" for such a party are its "state convention," "state central committee," and "county central committees," Cal. Elec. Code Ann. § 11702 (West [*217] 1977), and that these bodies are responsible for conducting the party's campaigns. [2] At the same time, the Code provides [**1017] that the official governing bodies "shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." *Ibid.* It is a misdemeanor for any primary candidate, or a person on her behalf, to claim that she is the officially endorsed candidate of the party. § 29430.

Although the official governing bodies of political parties are barred from issuing endorsements, other groups are not. Political clubs affiliated with a party, labor organizations, political action

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[1] A "ballot-qualified" party is eligible to participate in any primary election because: (a) during the last gubernatorial election one of its candidates for state-wide office received two percent of the vote; (b) one percent of the State's voters are registered with the party; or (c) a petition establishing the party has been filed by ten percent of the State's voters. Cal. Elec. Code Ann. § 6430 (West 1977).

In the interest of simplicity, we use the terms "ballot-qualified party" and "political party" interchangeably.

[2] The Code requires the state central committee of each party to conduct campaigns for the party, employ campaign directors, and develop whatever campaign organizations serve the best interests of the party. Cal. Elec. Code Ann. § 8776 (West Supp. 1989) (Democratic Party); § 9276 (Republican Party); § 9688 (American Independent Party); § 9819 (Peace and Freedom Party). The county central committees, in turn, "have charge of the party campaign under general direction of the state central committee." § 8940 (Democratic Party); § 9440 (Republican Party); § 9740 (American Independent Party); § 9850 (Peace and Freedom Party). In addition, they "perform such other duties and services for th[e] political party as seem to be for the benefit of the party." § 8942 (Democratic Party); § 9443 (Republican Party); § 9742 (American Independent Party); § 9852 (Peace and Freedom Party).

committees, other [****8] politically active associations, and newspapers frequently endorse primary candidates. [3] With the official party organizations silenced by the ban, it has been possible for a candidate with views antithetical to [***279] those of her party nevertheless to win its primary. [4]

[****9] [*218] In addition to restricting the primary activities of the official governing bodies of political parties, California also regulates their internal affairs. Separate statutory provisions dictate the size and composition of the state central committees; [5] [****10] set forth rules governing the selection and removal of committee members; [6] fix the maximum term of office for the chair of the state central committee; [7] require that the chair rotate between residents of northern and southern California; [8] specify the time and place of committee meetings; [9] [****11] and [*219] limit [**1018] the dues parties may impose on members. [10] Violations of these provisions are criminal offenses punishable by fine and imprisonment.

B

Various county central committees of the Democratic and Republican Parties, the state central committee of the Libertarian Party, members of various state and county central

[3] For example, while voters cannot learn what the Democratic state and county central committees think of candidates, they may be flooded with endorsements from disparate groups across the State such as the Berkeley Democratic Club, the Muleskinners Democratic Club, and the District 8 Democratic Club. Addendum to Motion to Affirm or to Dismiss 39a para. 7 (Addendum) (declaration of Mary King, chair of the Alameda County Democratic Central Committee); Addendum 48 para. 7 (declaration of Linda Post, chair of San Francisco County Democratic Central Committee).

[4] In 1980, for example, Tom Metzger won the Democratic Party's nomination for United States House of Representative from the San Diego area, although he was a Grand Dragon of the Ku Klux Klan and held views antithetical to those of the Democratic Party. Addendum 15a para. 2 (declaration of Edmond Costantini, member of the Executive Board of the Democratic state central committee).

[5] For example, the Code dictates the precise mix of elected officials, party nominees, and party activists who are members of the state central committees of the Republican and Democratic Parties as well as who may nominate the various committee members. Cal. Elec. Code Ann. §§ 8660, 8661, 8663 (West 1977 and Supp. 1989) (Democratic Party); §§ 9160-9164 (Republican Party). Other parties are similarly regulated. See § 9640 (American Independent Party); §§ 9762, 9765 (Peace and Freedom Party).

[6] §§ 8663-8667, 8669 (Democratic Party); §§ 9161-9164, 9168, 9170 (Republican Party); §§ 9641-9644, 9648-9650 (West 1977) (American Independent Party); §§ 9790-9794 (West 1977 and Supp. 1989) (Peace and Freedom Party).

[7] The Code limits the term of office of the chair of the state central committee to two years and prohibits successive terms. See § 8774 (West Supp. 1989) (Democratic Party); § 9274 (West 1977) (Republican Party); § 9685 (American Independent Party); § 9816 (West 1977 and Supp. 1989) (Peace and Freedom Party).

[8] § 8774 (West Supp. 1989) (Democratic state central committee); § 9274 (West 1977) (Republican state central committee); § 9816 (West 1977 and Supp. 1989) (Peace and Freedom state central committee).

[9] §§ 8710, 8711 (West Supp. 1989) (Democratic state central committee); §§ 8920, 8921 (West 1977 and Supp. 1989) (Democratic county central committee); § 9210 (West Supp. 1989) (Republican state central committee); §§ 9420-9421 (West 1977 and Supp. 1989) (Republican county central committee); §§ 9730-9732 (American Independent county central committee); § 9800 (West 1977) (Peace and Freedom state central committee); §§ 9830, 9840-9842 (Peace and Freedom county central committee).

[10] §§ 8775, 8945 (West 1977 and Supp. 1989) (Democratic Party); § 9275 (Republican Party); §§ 9687, 9745 (West 1977) (American Independent Party); §§ 9818, 9855 (Peace and Freedom Party).

committees, and other groups and individuals active in partisan politics in California brought this action in federal court against state officials responsible for enforcing the Code (State or California). [11] They contended that the ban on primary endorsements and the restrictions on internal party governance deprive political parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments of the [***280] United States Constitution. [12] The first count of the complaint challenged the ban on endorsements in partisan primary elections; the second count challenged the ban on endorsements in nonpartisan school, county, and municipal elections; and the third count challenged the [****12] provisions that prescribe the composition of state central committees, the term of office and eligibility criteria for state central committee chairs, the time and place of state and county central committee meetings, and the dues county committee members must pay.

[*220] The plaintiffs moved for summary judgment, in support of which they filed 28 declarations from the chairs of each plaintiff central committee, prominent political scientists, and elected officials from California and other States. The State moved to dismiss and filed a cross-motion [****13] for summary judgment supported by one declaration from a former state senator.

The District Court granted summary judgment for the plaintiffs on the first count, ruling that the ban on primary endorsements in §§ 11702 and 29430 violated the First Amendment as applied to the States through the Fourteenth Amendment. The court stayed all proceedings on the second count under the abstention doctrine of *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). [13] [****14] On the third count, the court ruled that the laws prescribing the composition of state central committees, limiting the committee chairs' terms of office, and designating that the chair rotate between residents of northern and southern

[11] The plaintiffs sued March Fong Eu, Secretary of State of California; John K. Van de Kamp, Attorney General of California; Arlo Smith, District Attorney of San Francisco County; and Leo Himmelsbach, District Attorney of Santa Clara County.

[12] The plaintiffs also asserted that the statutes violated the Equal Protection Clause of the Fourteenth Amendment. Because the District Court held that the statutes violate the First Amendment, it did not reach this claim.

[13] An appeal was then pending in the California Supreme Court presenting a First Amendment challenge to a ban on endorsements by political parties of candidates in nonpartisan school, county, and municipal elections. The California Supreme Court ultimately decided that the Code did not prohibit such endorsements and so did not reach the First Amendment question. *Unger* v. *Superior Court*, 37 Cal. 3d 612, 692 P. 2d 238 (1984). A ban on party endorsements in nonpartisan elections subsequently was enacted by ballot initiative. A Federal District Court has ruled that this ban violates the First and Fourteenth Amendments. *Geary* v. *Renne*, 708 F. Supp. 278 (ND Cal.), stayed, 856 F. 2d 1456 (CA9 1988).

California violate the First Amendment. [14] The court denied summary judgment [**1019] with respect to the statutory provisions establishing [*221] the time and place of committee meetings and the amount of dues. Civ. No. C-83-5599 MHP (ND Cal., May 3, 1984).

The Court of Appeals for the Ninth Circuit affirmed. 792 F. 2d 802 (1986). This Court vacated that decision, 479 U.S. 1024 (1987), and remanded for further consideration in light of *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986).

After supplemental briefing, the Court of Appeals again affirmed. 826 F. 2d 814 (1987). The court first rejected the State's arguments based [***281] on nonjusticiability, lack of standing, Eleventh Amendment immunity, and *Pullman* abstention. 826 F. 2d, at 821-825. [****15] Turning to the merits, the court characterized the prohibition on primary endorsements as an "outright ban" on political speech. *Id.*, at 833. "Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information." *Id.*, at 835. The court rejected the State's argument that the ban served a compelling state interest in preventing internal party dissension and factionalism: "The government simply has no legitimate interest in protecting political parties from disruptions of their own making." *Id.*, at 834. The court noted, moreover, that the State had not shown that banning primary endorsements protects parties from factionalism. *Ibid.* The court concluded that the ban was not necessary to protect voters from confusion, stating, "California's ban on preprimary endorsements is a form of paternalism that is inconsistent with the First Amendment." *Id.*, at 836.

The Court of Appeals [****16] also found that California's regulation of internal party affairs "burdens the parties' right to govern themselves as they think best." *Id.*, at 827. This interference with the parties' and their members' First Amendment rights was not justified by a compelling state interest, for a State has a legitimate interest "in orderly elections, [*222] not orderly parties." *Id.*, at 831. In any event, the court noted, the State had failed to submit "'a shred of evidence,'" *id.*, at 833

[14] The District Court invalidated the following Code sections: Cal. Elec. Code §§ 8660, 8661, 8663-8667, 8669 (West 1977 and Supp. 1989) (Democratic state central committee); §§ 9160, 9160.5, 9161, 9161.5, 9162-9164 (Republican state central committee); § 9274 (West 1977) (Republican state central committee chair); and § 9816 (West 1977 and Supp. 1989) (Peace and Freedom state central committee chair). In addition, it held that § 29102 (West 1977) was unconstitutional as applied.

(quoting Civ. No. C-83-5599 (ND Cal., May 3, 1984)), that the regulations of party internal affairs helped minimize party factionalism. Accordingly, the court held that the challenged provisions were unconstitutional under the First and Fourteenth Amendments.

II

LEdHN[3][⬆] [3]***HN1***[⬆] A State's broad power to regulate the time, place, and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian* v. *Republican Party of Connecticut*, 479 U.S., at 217.To assess the constitutionality of a state election [****17] law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. *Id.*, at 214; *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983). If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, *Tashjian, supra*, at 217, 222; *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979); *American Party of Texas* v. *White*, 415 U.S. 767, 780, and n. 11 (1974); *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968), and is narrowly tailored to serve that interest, *Illinois Bd. of Elections, supra*, at 185; *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972).

[***282] [**1020] A

LEdHN[1B][⬆] [1B] ***LEdHN[4]***[⬆] [4]We first consider California's prohibition on primary endorsements by the official governing bodies of political [****18] parties. California concedes that its ban implicates the First Amendment, Tr. of Oral Arg. 17, but contends that the burden is "miniscule." *Id.*, at 7. We disagree. The ban directly affects speech which "is at the core of our electoral [*223] process and of the First Amendment freedoms." *Williams* v. *Rhodes, supra*, at 32. We have recognized repeatedly that ***HN2***[⬆] "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) *(per curiam);* see also *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 455, 467 (1980); *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office. *Monitor Patriot Co.* v. *Roy*,

401 U.S. 265, 272 (1971); see also *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). [****19] Free discussion about candidates for public office is no less critical before a primary than before a general election. Cf. *Storer* v. *Brown*, 415 U.S. 724, 735 (1974); *Smith* v. *Allwright*, 321 U.S. 649, 666 (1944); *United States* v. *Classic*, 313 U.S. 299, 314 (1941). In both instances, the "election campaign is a means of disseminating ideas as well as attaining political office." *Illinois Bd. of Elections, supra*, at 186.

LEdHN[1C][] [1C]***LEdHN[5]***[] [5]California's ban on primary endorsements, however, prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues. See *Tashjian, supra*, at 220-222; *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of California*, 475 U.S. 1, 8 (1986); *Brown* v. *Hartlage*, 456 U.S. 45, 60 (1982); [****20] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791-792 (1978). ***HN3***[] A "highly paternalistic approach" limiting what people may hear is generally suspect, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 [*224] (1976); see also *First National Bank of Boston, supra*, at 790-792, but it is particularly egregious where the State censors the political speech a political party shares with its members. See *Roberts* v. *United States Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

LEdHN[1D][] [1D]***LEdHN[6]***[] [6]Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association. ***HN4***[] It is [***283] well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. *Tashjian, supra*, at 214; see also *Elrod* v. *Burns*, 427 U.S. 347, 357 (1976) (plurality opinion). Freedom of association means not only that an individual [****21] voter has the right to associate with the political party of her choice, *Tashjian, supra*, at 214 (quoting *Kusper, supra*, at 57), but also that a political party has a right to "'identify the people who constitute the association,'" *Tashjian, supra*, at 214 (quoting *Democratic Party* [**1021] *of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 122

(1981)); cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460-462 (1958), and to select a "standard bearer who best represents the party's ideologies and preferences." *Ripon Society, Inc.* v. *National Republican Party*, 173 U. S. App. D. C. 350, 384, 525 F. 2d 567, 601 (1975) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933 (1976).

LEdHN[1E][] [1E]***LEdHN[7]***[] [7]Depriving a political party of the power to endorse suffocates this right. The endorsement ban prevents parties from promoting candidates "at the crucial juncture at which the appeal to common principles may be translated into concerted action, [****22] and hence to political power in the community." *Tashjian, supra*, at 216. Even though individual members of the state central committees and county central committees are free to issue endorsements, imposing limitations [*225] "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U.S. 290, 296 (1981).

LEdHN[1F][] [1F]***LEdHN[8A]***[] [8A]Because the ban burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest. [15] [****24] The [*226] State offers two: stable government [***284] and

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[15] California contends that it need not show that its endorsement ban serves a compelling state interest because the political parties have "consented" to it. In support of this claim, California observes that the legislators who could repeal the ban belong to political parties, that the bylaws of some parties prohibit primary endorsements, and that parties continue to participate in state-run primaries.

This argument is fatally flawed in several respects. We have never held that a political party's consent will cure a statute that otherwise violates the First Amendment. Even aside from this fundamental defect, California's consent argument is contradicted by the simple fact that the official governing bodies of various political parties have joined this lawsuit. In addition, the Democratic and Libertarian Parties moved to issue endorsements following the Court of Appeals' invalidation of the endorsement ban.

There are other flaws in the State's argument. Simply because a legislator belongs to a political party does not make her at all times a representative of party interests. In supporting the endorsement ban, an individual legislator may be acting on her understanding of the public good or her interest in reelection. The independence of legislators from their parties is illustrated by the California Legislature's frequent refusal to amend the election laws in accordance with the wishes of political parties. See, *e. g.*, Addendum 12a-13a paras. 7-9 (declaration of Bert Coffey, chair of the Democratic state central committee). Moreover, the State's argument ignores those parties with negligible, if any, representation in the legislature.

That the bylaws of some parties prohibit party primary endorsements also does not prove consent. These parties may have chosen to reflect state election law in their bylaws, rather than permit or require conduct prohibited by law. Nor does the fact that parties continue to participate in the state-run primary process indicate that they favor each regulation imposed upon that process. A decision to participate in state-run primaries more likely reflects a party's determination that ballot participation is more advantageous than the alternatives, that is, supporting independent candidates or conducting write-in campaigns. See *Storer* v. *Brown*, 415 U.S. 724, 745 (1974); *Anderson* v. *Celebrezze*, 460 U.S. 780, 799, n. 26 (1983).

Finally, the State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights.

protecting voters from confusion and undue influence. [16] ***HN5***[] Maintaining [**1022] a stable political system is, unquestionably, a compelling state interest. See *Storer* v. *Brown*, 415 U.S., at 736. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest. There is no [****23] showing, for example, that California's political system is any more stable now than it was in 1963, when the legislature enacted the ban. Nor does the State explain what makes the California system so peculiar that it is virtually the only State that has determined that such a ban is necessary. [17]

[16] The State also claims that the ban on primary endorsements serves a compelling state interest in "'confining each voter to a single nominating act.'" *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 225, n. 13 (1986) (quoting *Anderson, supra*, at 802, n. 29). This argument is meritless. It fails to distinguish between a nominating act -- the vote cast at the primary election -- and speech that may influence that act. The logic of the State's argument not only would support a ban on endorsements by every organization and individual, but also would justify a total ban on all discussion of a candidate's qualifications and political positions. Such a blanket prohibition cannot coexist with the constitutional protection of political speech.

The State's claim that the endorsement ban is necessary to serve any compelling state interest is called into question by its argument before the District Court and the Court of Appeals that this action is not justiciable because the State has never enforced the challenged election laws. 826 F. 2d 814, 821 (1987).

[17] New Jersey also bans primary endorsements by political parties. N. J. Stat. Ann. § 19:34-52 (West 1964); see Weisburd, Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods, 57 S. Cal. L. Rev. 213, 271-272, n. 343 (1984). Florida's statutory ban on primary endorsements by political parties was held to violate the First Amendment. See *Abrams* v. *Reno*, 452 F. Supp. 1166, 1171-1172 (SD Fla. 1978), aff'd, 649 F. 2d 342 (CA5 1981), cert. denied, 455 U.S. 1016 (1982). Several States provide formal procedures for party primary endorsements. See, *e. g.*, Conn. Gen. Stat. § 9-390 (1967 and Supp. 1988); R. I. Gen. Laws § 17-12-4 (1988); see also Advisory Commission on Intergovernmental Relations, The Transformation in American Politics: Implications for Federalism 148 (

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[*227] ***LEdHN[1G]***[] [1G]The only explanation the State offers is that its compelling interest in stable government embraces a similar interest in party stability. Brief for Appellants 47. The State relies heavily on *Storer* v. *Brown, supra*, where we stated that because "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," 415 U.S., at 736, States may regulate elections to ensure that "some sort of order, rather than chaos . . . [***285] accompan[ies] the democratic processes," *id.*, at 730. Our decision in *Storer*, however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign. To the contrary, *Storer* recognized that "contending forces within the party employ the primary campaign and the primary election to finally settle their differences." *Id.*, at 735. A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them. *Ibid.; American Party of Texas* v. *White*, 415 U.S., at 781. [****26] *Tashjian*

recognizes precisely this distinction. In that case, we noted that a State may enact laws to "prevent the disruption of the political parties from without" but not, as in this case, laws "to prevent the parties from taking internal steps affecting their own process for the selection of candidates." 479 U.S., at 224.

It is no answer to argue, as does the State, that a party that issues primary endorsements risks intraparty friction which may endanger the party's general election prospects. Presumably a party will be motivated by self-interest and not engage in acts or speech that run counter to its political success. However, even if a ban on endorsements saves a political party from pursuing self-destructive acts, that would [*228] not justify a State substituting its judgment for that of the party. See *ibid.*; *Democratic Party of United States*, 450 U.S., at 124. Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.

LEdHN[1H][⬆] [1H]***LEdHN[8B]***[⬆] [8B]***LEdHN[9]***[⬆] [9]***LEdHN[10A]***[⬆] [10A]The State's second justification for the ban on party endorsements and statements of opposition is that it [****27] is necessary to protect primary voters from confusion and undue influence. ***HN6***[⬆] Certainly the State [**1023] has a legitimate interest in fostering an informed electorate. *Tashjian, supra*, at 220; *Anderson* v. *Celebrezze*, 460 U.S., at 796; *American Party of Texas* v. *White, supra*, at 782, n. 14; *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972); *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971). However, "'[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.'" *Tashjian, supra*, at 221 (quoting *Anderson* v. *Celebrezze, supra*, at 798). [18] While a State may regulate [***286] the [*229] flow of information between political associations and their members when necessary to prevent fraud and corruption, see

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[18] It is doubtful that the silencing of official party committees, alone among the various groups interested in the outcome of a primary election, is the key to protecting voters from confusion. Indeed, the growing number of endorsements by political organizations using the labels "Democratic" or "Republican" has likely misled voters into believing that the official governing bodies were supporting the candidates.

The State makes no showing, moreover, that voters are unduly influenced by party endorsements. There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union. In States where parties are permitted to issue primary endorsements, voters may consider the parties' views on the candidates but still exercise independent judgment when casting their vote. For example, in the 1982 New York Democratic gubernatorial contest, Mario Cuomo won the primary over Edward Koch, who had been endorsed by the party. That year gubernatorial candidates endorsed by their parties also lost the primary election to nonendorsed candidates in Massachusetts and Minnesota. Even where the party-endorsed candidate wins the primary, one study has concluded that the party endorsement has little, if any effect, on the way voters cast their vote. App. 97-98 paras. 10, 14-17 (declaration of Malcolm E. Jewell, Professor of Political Science, University of Kentucky).

Buckley v. *Valeo*, 424 U.S., at 26-27; *Jenness* v. *Fortson, supra*, at 442, [****28] there is no evidence that California's ban on party primary endorsements serves that purpose. [19]

[redacted] ***LEdHN[10B]***[↑] [10B]

LEdHN[1I][↑] [1I]Because the ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest, we hold that §§ 11702 and 29430 violate the [****30] First and Fourteenth Amendments.

B

LEdHN[2B][↑] [2B]***LEdHN[11]***[↑] [11]We turn next to California's restrictions on the organization and composition of official governing bodies, the limits on the term of office for state central committee chair, and the requirement that the chair rotate between residents of northern and southern California. These laws directly implicate the associational rights of political parties and their members. As we noted in *Tashjian*, ***HN7***[↑] a political party's "determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution." 479 U.S., at 224. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. See *Democratic Party of United States, supra* (State cannot dictate process of selecting state delegates to Democratic National [**1024] Convention); [*230] *Cousins* v. *Wigoda*, 419 U.S. 477 (1975) (State cannot dictate who may sit as state delegates to Democratic National Convention); cf. *Tashjian, supra*, at 235-236 (Scalia, J., dissenting) [****31] ("The ability of the members of [a political p]arty to select their own candidate . . . unquestionably implicates an associational freedom").

LEdHN[2C][↑] [2C]The laws at issue burden these rights. By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best. [20] And by specifying who [***287] shall be the members of the parties' official governing

[19] The State suggested at oral argument that the endorsement ban prevents fraud by barring party officials from misrepresenting that they speak for the party. To the extent that the State suggests that only the primary election results can constitute a party endorsement, Tr. of Oral Arg. 8-9, it confuses an endorsement from the official governing bodies that may influence election results with the results themselves. To the extent that the State is claiming that the appellees are not authorized to represent the official party governing bodies and their members, the State simply is reasserting its standing claim, which the District Court rejected. Civ. No. C-83-5599 (ND Cal., June 1, 1984) ("[T]he plaintiff central committees . . . have authorization and capacity to bring and maintain this litigation"). The Court of Appeals did not disturb this ruling, 826 F. 2d, at 822, n. 17; nor do we.

[20] For example, the Libertarian Party was forced to abandon its region-based organization in favor of the statutorily mandated county-based system.

bodies, California interferes with the parties' choice of leaders. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from [****32] the southern part of the State.

Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. Indeed, the associational rights at stake are much stronger than those we credited in *Tashjian*. There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to [*231] associate with nonparty members, but only with one another in freely choosing their party leaders. [21]

[****33] ***LEdHN[2D]***[↑] [2D]***LEdHN[12A]***[↑] [12A]Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest. ***HN8***[↑] A State indisputably has a compelling interest in preserving the integrity of its election process. *Rosario* v. *Rockefeller*, 410 U.S. 752, 761 (1973). Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Storer* v. *Brown*, 415 U.S., at 730. For example, a State may impose certain eligibility requirements for voters in the general election even though they limit parties' ability to garner support and members. See, *e. g., Dunn* v. *Blumstein*, 405 U.S., at 343-344 (residence requirement); *Oregon* v. *Mitchell*, 400 U.S. 112, 118 (1970) (age minimum); *Kramer* v. *Union Free School Dist. No. 15*, 395 U.S. 621, 625 (1969) (citizenship requirement). We have also recognized that a State may impose restrictions that promote the integrity of primary elections. See,

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[21] By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message.

[****34] *e. g., American Party of Texas* v. *White*, 415 U.S., at 779-780 (requirement that major political parties nominate candidates through a primary and that minor parties nominate candidates through conventions); *id.*, at 785-786 (limitation on voters' participation to one primary and bar on voters both voting in a party primary and signing a petition supporting an independent candidate); *Rosario* v. *Rockefeller, supra* (waiting periods before voters may change party registration and participate [**1025] in another party's primary); *Bullock* v. *Carter*, 405 U.S., at 145 [***288] (reasonable filing fees as a condition of placement on the ballot). None of these restrictions, however, involved direct regulation of [*232] a party's leaders. [22] Rather, the infringement on the associational rights of the parties and their members was the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections.

[****35] In the instant case, the State has not shown that its regulation of internal party governance is necessary to the integrity of the electoral process. Instead, it contends that the challenged laws serve a compelling "interest in the 'democratic management of the political party's internal affairs.'" Brief for Appellants 43 (quoting 415 U.S., at 781, n. 15). This, however, is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents. Cf. *Smith* v. *Allwright*, 321 U.S. 649 (1944). Moreover, as we have observed, the State has no interest in "protect[ing] the integrity of the Party against the Party itself." *Tashjian*, 479 U.S., at 224. The State further claims that limiting the term of the state central committee chair and requiring that the chair rotate between residents of northern and southern California helps "prevent regional friction from reaching a 'critical mass.'" Brief for Appellants 48. However, [*233] a State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any [****36] more than it can tell a party that its

[22] *Marchioro* v. *Chaney*, 442 U.S. 191 (1979), is not to the contrary. There we upheld a Washington statute mandating that political parties create a state central committee, to which the Democratic Party, not the State, had assigned significant responsibilities in administering the party, raising and distributing funds to candidates, conducting campaigns, and setting party policy. *Id.*, at 198-199. The statute only required that the state central committee perform certain limited functions such as filling vacancies on the party ticket, nominating Presidential electors and delegates to national conventions, and calling state-wide conventions. The party members did not claim that these *statutory* requirements imposed impermissible burdens on the party or themselves, so we had no occasion to consider whether the challenged law burdened the party's First Amendment rights, and if so, whether the law served a compelling state interest. *Id.*, at 197, n. 12. Here, in contrast, it is state law, not a political party's charter, that places the state central committees at a party's helm and, in particular, assigns the statutorily mandated committee responsibility for conducting the party's campaigns.

proposed communication to party members is unwise. *Tashjian, supra*, at 224.

LEdHN[12B][⬆] [12B]***LEdHN[13A]***[⬆] [13A]In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair. Because California has made no such showing here, the challenged laws cannot be upheld.[23]

LEdHN[13B][⬆] [13B]

III

LEdHN[1J][⬆] [1J] ***LEdHN[2F]***[⬆] [2F]For the reasons stated above, we hold that the challenged California election laws burden the [***289] First Amendment rights of political parties and their members without serving a compelling state interest. Accordingly, the judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE REHNQUIST took no part in the consideration or decision of this case.

[23] Because we find that curbing intraparty friction is not a compelling state interest as long as the electoral process remains fair and orderly, we need not address the appellees' contention that the challenged laws weaken rather than strengthen parties.

Concur by: [****37] STEVENS

Concur

JUSTICE **STEVENS**, concurring.

Today the Court relies on its opinion in *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183-185 (1979) -- and, in particular, on a portion of that opinion that I did not join -- for its formulation of [**1026] the governing standards in election cases. In that case Justice Blackmun explained his acceptance of the Court's approach in words that precisely express my views about this case. He wrote:

> "Although I join the Court's opinion . . ., I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what [*234] seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' See, *ante*, at 184, 185, and 186. I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all.

> And, for me, 'least drastic means' is a slippery slope [****38] and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.
>
> "I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion." *Id.*, at 188-189.

With those same reservations I join the Court's opinion today.

References

25 Am Jur 2d, Elections 117-119, 123-125, 129-131, 150-152

USCS, Constitution, Amendments 1, 14

US L Ed Digest, Constitutional Law 940.5; Elections 2

Index to Annotations, Elections and Voting; Freedom of Association; Freedom of Speech and Press; [****39] Politics and Political Matters

Annotation References:

Supreme Court's views regarding First Amendment guaranties of freedom of speech or of the press as applied to electoral or referendum process. 71 L Ed 2d 1000.

Supreme Court's views regarding First Amendment right of association as applied to advancement of political beliefs. 67 L Ed 2d 859.

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Tashjian v. Republican Party

Supreme Court of the United States

October 8, 1986, Argued ; December 10, 1986, Decided

No. 85-766

Reporter

479 U.S. 208 *; 107 S. Ct. 544 **; 93 L. Ed. 2d 514 ***; 1986 U.S. LEXIS 25 ****; 55 U.S.L.W. 4057

TASHJIAN, SECRETARY OF STATE OF CONNECTICUT v. REPUBLICAN PARTY OF CONNECTICUT ET AL.

Prior History: [****1] APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Disposition: 770 F.2d 265, affirmed.

Core Terms

voters, candidates, qualifications, elections, convention, state legislature, voting, federal election, parties, rights, nominee, ballot, primary election, Framers, raiding, select, political party, registered, contends, enrolled, franchise, nominate, freedom of association, general election, closed primary, restricting, decisions, delegates, prescribe, statewide

Case Summary

Procedural Posture

Appellees, a political party, its federal office holders, and its state chairman challenged Conn. Gen. Stat. § 9-431 (1985), requiring voters in any party primary to be registered members of that party. The United States Court of Appeals for the Second Circuit affirmed the order of the district court granting summary judgment in favor of the political party. Appellant Secretary of the State of Connecticut sought review.

Overview

The political party challenged the eligibility provision of Conn. Gen. Stat. § 9-431 on the ground that it deprived the party of its First Amendment right to enter into political association with individuals of its own choosing. The appellate court affirmed the summary judgment in favor of the party holding that § 9-431 substantially interfered with the party's first amendment right to define its associational boundaries. The Secretary contended that § 9-431 was a narrowly tailored

regulation advancing compelling state interests by ensuring the administrability of the primary system, preventing raiding, and protecting the responsibility of party government. The Court found that the state's enforcement of its closed primary system burdened the First Amendment rights of the party. Added costs alone were not sufficient to burden the party's freedom of association, nor did the statute prevent raiding when a raid could be organized at the 11th hour. The interests which the Secretary adduced in support of the statute were insubstantial, and thus the statute, as applied to the party, impermissibly burdened the rights of the party protected by the First and Fourteenth Amendments.

Outcome

The Court affirmed the judgment of the appellate court and held that the challenged statute impermissibly burdened the rights of the political party and its members protected by the First and Fourteenth Amendments.

LexisNexis® Headnotes

Governments > State & Territorial Governments > Elections

HN1[] **State & Territorial Governments, Elections**

See Conn. Gen. Stat. § 9-431 (1985).

Governments > State & Territorial Governments > Elections

Tax Law > ... > S Corporations > Election of S Status > Termination of S Election

HN2[] **State & Territorial Governments, Elections**

Constitutional challenges to specific provisions of a state's election laws cannot be resolved by any litmus-paper test that will separate valid from invalid restrictions. Instead, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule. In passing judgment, the deciding court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > Substantive Due Process > Scope

HN3[] **Fundamental Freedoms, Freedom of Association**

Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

HN4[] **Fundamental Freedoms, Freedom of Association**

The freedom to join together in furtherance of common political beliefs necessarily presupposes the freedom to identify the people who constitute the association.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

HN5[] **Fundamental Freedoms, Freedom of Association**

Acts of public affiliation may subject the members of political organizations to public hostility or discrimination; under those circumstances an association has a constitutional right to protect the privacy of its membership rolls.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

HN6[] **Fundamental Freedoms, Freedom of Association**

Any interference with the freedom of a political party is simultaneously an interference with the freedom of its adherents.

Constitutional Law > Congressional Duties & Powers > Elections > Time, Place & Manner Restrictions

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > General Overview

Governments > State & Territorial Governments > Elections

HN7[] **Elections, Time, Place & Manner Restrictions**

The United States Constitution grants to the states a broad power to prescribe the times, places and manner of holding elections for senators and representatives, U.S. Const. art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the state's responsibility to observe the limits established by the First Amendment rights of the state's citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or the freedom of political association.

Governments > State & Territorial Governments > Elections

HN8[] **State & Territorial Governments, Elections**

While a state is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.

Governments > State & Territorial Governments > Elections

HN9[] **State & Territorial Governments, Elections**

A state may have a legitimate interest in seeking to curtail "raiding," whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary, because that practice may affect the integrity of the electoral process.

Governments > State & Territorial

Governments > Elections

HN10[] **State & Territorial Governments, Elections**

There can be no question about the legitimacy of the state's interest in fostering informed and educated expressions of the popular will in a general election. To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.

Governments > State & Territorial

Governments > Elections

HN11[] **State & Territorial Governments, Elections**

A state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. The state's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions in no respect make it necessary to burden the party's rights.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN12[] **Fundamental Freedoms, Freedom of Association**

A state, or a court, may not constitutionally substitute its own judgment for that of the political party. The party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution of the United States. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression

as unwise or irrational.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > Elections, Terms & Voting > General Overview

HN13[] **Bill of Rights, Fundamental Freedoms**

See U.S. Const. art. I, § 2, cl. 1.

Constitutional Law > Elections, Terms & Voting > US Senate Terms & Vacancies

HN14[] **Elections, Terms & Voting, US Senate Terms & Vacancies**

See U.S. Const. amend. XVII.

Constitutional Law > Elections, Terms & Voting > General Overview

Governments > Federal Government > Elections

HN15[] **Constitutional Law, Elections, Terms & Voting**

The Qualifications Clause and the parallel provision of the Seventeenth Amendment require only that anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote in federal legislative elections.

Constitutional Law > Elections, Terms & Voting > General Overview

HN16[] **Constitutional Law, Elections, Terms & Voting**

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 requirements of U.S. Const. art. I, § 2, cl. 1, and the Seventeenth Amendment apply to primaries as well as to general elections. The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process.

Constitutional Law > Elections, Terms & Voting > General Overview

HN17[] **Constitutional Law, Elections, Terms & Voting**

The Qualifications Clauses of U.S. Const. art. I, §

2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Constitutional Law > Elections, Terms & Voting > US Senate Terms & Vacancies

Governments > Federal Government > Elections

Constitutional Law > Elections, Terms & Voting > General Overview

Constitutional Law > Elections, Terms & Voting > Voting Age

HN18[] **Franchise Relationships, Franchise Agreements**

The achievement of the goal of the Qualifications Clause, which is to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections, does not require that qualifications for exercise of the federal franchise be at all times precisely equivalent to the prevailing qualifications for the exercise of the franchise in a given state. The fundamental purpose of the Qualifications Clauses contained in U.S. Const. art. I, § 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of senators and members of the House of Representatives.

Lawyers' Edition Display

Decision

Connecticut prohibition of political party's choice to permit independents to vote in certain party primary elections held to violate freedom of association under First and Fourteenth Amendments.

Summary

A Connecticut statute allowed only party members to vote in a primary election for a nomination to public office by a major political party. In 1983, one of the state's two major political parties adopted a rule (1) attempting to permit independents--registered voters not affiliated with any political party--to vote in the party's primaries for federal and statewide public offices, while (2)

remaining silent as to the party's primaries for nominations for the state legislature. Then, challenging the state statute, the party, its federal officeholders, and its state chairperson filed suit in the United States District Court for the District of Connecticut against the Secretary of the State of Connecticut, who was charged with the administration of the state's election statutes. The District Court granted summary judgment in favor of the party and its members, expressing the view that the statute (1) imposed a substantial burden on their right of association under the First and Fourteenth Amendments to the United States Constitution, and (2) was not supported by any compelling state interests (599 F Supp 1228). On appeal, the United States Court of Appeals for the Second Circuit affirmed, expressing the view that (1) the qualifications clauses of Art I, 2, cl 1, and the Seventeenth Amendment to the United States Constitution, requiring that voters in elections for the United States House of Representatives and Senate have the same qualifications as voters in elections for the most numerous branch of the state legislature, did not apply to party primaries; and (2) the state statute prohibiting the party rule substantially interfered with the party's constitutional right of political association, by determining who was eligible to participate in the party's candidate selection process (770 F2d 265).

On appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Brennan, White, Blackmun, and Powell, JJ., it was held that (1) the state's statutory prohibition of the party's primary voting rule placed an unconstitutional burden on the fundamental freedom of political association guaranteed by the First and Fourteenth Amendments, while the interests asserted by the state in defense of the statute were insubstantial, and (2) the party rule did not violate the qualifications clauses of Art I, 2, cl 1, and the Seventeenth Amendment, because the clauses did not require a perfect symmetry, even though the clauses did apply to congressional primary elections.

Stevens, J., joined by Scalia, J., dissented, expressing the view that, under the circumstances, allowing independents to vote in primary elections for the United States House of Representatives and Senate, while prohibiting such voters from participating in primary elections for the state house of representatives, violated the qualifications clauses of Art I, 2, cl 1, and the Seventeenth Amendment.

Scalia, J., joined by Rehnquist, Ch. J., and

O'Connor, J., dissented, expressing the view that the Connecticut restriction on a party's primary voting to party members was constitutional, and that the Supreme Court's opinion exaggerated the importance of the associational interest at issue, if indeed such an interest existed.

Headnotes

CONSTITUTIONAL LAW §940.5 > ELECTIONS §2 > party choice to allow independents to vote in primaries -- freedom of association -- > Headnote:

LEdHN[1A][⬇] [1A]***LEdHN[1B]***[⬇] [1B]***LEdHN[1C]***[⬇] [1C]***LEdHN[1D]***[⬇] [1D]***LEdHN[1E]***[⬇] [1E]***LEdHN[1F]***[⬇] [1F]***LEdHN[1G]***[⬇] [1G]

A state statute which prohibits a political party from exercising its choice to permit independents--registered voters not affiliated with any party--to vote in the party's primary elections for federal and statewide offices places an unconstitutional burden on the fundamental freedom of political association guaranteed by the First and Fourteenth Amendments to the United States Constitution, where (1) any interference with the freedom of a political party is simultaneously an interference with the freedom of its adherents; (2) under the circumstances, there is no conflict between the associational interests of members and nonmembers over voting in such elections; (3) a state law which permits registration as a party member until noon of the last business day preceding a primary is not a satisfactory response, for it requires action by the voters rather than the party, and insists upon a public act of affiliation with the party as a condition of association; (4) the power of the state under the Constitution (Art I, 4, cl 1) to prescribe the time, place, and manner of holding elections for United States Senators and Representatives, which power is matched by state control over the election process for state offices, does not extinguish the state's responsibility to observe the limits established by the First Amendment rights of the state's citizens; and (5) the interests which the state asserts in defense of the statute are insubstantial. (Scalia, J., Rehnquist, Ch. J., and O'Connor, J., dissented from this holding.)

ELECTIONS §2 > primaries -- different qualifications for federal congressional and state legislative voters -- > Headnote:

LEdHN[2A][⬇] [2A]***LEdHN[2B]***[⬇]

[2B]***LEdHN[2C]***[⬇] [2C]***LEdHN[2D]***[⬇] [2D]***LEdHN[2E]***[⬇] [2E]

A political party's rule permitting independents--registered voters not affiliated with any party--to vote in the party's primary elections for the United States House of Representatives and Senate, while remaining silent as to voting by such independents in the party's primary elections for the state legislature, does not violate the Federal Constitution's clauses on qualifications of federal congressional electors (Art I, 2, cl 1, and the Seventeenth Amendment), where (1) the two clauses apply to the state's primary elections in precisely the same fashion as they apply to general congressional elections, (2) the two clauses do not require perfect symmetry, and (3) the party rule does not disenfranchise any voter in a federal congressional election who is qualified to vote in a primary or general election for the more numerous house of the state's legislature. (Stevens and Scalia, JJ., dissented from this holding.)

CONSTITUTIONAL LAW §940.5 > ELECTIONS §1 > First Amendment -- tests -- > Headnote:

LEdHN[3][⬇] [3]

Constitutional challenges to specific provisions of a state's election laws cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions; instead, a court must (1) consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that a plaintiff seeks to vindicate, and (2) identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule; a court must not only determine the legitimacy and strength of each of these state interests, but also consider the extent to which these interests make it necessary to burden the plaintiff's rights.

CONSTITUTIONAL LAW §36.3 > freedom of speech and association -- due process -- > Headnote:

LEdHN[4][⬇] [4]

Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the Federal Constitution's Fourteenth Amendment, which embraces freedom of speech.

CONSTITUTIONAL LAW §940.5 > freedom of political association -- extent -- > Headnote:

LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]***LEdHN[5C]***[] [5C]

The freedom of association protected by the First and Fourteenth Amendments of the United States Constitution includes partisan political organization; the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom; freedom to join together in the furtherance of common political beliefs necessarily presupposes the freedom to identify the people who constitute the association; a political party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.

CONSTITUTIONAL LAW §940.5 > political organization -- privacy of members -- > Headnote:

LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

A political organization has a constitutional right to protect the privacy of its membership rolls, where acts of public affiliation may subject the members of the organization to public hostility or discrimination.

ELECTIONS §3 > time, place, and manner -- right to vote -- > Headnote:

LEdHN[7][] [7]

The power of a state under the United States Constitution (Art I, 4, cl 1) to regulate the time, place, and manner of holding elections for United States Senators and Representatives, which power is matched by state control over the election process for state offices, does not justify, without more, abridgment of the fundamental right to vote.

CONSTITUTIONAL LAW §940.5 > ELECTIONS §2 > party primary -- freedom of association -- administrative cost -- > Headnote:

LEdHN[8][] [8]

Even assuming the factual accuracy of contentions as to the possibility of future increases in the cost of administering a state's primary election system due to a party rule permitting independents--registered voters not affiliated with any political party--to vote in the party's primary elections for federal and

statewide office, such contentions do not form a sufficient basis for infringing the First Amendment right of freedom of political association by prohibiting such a party rule.

ELECTIONS §2 > primaries -- raiding by other party -- > Headnote:

LEdHN[9][] [9]

A possible state interest in seeking to curtail "raiding"--a practice whereby voters in sympathy with one political party designate themselves as voters of another party so as to influence or determine the results of the other party's primary--is not implicated by the state's prohibition of one party's choice to permit independents (registered voters not affiliated with any political party) to vote in certain party primaries, where, under state law, (1) the independents need only register as party members to vote in the primary, and (2) the state permits such registration as late as noon on the business day preceding the primary.

CONSTITUTIONAL LAW §940.5 > ELECTIONS §1 > primary and general elections -- relation -- freedom of association -- > Headnote:

LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

A state has a legitimate interest in fostering informed and educated expressions of the popular will in a general election, but this interest is not sufficient to justify, under the First and Fourteenth Amendments to the United States Constitution, the state's prohibition of a party rule permitting independents--registered voters not affiliated with any political party--to vote in certain party primaries, on the grounds that voters would be misled by party labels in the ensuing general election, where (1) the United States Supreme Court's cases reflect faith in the ability of individual voters to inform themselves about campaign issues, (2) in the state in question, to be listed on a primary ballot requires that a candidate have obtained at least 20% of the vote at a party convention which only party members may attend, and (3) the argument in favor of such a prohibition disregards the substantial benefit the party rule provides the party and its members in seeking to choose successful candidates, given the numerical strength of independent voters in that state. (Scalia, J., Rehnquist, Ch. J., and O'Connor, J., dissented in part from this holding.)

to a single nominating act.

CONSTITUTIONAL LAW §940.5 > ELECTIONS §2 > party primary -- freedom of association -- protecting integrity of party -- > Headnote:

LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]

Even if a state is correct that its prohibition of a political party's rule permitting independents--registered voters not affiliated with any party--to vote in certain party primaries protects the integrity of the two-party system and the responsibility of party government, a state or court may not constitutionally substitute its own judgment for that of the party; under the freedom of association for the advancement of political beliefs, as is true of all First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational. (Scalia, J., Rehnquist, Ch. J., and O'Connor, J., dissented from this holding.)

ELECTIONS §2 > single nominations -- > Headnote:

LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]

A state may adopt a policy of confining each voter

CONSTITUTIONAL LAW §9 > construction -- new subject matter -- > Headnote:

LEdHN[13][] [13]

In determining whether a provision of the United States Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar, for in setting up an enduring framework of government, they undertook to carry out for the indefinite future and in all the vicissitudes of changing human affairs, those fundamental purposes which the instrument itself discloses.

ELECTIONS §2 > constitutional voter qualifications -- stages applicable -- > Headnote:

LEdHN[14][] [14]

The goal--under Art I, 2, cl 1, and the Seventeenth Amendment to the United States Constitution--of assuring that the members of the United States Congress are chosen by the people can only be secured if that principle is applicable to every stage

in the selection process; the constitutional voter qualifications of these clauses apply to primaries as well as to general elections (1) where the state law has made the primary an integral part of the procedure of choice, or (2) where in fact the primary effectively controls the choice.

Syllabus

A Connecticut statute (§ 9-431), enacted in 1955, requires voters in any political party primary to be registered members of that party. In 1984, appellee Republican Party of Connecticut (Party) adopted a Party rule that permits independent voters -- registered voters not affiliated with any party -- to vote in Republican primaries for federal and statewide offices. The Party and the Party's federal officeholders and state chairman (also appellees) brought an action in Federal District Court challenging the constitutionality of § 9-431 on the ground that it deprives the Party of its right under the First and Fourteenth Amendments to enter into political association with individuals of its own choosing, and seeking declaratory and injunctive relief. The District Court granted summary judgment in appellees' favor, and the Court of Appeals affirmed.

Held:

1. Section 9-431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments. Pp. 213-225.

(a) The freedom of association protected by those Amendments includes [****2] partisan political organization. Section 9-431 places limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community. The fact that the State has the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote or, as here, the freedom of political association. Pp. 213-217.

(b) The interests asserted by appellant Secretary of State of Connecticut as justification for the statute -- that it ensures the administrability of the primary, prevents voter raiding, avoids voter confusion, and protects the integrity of the two-party system and the responsibility of party government -- are insubstantial. The possibility of increases in the cost of administering the election system is not a

sufficient basis for infringing appellees' First Amendment rights. The interest in curtailing raiding is not implicated, [****3] since § 9-431 does not impede a raid on the Republican Party by independent voters; independent raiders need only register as Republicans and vote in the primary. The interest in preventing voter confusion does not make it necessary to burden the Party's associational rights. And even if the State were correct in arguing that § 9-431 in providing for a closed primary system is designed to save the Party from undertaking conduct destructive of its own interests, the State may not constitutionally substitute its judgment for that of the Party, whose determination of the boundaries of its own association and of the structure that best allows it to pursue its political goals is protected by the Constitution. Pp. 217-225.

2. The implementation of the Party rule will not violate the Qualifications Clause of the Constitution -- which provides that the House of Representatives "shall be composed of Members chosen . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" -- and the parallel provision of the Seventeenth Amendment, because it does not disenfranchise [****4] any voter in a federal election who was qualified to vote in a primary or general election for the more numerous house of the state legislature. The Clause and the Amendment are not violated by the fact that the Party rule establishes qualifications for voting in congressional elections that differ from the qualifications in elections for the state legislature. Where state law, as here, has made the primary an integral part of the election procedure, the requirements of the Clause and the Amendment apply to primaries as well as to general elections. The achievement of the goal of the Clause to prevent the mischief that would arise if state voters found themselves disqualified from participating in federal elections does not require that qualifications for exercise of the federal franchise be precisely equivalent to the qualifications for exercising the franchise in a given State. Pp. 225-229.

Counsel: Elliot F. Gerson, Special Assistant Attorney General of Connecticut, argued the cause for appellant. With him on the briefs were Joseph I. Lieberman, Attorney General, and Barney Lapp, Daniel R. Schaefer, and Henry S. Cohn, Assistant Attorneys General.

David S. Golub argued the cause and [****5] filed

a brief for appellees. *

[****6]

Judges: MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SCALIA, J., joined, post, p. 230. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, post, p. 234.

Opinion by: MARSHALL

Opinion

[*210] [***521] [**546] JUSTICE **MARSHALL** delivered the opinion of the Court.

LEdHN[1A][] [1A] ***LEdHN[2A]***[] [2A]Appellee Republican Party of the State of Connecticut (Party) in 1984 adopted a Party rule which permits independent voters -- registered voters not affiliated with any political party -- to vote in Republican primaries for federal and statewide offices. Appellant Julia Tashjian, the Secretary of the State of Connecticut, is charged with the administration of the State's election statutes, which include a provision requiring voters in any party primary to be registered members [*211] of that party. Conn. Gen. Stat. § 9-431 (1985). [1] Appellees, who in addition to the Party include the Party's federal officeholders and the Party's state chairman, challenged this eligibility provision on the ground that it deprives the Party of its First Amendment right to enter into political association with [****7] individuals of its own choosing. The District Court granted summary judgment in favor of appellees. 599 F.Supp. 1228 (Conn. 1984). The Court of Appeals affirmed. 770 F.2d 265 [**547] (CA2 1985). We noted probable

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* Briefs of amici curiae urging reversal were filed for the State of New York et al. by Robert Abrams, Attorney General of New York, Robert Hermann, Solicitor General, Patrick Barnett-Mulligan, Lisa Margaret Smith, and Betsy Broder, Assistant Attorneys General, Charles A. Graddick, Attorney General of Alabama, Robert K. Corbin, Attorney General of Arizona, and Anthony B. Ching, Solicitor General, Charles M. Oberly III, Attorney General of Delaware, Jim Smith, Attorney General of Florida, Neil F. Hartigan, Attorney General of Illinois, and Roma J. Stewart, Solicitor General, William J. Guste, Jr., Attorney General of Louisiana, James E. Tierney, Attorney General of Maine, and Cabanne Howard, Deputy Attorney General, Brian McKay, Attorney General of Nevada, Lacy H. Thornburg, Attorney General of North Carolina, Nicholas J. Spaeth, Attorney General of North Dakota, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Michael Turpen, Attorney General of Oklahoma, LeRoy S. Zimmerman, Attorney General of Pennsylvania, W. J. Michael Cody, Attorney General of Tennessee, and A. G. McClintock, Attorney General of Wyoming; and for William J. Cibes, Jr., et al. by Timothy D. Bates.

Stephen E. Gottlieb filed a brief for James MacGregor Burns et al. as amici curiae urging affirmance.

Bruce A. Morrison, pro se, filed a brief for Senator Christopher J. Dodd et al. as amici curiae.

[1] ***HN1***[] The statute provides in pertinent part: "No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district. . . ."

jurisdiction, 474 U.S. 1049 (1986), and now affirm.

I

In 1955, Connecticut adopted its present primary election system. For major parties, [2] the process of candidate selection for federal and statewide offices requires a statewide convention of party delegates; district conventions are held to select candidates for seats in the state legislature. The party convention may certify as the party-endorsed candidate any person receiving more than 20% of the votes cast in a roll-call vote at the convention. Any candidate not endorsed by the party [****8] who received 20% of the vote may challenge the party-endorsed candidate in a primary election, in which the candidate [***522] receiving the plurality of votes becomes the party's nominee. Conn. Gen. Stat. §§ 9-382, 9-400, 9-444 (1985). Candidates selected by the major parties, whether through convention or primary, are automatically accorded a place on the ballot at the general election. [*212] § 9-379. The costs of primary elections are paid out of public funds. See, *e. g.*, § 9-441.

The statute challenged in these proceedings, § 9-431, has remained substantially unchanged since the adoption of the State's primary system. [****9] In 1976, the statute's constitutionality was upheld by a three-judge District Court against a challenge by an independent voter who sought a declaration of his right to vote in the Republican primary. *Nader* v. *Schaffer*, 417 F.Supp. 837 (Conn.), summarily aff'd, 429 U.S. 989 (1976). In that action, the Party opposed the plaintiff's efforts to participate in the Party primary.

Subsequent to the decision in *Nader*, however, the Party changed its views with respect to participation by independent voters in Party primaries. Motivated in part by the demographic importance of independent voters in Connecticut politics, [3] in September 1983 the Party's Central Committee recommended calling a state convention to consider altering the Party's rules to allow independents to vote in Party primaries. In January 1984 the state convention adopted the Party rule now at issue, which provides:

"Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in

[2] A "major party" is defined as "a political party or organization whose candidate for governor at the last-preceding election for governor received . . . at least twenty per cent of the whole number of votes cast for all candidates for governor." Conn. Gen. Stat. § 9-372(5)(B) (1985). The Democratic and Republican parties are the only major parties in the State under this definition.

[3] The record shows that in October 1983 there were 659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered and unaffiliated voters in Connecticut. 2 App. to Juris. Statement 244.

primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, [****10] Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer." App. 20.

During the 1984 session, the Republican leadership in the state legislature, in response to the conflict between the newly enacted Party rule and § 9-431, proposed to amend the statute to allow independents to vote in primaries when permitted by Party rules. The proposed legislation was defeated, [*213] substantially along party lines, in both houses of the legislature, which at that time were controlled by the Democractic Party. [4]

[****11] The Party and the individual appellees then commenced this action in the District Court, seeking a declaration that § 9-431 infringes appellees' right to freedom of association [**548] for the advancement of common political objectives guaranteed by the First and Fourteenth Amendments, and injunctive relief against its further enforcement. After discovery, the parties submitted extensive stipulations of fact to the District Court, which granted summary judgment for appellees. The District Court concluded that "[any] effort by the state to substitute its judgment for that of the party on . . . the question of who is and is not sufficiently allied in interest with the [***523] party to warrant inclusion in its candidate selection process . . . substantially impinges on First Amendment rights." 599 F.Supp., at 1238. Rejecting the state interests proffered by appellant to justify the statute, the District Court held that "as applied to the Republican Party rule permitting unaffiliated voters to participate in certain Republican Party primaries, the statute abridges the right of association guaranteed by the First Amendment." *Id*., at 1241.

The [****12] Court of Appeals affirmed, holding that § 9-431 "substantially interferes with the Republican Party's first amendment right to define its associational boundaries, determine the content of its message, and engage in effective political association." 770 F.2d, at 283.

II

LEdHN[3][↑] [3]We begin from the recognition that ***HN2***[↑] "[constitutional] challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions."

[4] In the November 1984 elections, the Republicans acquired a majority of seats in both houses of the state legislature, and an amendment to § 9-431 was passed, but was vetoed by the Democratic Governor.

Anderson v. *Celebrezze*, [*214] 460 U.S. 780, 789 (1983) (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974))."Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden [****13] the plaintiff's rights." 460 U.S., at 789.

LEdHN[4][] [4]***LEdHN[5A]***[] [5A]The nature of appellees' First Amendment interest is evident. "It is beyond debate that ***HN3***[] freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); see *NAACP* v. *Button*, 371 U.S. 415, 430 (1963); *Bates* v. *Little Rock*, 361 U.S. 516, 522-523 (1960). The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. *Elrod* v. *Burns*, 427 U.S. 347, 357 (1976) (plurality opinion); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973).

LEdHN[5B][] [5B]The Party here contends that § 9-431 impermissibly burdens the right of its members to determine for themselves with whom they will associate, [****14] and whose support they will seek, in their quest for political success. The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association. As we have said, ***HN4***[] the freedom to join together in furtherance of common political beliefs "necessarily presupposes the freedom to identify the people who [**549] constitute the association." [***524] *Democratic Party of* [*215] *United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

LEdHN[6A][] [6A]A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members devote substantial portions of their lives to furthering its political and

organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be [****15] in any sense the most important. [5]

LEdHN[6B][⬆] [6B]

LEdHN[1B][⬆] [1B]Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals. As we have said, ***HN6***[⬆] "'[any] interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.'" *Democratic Party, supra*, at 122 [****16] (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957)).[6] The statute here places limits upon the group of [*216] registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. *Kusper* v. *Pontikes, supra*, at 58.The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community. [7]

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[5] Indeed, ***HN5***[⬆] acts of public affiliation may subject the members of political organizations to public hostility or discrimination; under those circumstances an association has a constitutional right to protect the privacy of its membership rolls. *Bates* v. *Little Rock*, 361 U.S. 516, 523-524 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

[6] It is this element of potential interference with the rights of the Party's members which distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. In this latter class of cases, the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. See *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Nader* v. *Schaffer*, 417 F.Supp. 837 (Conn.), summarily aff'd, 429 U.S. 989 (1976). Similarly, the Court has upheld the right of national political parties to refuse to seat at their conventions delegates chosen in state selection processes which did not conform to party rules. See *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins* v. *Wigoda*, 419 U.S. 477 (1975). These situations are analytically distinct from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers. Under these circumstances, there is no conflict between the associational interests of members and nonmembers. See generally Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L. J. 117 (1984).

[7] Appellant contends that any infringement of the associational right of the Party or its members is *de minimis*, because Connecticut law, as amended during the pendency of this litigation, provides that any previously unaffiliated voter may become eligible to vote in the Party's primary by enrolling as a Party member as late as noon on the last business day preceding the primary. Conn. Gen. Stat. § 9-56 (1985). Thus, appellant contends, any independent voter wishing to participate in any Party primary may do so. This is not a satisfactory

LEdHN[1C][⬆] [1C]

[****17] ***LEdHN[1D]***[⬆] [1D] ***LEdHN[1E]***[⬆] [1E]

[****18]

[*217] [**550] ***LEdHN[1F]***[⬆] [1F]***LEdHN[7]***[⬆] [7]It [***525] is, of course, fundamental to appellant's defense of the State's statute that this impingement upon the associational rights of the Party and its members occurs at the ballot box, for ***HN7***[⬆] the Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, see *Wesberry* v. *Sanders*, 376 U.S. 1, 6-7 (1964), or, as here, the freedom of political association. We turn then to an examination of the interests which appellant asserts to justify the burden cast by the statute upon the associational rights of the Party and its members.

III

Appellant contends that § 9-431 is a narrowly tailored regulation which advances the State's compelling interests [****19] by ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government.

A

Although it was not presented to the Court of Appeals as a basis for the defense of the statute, appellant argues here that the administrative burden imposed by the Party rule is a sufficient ground on which to uphold the constitutionality of [*218] § 9-431. [8] [***526] Appellant contends that the

response to the Party's contentions for two reasons. First, as the Court of Appeals noted, the formal affiliation process is one which individual voters may employ in order to associate with the Party, but it provides no means by which the members of the Party may choose to broaden opportunities for joining the association by their own act, without any intervening action by potential voters. 770 F.2d, at 281, n. 24. Second, and more importantly, the requirement of public affiliation with the Party in order to vote in the primary conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the State requires regardless of the actual beliefs of the individual voter. Cf. *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1977); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 633-634 (1943). As counsel for appellees conceded at oral argument, a requirement that independent voters merely notify state authorities of their intention to vote in the Party primary would be acceptable as an administrative measure, but "[the] problem is that the State is insisting on a public act of affiliation . . . joining the Republican Party as a condition of this association." Tr. of Oral Arg. 40.

[8] The District Court entered no findings of fact as to the potential

Party's rule would require the purchase of additional voting machines, the training of additional poll workers, and potentially the printing of additional ballot materials specifically intended for independents voting in the Republican primary. In essence, appellant claims that the administration of the system contemplated by the Party rule would simply cost the State too much.

[****20] ***LEdHN[8]***[] [8]Even assuming the factual accuracy of these contentions, which have not been subjected to any scrutiny by the District Court, the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights. Costs of administration would likewise increase if a third major party should come into existence in Connecticut, thus requiring the State to fund a third major-party primary. [**551] Additional voting machines, poll workers, and ballot materials would all be necessary under these circumstances as well. But the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford. Cf. *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). ***HN8***[] While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could [****21] on the same ground limit the ballot access of a new major party.

[*219] B

LEdHN[9][] [9]Appellant argues that § 9-431 is justified as a measure to prevent raiding, a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario* v. *Rockefeller*, 410 U.S. 752, 760 (1973). While we have recognized that ***HN9***[] "a State may have a legitimate interest in seeking to curtail 'raiding,' since that practice may affect the integrity of the electoral process," *Kusper* v. *Pontikes*, 414 U.S., at 59-60;*Rosario* v. *Rockefeller, supra*, at 761, that interest is not

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administrative changes necessary to implement the Party rule. As appellant conceded at oral argument, the only evidence in the record before the District Court relating to the administration of the rule was a statement by the State's election attorney in testimony before the legislature that the system would be "workable." *Id.*, at 20. Appellant relies here upon affidavits concerning potential administrative burden which were submitted to the Court of Appeals in support of appellant's request for a stay, entered after this Court noted probable jurisdiction.

implicated here. [9] The statute as applied to the Party's rule prevents independents, who otherwise cannot vote in any primary, from participating in the Republican primary. Yet a raid on the Republican Party primary by independent voters, a curious concept only distantly related to the type of raiding [***527] discussed in *Kusper* and *Rosario*, is not impeded by § 9-431; the independent raiders need only register as Republicans and vote in the primary. Indeed, [****22] under Conn. Gen. Stat. § 9-56 (1985), which permits an independent to affiliate with the Party as late as noon on the business day preceding the primary, see n. 7, *supra*, the State's election statutes actually *assist* a "raid" by independents, which could be organized and implemented at the 11th hour. The State's asserted interest in the prevention of raiding provides no justification for the statute challenged here.

[****23] [*220] C

Appellant's next argument in support of § 9-431 is that the closed primary system avoids voter confusion. Appellant contends that "[the] legislature could properly find that it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name." Brief for Appellant 59. Appellees respond that the State is attempting to act as the ideological guarantor of the Republican Party's candidates, ensuring that voters are not misled by a "Republican" candidate who professes something other than what the State regards as true Republican principles. Brief for Appellees 28.

LEdHN[10A][⬆] [10A]As we have said, ***HN10***[⬆] "[there] can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson* v. *Celebrezze*, 460 U.S., at 796. [**552] To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters [****24] inform themselves for the exercise of the franchise. Appellant's argument depends upon the belief that voters can be "misled" by party

[9] As we have previously noted, a study commission established by the national Democratic Party concluded that "'the existence of "raiding" has never been conclusively proven by survey research.'" *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S., at 122-123, n. 23 (quoting Openness, Participation and Party Building: Reforms for a Stronger Democratic Party 68 (Feb. 17, 1978)). In view of our conclusion that § 9-431 is irrelevant to the question of raiding, we express no opinion as to whether the continuing difficulty of proving that raiding is possible attenuates the asserted state interest in preventing the practice.

labels. But "[our] cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Id.*, at 797. Moreover, appellant's concern that candidates selected under the Party rule will be the nominees of an "amorphous" group using the Party's name is inconsistent with the facts. The Party is not proposing that independents be allowed to choose the Party's nominee without Party participation; on the contrary, to be listed on the Party's primary ballot continues to require, under a statute not challenged here, that the primary candidate have obtained at least 20% of the vote at a Party convention, which only Party [*221] members may attend. Conn. Gen. Stat. § 9-400 (1985). If no such candidate seeks to challenge the convention's nominee in a primary, then no primary is held, and the convention nominee becomes the Party's nominee in the general election without any intervention by independent voters. [10] Even assuming, however, that putative candidates defeated at the Party convention [****25] will have an increased incentive under the Party's rule to make primary challenges, hoping to attract more substantial support from independents than [***528] from Party delegates, the requirement that such challengers garner substantial minority support at the convention greatly attenuates the State's concern that the ultimate nominee will be wedded to the Party in nothing more than a marriage of convenience.

LEdHN[10B][↑] [10B]In arguing that the Party rule interferes with educated decisions by voters, appellant also disregards the substantial benefit which the Party rule provides to the Party and its members in seeking to choose successful candidates. Given the numerical strength of independent voters in the State, one of the questions most likely to occur to Connecticut Republicans in selecting candidates for public office is how can the Party most effectively appeal to the independent voter? By [****26] inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors. ***HN11***[↑] "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of

[10] The record does not disclose the proportion of Connecticut Republican Party nominations that are the result of primary contests.

information to them must be viewed with some skepticism." *Anderson* v. *Celebrezze, supra*, at 798. The State's legitimate interests in preventing voter confusion [*222] and providing for educated and responsible voter decisions in no respect "make it necessary to burden the [Party's] rights." 460 U.S., at 789.

D

LEdHN[11A][⬆] [11A]Finally, appellant contends that § 9-431 furthers the State's compelling interest in protecting the integrity of the two-party system and the responsibility of party government. Appellant argues vigorously and at length that the closed primary system chosen by the state legislature [****27] promotes responsiveness by elected officials and strengthens the effectiveness of the political parties.

The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century, [**553] and no consensus has as yet emerged. [11] [****28] Appellant [*223] [***529] invokes a long and distinguished line of political scientists and public officials who have been supporters of the closed primary. But our role is not to decide whether the state legislature was acting wisely in enacting the closed primary system in 1955, or whether the Republican Party makes a mistake in seeking to depart from the practice of the past 30 years. [12]

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[11] At the present time, 21 States provide for "closed" primaries of the classic sort, in which the primary voter must be registered as a member of the party for some period of time prior to the holding of the primary election. See Ariz. Rev. Stat. Ann. § 16-467 (1984); Cal. Elec. Code Ann. § 501 (West Supp. 1986); Colo. Rev. Stat. § 1-2-203 (Supp. 1986); Conn. Gen. Stat. § 9-431 (1985); Del. Code Ann., Tit. 15, § 3161 (1981); Fla. Stat. § 101.021 (1985); Kan. Stat. Ann. § 25-3301 (1981); Ky. Rev. Stat. §§ 116.045, 116.055 (1982); Me. Rev. Stat. Ann., Tit. 21-A, § 141 *et seq*. (Supp. 1986-1987); Md. Ann. Code, Art. 33, § 3-8 *et seq*. (1985); Neb. Rev. Stat. § 32-530 (1984); Nev. Rev. Stat. § 293.287 (1985); N. M. Stat. Ann. § 1-4-16 (1985); N. Y. Elec. Law § 1-104.9 (McKinney 1978); N. C. Gen. Stat. § 163.74 (1982 and Supp. 1985); Okla. Stat., Tit. 26, § 1-104 (1976); Ore. Rev. Stat. § 247.201 (1985); Pa. Stat. Ann., Tit. 25, § 2832 (Purdon 1963); S. D. Codified Laws § 12-4-15 (1982); W. Va. Code § 3-1-35 (1979); Wyo. Stat. § 22-5-212 (1977). Sixteen States allow a voter previously unaffiliated with any party to vote in a party primary if he affiliates with the party at the time of, or for the purpose of, voting in the primary. See Ala. Code § 17-16-14(b) (1985); Ark. Stat. Ann. § 3-126 (1976); Ga. Code Ann. § 21-2-235 (1982); Ill. Rev. Stat., ch. 46, para. 7-43(a) (1986); Ind. Code § 3-10-1-6 (Supp. 1986); Iowa Code §§ 43.41, 43.42 (1985); Mass. Gen. Laws § 53:37 (1984); Miss. Code Ann. § 23-15-575 (1986 pamphlet); Mo. Rev. Stat. § 115.397 (1978); N. H. Rev. Stat. Ann. § 654:34II (1986); N. J. Stat. Ann. § 19:23-45 (West Supp. 1986); Ohio Rev. Code Ann. § 3513.19 (Supp. 1985); R. I. Gen. Laws § 17-9-26(c) (1981); S. C. Code §§ 7-5-120, 7-9-20 (1976 and Supp. 1985); Tenn. Code Ann. § 2-7-115(b)(2) (1985); Tex. Elec. Code Ann. § 162.003 (1986). Four States provide for nonpartisan primaries in which all registered voters may participate, Alaska Stat. Ann. §§ 15.05.010, 15.25.090 (1982); La. Rev. Stat. Ann. §§ 18:401B, 18:521B (West 1979 and Supp. 1986); Va. Code § 24.1-182 (1985); Wash. Rev. Code § 29.18.200 (1965), while nine States have adopted classical "open" primaries, in which all registered voters may choose in which party primary to vote. Haw. Rev. Stat. § 12-31 (Supp. 1984); Idaho Code §§ 34-402, 34-404, 34-904 (Supp. 1986); Mich. Comp. Laws §§ 168.575, 168.576 (1967 and Supp. 1986); Minn. Stat. § 204D.08(4) (1985); Mont. Code Ann. § 13-10-301(2) (1985); N. D. Cent. Code § 16.1-11-22 (Supp. 1985); Utah Code Ann. § 20-3-19(2) (Supp. 1986); Vt. Stat. Ann., Tit. 17, § 2363 (1982); Wis. Stat. §§ 5.37, 6.80 (1983-1984).

[12] We note that appellant's direct predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 States which have chosen to permit more substantial openness in their primary systems than Connecticut has permitted heretofore.

We have previously recognized the danger that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer* v. *Brown*, 415 U.S., at 736. We upheld a California statute which denied access to the ballot to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediately preceding primary election. We said:

"[The] one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late [*224] rather than an early decision [****29] to seek independent ballot status." *Ibid*.

The statute in *Storer* was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened by raiding in *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973), is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in *Storer* [**554] and *Rosario* imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

LEdHN[5C][↑] [5C]***LEdHN[11B]***[↑] [11B]***LEdHN[12A]***[↑] [12A]Under these circumstances, the views of the State, which to some extent represent the views of the one political party transiently [***530] enjoying majority power, as to the optimum methods for preserving [****30] party integrity lose much of their force. The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point "even if the State were correct, ***HN12***[↑] a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S., at 123-124 (footnote omitted). The Party's determination of the boundaries of its own association, and of the

structure which best allows it to pursue its political goals, is protected by the Constitution. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Id.*, at 124.[13]

LEdHN[12B][] [12B]

[****31] [*225] We conclude that the State's enforcement, under these circumstances, of its closed primary system burdens the First Amendment rights of the Party. The interests which the appellant adduces in support of the statute are insubstantial, and accordingly the statute, as applied to the Party in this case, is unconstitutional.

IV

LEdHN[2B][] [2B]Appellant argues here, as in the courts below, that implementation of the Party rule would violate the Qualifications Clause of the Constitution, Art. I, § 2, cl. 1, and the Seventeenth Amendment because it would establish qualifications for voting in congressional elections which differ from the voting qualifications in elections for the more numerous house of the state legislature. [14] The Party rule as adopted permits independent voters to vote in Party primaries for the offices of United States Senator and Member of the House of Representatives, and for statewide offices, but is silent as regards [*226] primaries held to contest nominations for seats in the state legislature. See *supra*, at [***531] 212. Appellant contends that the Qualifications Clause and the Seventeenth Amendment require an absolute [**555] symmetry of qualifications [****32] to vote in elections for Congress and the lower house of the state legislature, and that the Party rule, if implemented according to its terms, would require lesser qualifications for voting in Party primaries

[13] Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in *Storer* v. *Brown*, 415 U.S. 724 (1974), and *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973), were designed to prevent. We have observed on several occasions that a State may adopt a "policy of confining each voter to a single nominating act," a policy decision which is not involved in the present case. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 802, n. 29 (1983); *Storer* v. *Brown, supra*, at 743. The analysis of these situations derives much from the particular facts involved. "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" *Anderson* v. *Celebrezze, supra*, at 789-790 (quoting *Storer* v. *Brown, supra*, at 730).

[14] ***HN13***[] Article I, § 2, cl. 1, provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." ***HN14***[] The Seventeenth Amendment, which provides for the direct election of United States Senators, states in pertinent part that "[the] electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

for federal office than for state legislative office.

The Court of Appeals rejected appellant's argument, holding that the Qualifications Clause and the parallel provision of the Seventeenth Amendment do not apply to primary elections. 770 F.2d, at 274. [****33] The concurring opinion took a different view, reaching the conclusion that ***HN15***[] these provisions require only that "anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote" in federal legislative elections. *Id*., at 286 (Oakes, J., concurring). We agree.

LEdHN[13][] [13] ***LEdHN[14]***[] [14]We recognize that the Federal Convention, in adopting the Qualifications Clause of Article I, § 2, was not contemplating the effects of that provision upon the modern system of party primaries. As we have said:

"We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all [****34] the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." *United States* v. *Classic*, 313 U.S. 299, 315-316 (1941).

[*227] The fundamental purpose underlying Article I, § 2, cl. 1, that "[the] House of Representatives shall be composed of Members chosen . . . by the People of the several States," like the parallel provision of the Seventeenth Amendment, applies to the entire process by which federal legislators are chosen. ***HN16***[] "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 requirements of Article I, § 2, cl. 1, and the Seventeenth Amendment apply to primaries as well as to general elections. *United States* v. *Classic, supra*, at 318; see *Smith* v. *Allwright*, 321 U.S. 649, 659-660 (1944). The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is

applicable to every stage in the selection process. If primaries were not subject to the requirements of the Qualifications Clauses contained [****35] in Article I, § 2 and the Seventeenth Amendment, the fundamental principle of free electoral choice would be subject to the sort of erosion these prior decisions were intended to prevent.

[***532] ***LEdHN[2C]***[⬆] [2C]Accordingly, we hold that ***HN17***[⬆] the Qualifications Clauses of Article I, § 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections. Our task is then to discover whether, as appellant contends, those provisions require that voter qualifications, such as party membership, in primaries for federal office must be absolutely symmetrical with those pertaining to primaries for state legislative office.

Our inquiry begins with an examination of the Framers' purpose in enacting the first Qualifications Clause. It is clear that the Clause was intended to avoid the consequences of declaring a single standard for exercise of the franchise in federal elections. The state governments represented at the Convention had established varying [**556] voter qualifications, and substantial concern was expressed by delegates as to the likely effects of a federal voting qualification which disenfranchised voters eligible [****36] to vote in the States. James [*228] Wilson argued that "[it] would be very hard and disagreeable for the same persons, at the same time, to vote for representatives in the State Legislature, and to be excluded from a vote for those in the National Legislature." J. Madison, Journal of the Federal Convention 467 (E. Scott ed. 1893) (hereinafter Madison's Journal). Oliver Ellsworth predicted that "[the] people will not readily subscribe to a National Constitution, if it should subject them to be disfranchised." *Id.*, at 468. Benjamin Franklin argued, in the same vein, that "[the] sons of a substantial farmer, not being themselves freeholders, would not be pleased at being disfranchised, and there are a great many persons of that description." *Id.*, at 471. James Madison later defended the resulting provision on similar grounds:

"To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every [****37] State; because it is conformable to the standard

already established, or which may be established by the State itself." The Federalist No. 52, p. 354 (J. Cooke ed. 1961).

LEdHN[2D][⬆] [2D]In adopting the language of Article I, § 2, cl. 1, the Convention rejected the suggestion that a property qualification was necessary to restrict the availability of the federal franchise. See Madison's Journal 468-473; 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 200-216 (1966). Far from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections. ***HN18***[⬆] The achievement of this goal does not require that qualifications for exercise of the federal franchise be at all [*229] times precisely equivalent to the prevailing qualifications for the exercise of the franchise in a given State. The fundamental purpose of the Qualifications Clauses contained in Article I, § 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the [***533] state legislature [****38] are also qualified to participate in the election of Senators and Members of the House of Representatives.

LEdHN[2E][⬆] [2E]Our conclusion that these provisions do not require a perfect symmetry of voter qualifications in state and federal legislative elections takes additional support from the fact that we have not previously required such absolute symmetry when the federal franchise has been expanded. In *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), five Justices agreed that the Voting Rights Act Amendments of 1970 could constitutionally establish a minimum age of 18 for voters in federal elections, while a majority of the Court also concluded that Congress was without power to set such a minimum age in state and local elections. See *id*., at 117-118 (Black, J., announcing the judgments of the Court). Appellant's reading of the Qualifications Clause, which would require identical voter qualifications in state and federal legislative elections, is plainly inconsistent with these holdings. We hold that the implementation of the Party rule does not violate the Qualifications Clause or the Seventeenth Amendment because it does not disenfranchise any voter [****39] in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature.

V

LEdHN[1G][⬆] [1G]We conclude that § 9-431

impermissibly burdens the rights of the Party and its [**557] members protected by the First and Fourteenth Amendments. The interests asserted by appellant in defense of the statute are insubstantial. The judgment of the Court of Appeals is

Affirmed.

Dissent by: STEVENS; SCALIA

Dissent

[*230] JUSTICE **STEVENS**, with whom JUSTICE SCALIA joins, dissenting.

The threshold issue presented by this case is whether, consistently with the Constitution, a State may permit a voter to participate in elections to the Congress while preventing that same person from voting for candidates to the most numerous branch of the state legislature. If we respect the plain language of Article I, § 2, cl. 1, of the Constitution and the Seventeenth Amendment, the intent of the Framers, and the reasoning of the opinions in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), we must answer that question in the negative.

Every person who votes in a federal election for a Member of the House of Representatives or for a United States Senator must be [****40] qualified to vote for candidates to the most numerous branch of the state legislature. The Constitution has imposed this condition of voter eligibility on congressional elections since 1789 [1] and on senatorial elections since the Seventeenth Amendment was ratified in 1913. [2]

As [***534] the Court recognizes, *ante*, at 227, a primary election is part of the process by which Members of the House and Senate are "chosen . . . by the People." U.S. Const., Art. I, § 2, cl. 1. Cf. *United States* v. *Classic*, 313 U.S. 299, 315 (1941). In Connecticut one of the [****41] qualifications for voters in Republican Party primary elections for the lower house of the state legislature is that the person be "on the last-completed enrollment list of such party in the municipality or voting district. . . ." Conn. Gen. Stat. § 9-431 (1985). Thus, only enrolled Republicans may vote in the Republican primary for the state legislature.

[*231] The Court today holds, however, that pursuant to the Republican Party of Connecticut's rules, the State must permit independent, as well as

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[1] Article I, § 2, cl. 1, provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

[2] "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

enrolled Republican, electors to vote in the Republican primary for the House of Representatives and the Senate of the United States. This facial disparity between the qualifications for electors of House and Senate candidates and the more stringent qualifications for electors to the state legislature violates both Qualifications Clauses.

The Court does not dispute the fact that the plain language of the Constitution requires that voters in congressional and senatorial elections "shall have" the qualifications of voters in elections to the state legislature. The Court nevertheless separates the federal voter qualifications from their state counterparts, inexplicably treating the [****42] mandatory "shall have" language of the Clauses as though it means only that the federal voters "may but need not have" the qualifications of state voters. In support of this freewheeling interpretation of the Constitution, the Court relies on what it describes as the Framers' purpose in enacting the first Qualification Clause and on the judgment in *Oregon* v. *Mitchell, supra*. Neither of these arguments withstands scrutiny.

The excerpts from the debate among the Framers quoted by the Court, *ante*, at 227-229, related to a motion made by Gouverneur Morris to amend a draft of proposed Art. I, § 1, that had been prepared by the Committee on Detail. To understand the full significance of that debate it is necessary first to consider the provision that Gouverneur Morris wanted to change and [**558] then to consider the nature of his proposed amendment.

Justice Stewart accurately summarized that background in his opinion in *Oregon* v. *Mitchell, supra*:

> "An early draft of the Constitution provided that the States should fix the qualifications of voters in congressional elections subject to the proviso that these qualifications might [****43] 'at any Time be altered and superseded by the Legislature of the United States.' The records of [*232] the Committee on Detail show that it was decided to strike the provision granting to Congress the authority to set voting qualifications and to add in its stead a clause making the qualifications 'the [***535] same from Time to Time as those of the Electors, in the several States, of the most numerous Branch of their own Legislatures.' The proposed draft reported by the Committee on Detail to the Convention included the following:

> 'The qualifications of the electors *shall be the same*, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures.' Art. IV, § 1."

400 U.S., at 289 (concurring in part and dissenting in part) (footnotes omitted; emphasis added).

Thus, the draft that the Federal Convention of 1787 was considering when Gouverneur Morris made his motion was abundantly clear -- the qualifications of the federal electors "shall be the same" as the electors of the legislatures of the several States. J. Madison, Journal of the Federal Convention 449-450 (E. Scott ed. 1893). This provision [****44] would ensure uniformity of electors' qualifications within each State, but would not impose a uniform nationwide standard. [3]

It was this clause that Gouverneur Morris proposed to strike in order to substitute a clause permitting Congress to prescribe the electoral qualifications or to adopt a provision "which would restrain the right of suffrage to freeholders." *Id*., at 467. Not surprisingly, his proposal was defeated by a vote of 7 to 1 because it would have disenfranchised a large number of voters in States that did not impose a property qualification on the right to vote. *Id*., at 467, 468, 471-472. Despite the Court's reliance on the concerns that led the [*233] Framers to reject the Morris [****45] proposal, they shed absolutely no light on the reasons why the Committee on Detail had previously decided that the voters' qualifications in state and federal elections "shall be the same."

The Court's reliance on the holding in *Oregon* v. *Mitchell* is equally misguided. That case tested the constitutionality of certain parts of the Voting Rights Act Amendments of 1970, 84 Stat. 314, including the section that lowered the minimum age of voters in both state and federal elections from 21 to 18. Four Members of the Court concluded that Congress had no such power; [4] [****46] four other Members of the Court concluded that the entire statute was valid. [5] Thus, the conclusions of all eight of those Justices were consistent with the proposition that the Constitution requires the same

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[3] James Wilson referred to this part of the Report of the Committee on Detail as "well considered," and "he did not think it could be changed for the better. It was difficult to form any uniform rule of qualifications, for all the States." J. Madison, Journal of the Federal Convention 467 (E. Scott ed. 1893).

[4] See opinion of Justice Harlan, 400 U.S., at 152, 212-213 (concurring in part and dissenting in part), and opinion of Justice Stewart, *id*., at 281, 287-289 (joined by Burger, C. J., and BLACKMUN, J.).

[5] See opinion of Justice Douglas, *id*., at 135, 141-144, and the joint opinion, *id*., at 229, 280-281 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

qualifications for state and federal elections. [6] [***536] Only Justice Black concluded [**559] that the statute was invalid insofar as it applied to state elections but valid insofar as it applied to federal elections. 400 U.S., at 125-130.

Even Justice Black's reasoning, however, supports a literal reading of the Qualifications Clause in the absence of a federal statute prescribing a different rule for federal elections. For he relied entirely on the provision in Art. I, § 4, that empowers Congress to alter a State's regulations concerning the times, places, and manner of holding elections for Senators and Representatives. 400 U.S., at 119-124. In Justice [*234] Black's opinion, the qualifications that the States prescribed for their own voters for state offices [****47] "were adopted for federal offices unless Congress directs otherwise under Art. I, § 4." *Id*., at 125.

In this case there is no federal statute that purports to authorize the State of Connecticut to prescribe different qualifications for state and federal elections. Thus, there is no authority whatsoever for the Court's refusal to honor the plain language of the Qualifications Clauses. An interpretation of that language linking federal voters' qualifications in each State to the States' existing qualifications exactly matches James Madison's understanding:

"The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself." The Federalist No. 52, p. 354 (J. Cooke ed. 1961).

I respectfully dissent.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Both the right of free political association and the State's authority to establish arrangements that assure fair and effective party participation in the election process are essential to democratic [****48] government. Our cases make it clear that the accommodation of these two vital interests does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788-790 (1983); *Storer* v. *Brown*, 415 U.S. 724, 730 (1974). Even

[6] This was certainly the view of Justice Harlan, see *id*., at 210-211, and of Justice Stewart and the two Justices who joined his opinion, see *id*., at 287-290. As Justice Stewart observed: "The Constitution thus adopts as the federal standard the standard which each State has chosen for itself." *Id*., at 288. The opinions of Justice Douglas and JUSTICE BRENNAN are silent on the issue.

so, the conclusion reached on the individuated facts of one case sheds some measure of light upon the conclusion that will be reached on the individuated facts of the next. Since this is an area, moreover, in which the predictability of decisions is important, [*235] I think it worth noting that for me today's decision already exceeds the permissible limit of First Amendment restrictions upon the States' ordering of elections.

[***537] In my view, the Court's opinion exaggerates the importance of the associational interest at issue, if indeed it does not see one where none exists. There is no question here of restricting the Republican Party's ability to recruit and enroll Party members by offering them the ability to select Party candidates; Conn. [****49] Gen. Stat. § 9-56 (1985) permits an independent voter to join the Party as late as the day before the primary. Cf. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). Nor is there any question of restricting the ability of the Party's members to select whatever candidate they desire. Appellees' only complaint is that the Party cannot leave the selection of its candidate to persons who are *not* members of the Party, and are unwilling to become members. It seems to me fanciful to refer to this as an interest in freedom of association between the members of the Republican Party and the putative independent voters. The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an "association" with the [**560] Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use. See *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 130-131 (1981) (POWELL, J., dissenting) [****50] ("[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights"; one must "look closely at the nature of the intrusion, in light of the nature of the association involved, to see whether we are presented with a real limitation on First Amendment freedoms").

The ability of the members of the Republican Party to select their own candidate, on the other hand, unquestionably [*236] implicates an associational freedom -- but it can hardly be thought that that freedom is unconstitutionally impaired here. The Party is entirely free to put forward, if it wishes, that candidate who has the highest degree of

support among Party members and independents combined. The State is under no obligation, however, to let its party primary be used, instead of a party-funded opinion poll, as the means by which the party identifies the relative popularity of its potential candidates among independents. Nor is there any reason apparent to me why the State cannot insist that this decision to support what might be called the independents' choice be taken *by the party membership in a democratic fashion*, rather than [****51] through a process that permits the members' votes to be diluted -- and perhaps even absolutely outnumbered -- by the votes of outsiders.

The Court's opinion characterizes this, disparagingly, as an attempt to "[protect] the integrity of the Party against the Party itself." *Ante*, at 224. There are two problems with this characterization. The first, and less important, is that it is not true. We have no way of knowing that a majority of the Party's members is in favor of allowing ultimate selection of its candidates for federal and statewide office to be determined by persons outside the Party. That decision was not made by democratic ballot, but by [***538] the Party's state convention -- which, for all we know, may have been dominated by officeholders and office seekers whose evaluation of the merits of assuring election of the Party's candidates, vis-a-vis the merits of proposing candidates faithful to the Party's political philosophy, diverged significantly from the views of the Party's rank and file. I had always thought it was a major purpose of state-imposed party primary requirements to protect the general party membership against this sort of minority control. See [****52] *Nader* v. *Schaffer*, 417 F.Supp. 837, 843 (Conn.), summarily aff'd, 429 U.S. 989 (1976). Second and more important, however, *even if* it were the fact that the majority of the Party's members wanted its candidates to be [*237] determined by outsiders, there is no reason why the State is bound to honor that desire -- any more than it would be bound to honor a party's democratically expressed desire that its candidates henceforth be selected by convention rather than by primary, or by the party's executive committee in a smoke-filled room. In other words, the validity of the state-imposed primary requirement itself, which we have hitherto considered "too plain for argument," *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974), presupposes that the State *has* the right "to protect the Party against the Party itself." Connecticut may lawfully require that significant elements of the democratic election process be democratic -- whether the Party wants

that or not. It is beyond my understanding why the Republican Party's delegation of its democratic choice to a Republican Convention can be proscribed, but [****53] its delegation of that choice to nonmembers of the Party cannot.

In the case before us, Connecticut has said no more than this: Just as the Republican [**561] Party may, if it wishes, nominate the candidate recommended by the Party's executive committee, so long as its members select that candidate by name in a democratic vote; so also it may nominate the independents' choice, so long as its members select him by name in a democratic vote. That seems to me plainly and entirely constitutional.

I respectfully dissent.

References

25 Am Jur 2d, Elections 116-119, 129-131, 150-152, 159; 77 Am Jur 2d, United States 23

USCS, Constitution, Article I 2 cl 1, Article I 4 cl 1, Amendments 1, 14, 17

US L Ed Digest, Constitutional Law 940.5; Elections 2, 4

Index to Annotations; Congress; Due Process; Elections and Voting; Freedom of Association; Legislature; States

Annotation References:

Supreme Court's views regarding the First Amendment right of association as applied to the advancement of political beliefs. 67 L Ed 2d 859.

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 18 L Ed 2d 1388, 23 L Ed 2d 985.

Fourteenth Amendment as affecting nomination or election to state office. 11 L Ed 2d 1057, 23 L Ed 2d 782.

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Concerned Citizens for Judicial Fairness v. Yacucci

Court of Appeal of Florida, Fourth District

September 3, 2014, Decided

No. 4D14-2971

Reporter

162 So. 3d 68 *; 2014 Fla. App. LEXIS 13670 **; 39 Fla. L. Weekly D 1869

CONCERNED CITIZENS FOR JUDICIAL FAIRNESS, INC., Appellant, v. PHILIP J. YACUCCI, Appellee.

Subsequent History: Related proceeding at In re Yacucci, 2017 Fla. LEXIS 2184 (Fla., Nov. 2, 2017)

Prior History: [**1] Appeal of a non-final order from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; George A. Shahood, Senior Judge; L.T. Case No. 2014CA001711.

Core Terms

injunction, temporary injunction, website, video, allegations, defamation, candidate, reasons, newspaper, stories

Case Summary

Overview

HOLDINGS: [1]-The circuit court erred in temporarily enjoining a political organization from saying anything about a candidate, because the injunction violated the First Amendment, the complaint failed to comply with Fla. R. Civ. P. 1.110(b) and 1.610(c), and the order contained no factual findings, lacked the necessary precision about what was being enjoined, was overly broad, and lacked supporting detail.

Outcome

Order reversed.

LexisNexis® Headnotes

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN1[] **Local Governments, Elections**

See § 106.011(9), Fla. Stat. (2014).

Civil Procedure > Pleading & Practice > Pleadings > General Overview

HN2[] **Pleading & Practice, Pleadings**

Fla. R. Civ. P. 1.110(b) provides that when verification of a document is required, the document filed shall include an oath, affirmation, or the following statement: Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Injunctions, Preliminary & Temporary Injunctions**

As an extraordinary remedy, a temporary injunction should be sparingly granted and only after the moving party has alleged and proved facts entitling it to relief.

Civil Procedure > Remedies > Injunctions > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN4[] **Remedies, Injunctions**

At a contested hearing, the party opposing an injunction has the opportunity to cross-examine witnesses and challenge the allegations of the complaint. Only where a temporary injunction is sought without notice is the evidence in support of the injunction limited to affidavits or a verified pleading. Fla. R. Civ. P. 1.610(a)(2).

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Evidence > Weight & Sufficiency

HN5[] **Grounds for Injunctions, Irreparable Harm**

The party seeking an injunction must prove: (1) it

will suffer irreparable harm unless the injunction is entered; (2) there is no adequate remedy at law; (3) there is a substantial likelihood that the party will succeed on the merits; and (4) that considerations of the public interest support the entry of the injunction. The party seeking the injunction has the burden of providing competent, substantial evidence to satisfy each of these elements.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN6[] **Injunctions, Grounds for Injunctions**

A trial court's order granting a temporary injunction must contain clear, definite, and unequivocally sufficient factual findings to support each of the four conclusions necessary to justify entry of the injunction.

Evidence > Types of Evidence

HN7[] **Evidence, Types of Evidence**

An attorney's unsworn argument does not constitute evidence.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN8[] **Injunctions, Preliminary & Temporary Injunctions**

Fla. R. Civ. P. 1.610(c) states that every temporary injunction shall specify the reasons for entry and shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document.

Civil Procedure > Remedies > Damages > General Overview

Torts > Intentional Torts > Defamation > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

Torts > Intentional Torts > Defamation > Libel

HN9[] **Remedies, Damages**

In Florida, temporary injunctive relief is not available to prohibit the making of defamatory or

libelous statements. One reason for this is that there is an adequate remedy at law, an action for damages.

Torts > ... > Defamation > Public Figures > Actual Malice

Torts > ... > Defamation > Public Figures > Political Candidates

HN10[] **Public Figures, Actual Malice**

As public figures, political candidates may pursue defamation actions, provided that they are able to prove actual malice on the part of the defamer.

Torts > ... > Defamation > Public Figures > Political Candidates

HN11[] **Public Figures, Political Candidates**

The law expects a political candidate to accept republication of previous newspaper stories as their lot.

Torts > Intentional Torts > Defamation > General Overview

Torts > Intentional Torts > Invasion of Privacy > General Overview

HN12[] **Intentional Torts, Defamation**

Invasion of privacy is subject to the same First Amendment considerations as defamation and provides a separate cause of action for redress.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

HN13[] **Freedom of Speech, Political Speech**

The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint

HN14[] **Judicial & Legislative Restraints, Prior Restraint**

Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative

Restraints > Prior Restraint

HN15[] **Judicial & Legislative Restraints, Prior Restraint**

In a prior restraint context, the concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form.

Counsel: Louis C. Arslanian, Plantation, for appellant.

Ashley N. Minton of Minton Law, P.A., Fort Pierce, for appellee.

Judges: WARNER and MAY, JJ., concur.

Opinion by: GROSS

Opinion

[*70] GROSS, J.

This case involves a temporary injunction issued during a political campaign that limits what a political organization may say about a candidate. For multiple reasons, not the least of which is that the injunction is a prior restraint on speech in violation of the First Amendment, we entered an order dated August 22, 2014, reversing the temporary injunction in its entirety. This is the opinion that explains that ruling.

This case arises out of a contested race for county court judge in St. Lucie County. Philip Yacucci is the incumbent and Stephen Smith is the challenger. The election was on August 26, 2014. Concerned Citizens for Judicial Fairness, Inc. is an electioneering communications organization.[1]

Yacucci filed suit against Smith and Citizens for defamation, invasion of privacy, and intentional infliction of emotional distress. The complaint sought damages and injunctive relief.

The salient facts alleged in the complaint can be summarized as follows. Citizens and Smith are linked because the only contributors to Citizens are affiliated with the law firm that employs Smith. There is a website pertaining to this election. The complaint generally alleges that Smith and Citizens are responsible for what is posted on the website without explaining how or why.

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[1] Section 106.011(9), Florida Statutes (2014), defines an "[e]lectioneering communications organization" as:

> ***HN1***[] [A]ny group, other than a political party, affiliated party committee, or political committee, whose election-related activities are limited [**2] to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications . . . .

The home page of the website says this:

Palm Beach Post or State Attorney Investigation, Yacucci Accused of:

*Battery on his wife

*Aggravated Assault with a Firearm

*Unlawful Compensation

*Failure to pay child support

The website publishes a series of headlines above the first sentence of newspaper stories. Clicking on a headline takes the reader to what purports to be the full newspaper story. Each story is identified as being published in *The Palm Beach Post* and by the date. Eight of the [**3] stories were published from 1992-93; one story [*71] was published in 2007. The reporters who wrote the stories are identified.

The website contains links to "three commercially produced video advertisements." The complaint describes the videos as follows:

> The first video alleged that a State Attorney investigation revealed that a witness testified that the Plaintiff was in a car with his children when he pointed a gun at a man and said "I'm going to blow your head off." The video further stated that the same witness said the Plaintiff pushed his wife and said he was going to kill her.
>
> The second video alleged that the Plaintiff was accused of battery on his wife, aggravated assault with a firearm, and unlawful compensation. The video goes on to discuss the Plaintiff's current salary and the alleged foreclosure of his home. Finally the video discusses the allegation that the Plaintiff was threatened with 20 days in jail for failure to pay child support.
>
> The third video again discussed the alleged foreclosure of the Plaintiff's home and the threat to the Plaintiff of 20 days in jail for failure to pay child support.

The complaint alleges that an "individual" identified as Irene Leroux emailed [**4] members of the Florida Bar, "en masse," a link to the website. Based on "a diligent investigation," Yacucci "became aware" that Citizens "purchased what looks to be large blocks of commercial time, presumably to air the videos located on the website over broadcast television."

Yacucci generally alleges that the statements contained in the newspaper stories were false. The complaint sets forth reasons why Yacucci believes the allegations are misleading. For example, attached as an exhibit to the complaint is a Close-

Out Memo prepared on December 29, 1991, by a state attorney appointed to investigate certain criminal allegations. The Memo explains in detail the reasons that no criminal charges were filed against either Yacucci or his former wife or his former wife's friend.

Yacucci "verif[ied] and approve[d]" the "contents" of the complaint. We note that such a verification fails to comply with ***HN2***[] Florida Rule of Civil Procedure 1.110(b) which provides that "[w]hen verification of a document is required, the document filed shall include an oath, affirmation, or the following statement":

> Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.

Count V of the [**5] complaint sought a temporary injunction. There was a temporary injunction hearing at which the attorneys for all sides appeared. No witnesses were called. No exhibits were introduced in evidence. Over objection, Yacucci's attorney argued as if the allegations in the complaint were established facts. She complained about the website's "many false and misleading claims" and provided unsworn testimony about the true facts in the case. She said that an FDLE investigation "pretty much refuted" certain criminal charges and that no charges were filed "because there wasn't enough evidence on them."

On August 8, 2014, the circuit court declined to enter a temporary injunction against Smith; the court did, however, enjoin Citizens

> from operating [the website] from disseminating any material contained therein in the form of websites, direct mailers, television commercials, radio commercials and/or any other format for dissemination, or any other information about the Plaintiff.

The court set a $10,000 injunction bond.

On August 13, 2014, this Court stayed the operation of the temporary injunction.

[*72] ***HN3***[] As an extraordinary remedy, a temporary injunction should be sparingly granted and only after the moving [**6] party has alleged and proved facts entitling it to relief. *See Liberty Fin. Mtg. Corp. v. Clampitt*, 667 So. 2d 880, 881 (Fla. 2d DCA 1996); *Hiles v. Auto Bahn Fed'n, Inc.*, 498 So. 2d 997, 998 (Fla. 4th DCA 1986). ***HN4***[] At a contested hearing, the party opposing an injunction has the opportunity to cross examine witnesses and challenge the allegations of the

complaint. Only where a temporary injunction is sought without notice is the evidence in support of the injunction limited to affidavits or a verified pleading. *See* Fla. R. Civ. P. 1.610(a)(2).

HN5[⬆] The party seeking the injunction must prove: (1) it will suffer irreparable harm unless the injunction is entered, (2) there is no adequate remedy at law, (3) there is a substantial likelihood that the party will succeed on the merits, and (4) that considerations of the public interest support the entry of the injunction. *See Masters Freight, Inc. v. Servco, Inc.*, 915 So. 2d 666, 666 (Fla. 2d DCA 2005); *Cordis Corp. v. Prooslin*, 482 So. 2d 486, 489-90 (Fla. 3d DCA 1986). The party seeking the injunction "has the burden of providing competent, substantial evidence" to satisfy each of these elements. *SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012). ***HN6***[⬆] A trial court's order granting a temporary injunction must contain "[c]lear, definite, and unequivocally sufficient factual findings [to] support each of the four conclusions necessary to justify entry of" the injunction. *Liberty Fin.*, 667 So. 2d at 881 (quoting *City of Jacksonville v. Naegele Outdoor Advertising Co.*, 634 So. 2d 750, 754 (Fla. 1st DCA 1994), *approved*, 659 So. 2d 1046 (Fla. 1995)).

For numerous reasons, the temporary injunction cannot stand.

First, Yacucci offered no evidence to support the injunction, only [**7] the unsworn argument of counsel. ***HN7***[⬆] An attorney's unsworn argument does not constitute evidence. *See, e.g.*, *Rowe v. Rodriguez-Schmidt*, 89 So. 3d 1101, 1104 (Fla. 2d DCA 2012).

Second, the temporary injunction contains no factual findings whatsoever and lacks the necessary precision about what is being enjoined. ***HN8***[⬆] Florida Rule of Civil Procedure 1.610(c) states that every temporary injunction "shall specify the reasons for entry [and] shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document." Contrary to the rule, the court's order refers generally to the website, so the injunction is overly broad. *See Chevaldina v. R.K./FL Mgmt., Inc.*, 133 So. 3d 1086, 1091 (Fla. 3d DCA 2014). The order lacks the detail to support "each of the four conclusions necessary to justify entry of" the injunction. *Liberty Fin.*, 667 So. 2d at 881 (quoting *City of Jacksonville*, 634 So. 2d at 754).

Third, the general rule ***HN9***[⬆] in Florida is that "temporary injunctive relief is not available to

prohibit the making of defamatory or libelous statements." *Vrasic v. Leibel*, 106 So. 3d 485, 486 (Fla. 4th DCA 2013). One reason for this is that there is an adequate remedy at law, an action for damages. *Id*. ***HN10***[⬆] As public figures, political candidates may pursue defamation actions, provided that they are able to prove actual malice on the part of the defamer. *See Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 293-94 (Fla. 2d DCA 2001); *Pullum v. Johnson*, 647 So. 2d 254, 257 (Fla. 1st DCA 1994); *Barnes v. Horan*, 841 So. 2d 472, 479-80 (Fla. 3d DCA 2002) (involving defamation action by losing candidate for State Attorney).

[*73] Yacucci has failed to demonstrate that this [**8] case falls within the limited exception to the general rule for cases where "defamatory words are made in the furtherance of the commission of another intentional tort." *Chevaldina*, 133 So. 3d at 1090; *see, e.g., Murtagh v. Hurley*, 40 So. 3d 62 (Fla. 2d DCA 2010) (involving tort of tortious interference with advantageous business relationship); *Zimmerman v. D.C.A. at Welleby, Inc.*, 505 So. 2d 1371 (Fla. 4th DCA 1987) (same). On its face, the complaint fails to demonstrate the conduct required for intentional infliction of emotional distress—conduct "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Allen v. Walker*, 810 So. 2d 1090, 1091 (Fla. 4th DCA 2002) (quoting *Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278-79 (Fla. 1985)). ***HN11***[⬆] The law expects a political candidate to accept republication of previous newspaper stories "as their lot. . . . [T]he first amendment demands a hide that tough." *Ollman v. Evans*, 750 F.2d 970, 1005, 242 U.S. App. D.C. 301 (D.C. Cir. 1984) (Bork, J., concurring) (concerning a private defamation suit against newspaper columnists for statements made during a political controversy). ***HN12***[⬆] Invasion of privacy is subject to the same First Amendment considerations as defamation and provides a separate cause of action for redress. *See Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 610-11 (Fla. 5th DCA 2007).

Fourth, and most importantly, the trial court's injunction, issuing in the last three weeks of a political campaign, is "a classic example of prior restraint on speech triggering [**9] First Amendment concerns." *Vrasic*, 106 So. 3d at 486; *Chevaldina*, 133 So. 3d at 1090. Such concerns make the injunction contrary to the public interest.

HN13[↑] "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco Cnty. Democratic Ctr. Comm.*, 489 U.S. 214, 223, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971)).

HN14[↑] "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). To allow a temporary injunction such as this one to stand would be to make courts into censors, deciding what candidates can and cannot say. The political process should not be subject to the whims of a local judge who may favor one candidate over another. ***HN15***[↑] "The concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in a most pernicious form." *Wilson v. Superior Court*, 13 Cal. 3d 652, 119 Cal. Rptr. 468, 532 P.2d 116, 120 (Cal. 1975).

For these reasons, we reverse the temporary injunction in its entirety.

WARNER and MAY, JJ., concur.

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

JAMES DONELON,
PLAINTIFF,

v. **Case No. 23-008089-CI**

PINELLAS DEMOCRATIC
EXECUTIVE COMMITTEE,
DEFENDANT.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE, having come before this Court on December 4, 2023, on Defendant Pinellas Democratic Executive Committee's Motion to Dismiss. Plaintiff appeared *pro se* and counsel appeared on behalf of Defendant. This Court, having review the Motion and having heard the argument of Plaintiff and Defendant's counsel, and is otherwise duly advised in its premises, it is hereby **ORDERED AND ADJUDGED** as follows:

(1) Defendant's Motion to Dismiss for failure to state a cause of action is **GRANTED** without prejudice.

(2) Plaintiff may file an Amended Complaint on or before December 15, 2023.

(3) Notwithstanding this Court granting the Motion to Dismiss without prejudice, this Court, based upon the authorities of *Repub. Party v. Davis*, 18 So. 3d 1112 (Fla. 3d DCA 2009) and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), finds that it lacks jurisdiction to hear an action regarding the internal operations of a political party such as Defendant.

(4) If Plaintiff opts to file an Amended Complaint, Plaintiff must demonstrate in such Amended Complaint why this Court should not rely on *Repub. Party v. Davis*, 18 So. 3d 1112 (Fla. 3d DCA 2009) and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) in determining that this Court lack jurisdiction, and must specifically cite case law demonstrating that this Court has jurisdiction to establish this Court's jurisdiction.

(5) By stipulation of the parties, Defendant's counsel may upload the Proposed Order to JAWS and then email a copy of the signed Order to Plaintiff at DemDonelon@hotmail.com.

Ordered in Chambers in St. Petersburg, Pinellas County, Florida.

23-008089-CI 12/5/2023 6:12:52 PM
Circuit Judge Thomas Ramsberger
23-008089-CI 12/5/2023 6:12:52 PM

CIRCUIT COURT JUDGE

Copies to:

-James Donelon, Plaintiff *pro se*

-George A.D. Thurlow, Esquire and George K. Rahdert, Esquire, attorneys for Defendant

Fla. Stat. § 768.295

Current through the 2024 regular session.

LexisNexis® Florida Annotated Statutes > Title XLV. Torts. (Chs. 766 — 774) > Chapter 768. Negligence. (Pts. I — II) > Part I. General Provisions. (§§ 768.041 — 768.395)

§ 768.295. Strategic Lawsuits Against Public Participation (SLAPP) prohibited.

(1) It is the intent of the Legislature to protect the right in Florida to exercise the rights of free speech in connection with public issues, and the rights to peacefully assemble, instruct representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. It is the public policy of this state that a person or governmental entity not engage in SLAPP suits because such actions are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues. Therefore, the Legislature finds and declares that prohibiting such lawsuits as herein described will preserve this fundamental state policy, preserve the constitutional rights of persons in Florida, and assure the continuation of representative government in this state. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

(2) As used in this section, the phrase or term:

(a) "Free speech in connection with public issues" means any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.

(b) "Governmental entity" or "government entity" means the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the

state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof.

(3) A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

(4) A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response. The court may award, subject to the limitations in s. 768.28, the party sued by a governmental entity actual damages arising from a governmental entity's violation of this section. The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section.

(5) In any case filed by a governmental entity which is found by a court to be in violation of this section, the governmental entity shall report such finding and provide a copy of the court's order to the Attorney General no later than 30 days after such order is final. The Attorney General shall report any violation of this section by a governmental entity to the Cabinet, the President of the

Senate, and the Speaker of the House of Representatives. A copy of such report shall be provided to the affected governmental entity.

History

S. 1, ch. 2000-174; s. 1, ch. 2015-70, effective July 1, 2015.

Annotations

Notes

Amendment Notes

The 2015 amendment rewrote the section.

Notes to Decisions

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Failures to State Claims

Civil Procedure: Summary Judgment: Motions for Summary Judgment

Civil Procedure: Remedies: Costs & Attorney Fees: Attorney Expenses & Fees: English Rule

Civil Procedure: Remedies: Costs & Attorney Fees: Attorney Expenses & Fees: Statutory Awards

Civil Procedure: Appeals: Appellate Jurisdiction: State Court Review

Civil Procedure: U.S. Supreme Court Review

Constitutional Law: Bill of Rights: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

Constitutional Law: Bill of Rights: Fundamental Freedoms: Freedom of Speech: Strategic Lawsuits Against Public Participation

Constitutional Law: Bill of Rights: Fundamental Freedoms: Freedom to Petition

Governments: Local Governments: Claims By & Against

Torts: Business Torts: Commercial Interference: Contracts: Defenses

Torts: Public Entity Liability: Liability: General Overview

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Failures to State Claims

Overview: *Writ of certiorari granted because defendants established a departure from the essential requirements of law by applying an incorrect motion-to-dismiss standard rather than the standard applied to motions to dismiss filed pursuant to Florida's Anti-SLAPP statute, § 768.295, Fla. Stat. (2020).*

- Section 768.295(4), Fla. Stat. (2020), permits a SLAPP defendant to file a motion to dismiss, a motion for final judgment entered in favor of the SLAPP defendant, or a motion for summary judgment.

Davis v. Mishiyev, 339 So. 3d 449, 2022 Fla. App. LEXIS 3212 (Fla. 2nd DCA 2022).

Civil Procedure: Summary Judgment: Motions for Summary Judgment

Overview: *Writ of certiorari granted because defendants established a departure from the essential requirements of law by applying an incorrect motion-to-dismiss standard rather than the standard applied to motions to dismiss filed pursuant to Florida's Anti-SLAPP statute, § 768.295, Fla. Stat. (2020).*

- Section 768.295(4), Fla. Stat. (2020), permits a SLAPP defendant to file a motion to dismiss, a motion for final judgment entered in favor of the SLAPP defendant, or a motion for summary judgment.

Davis v. Mishiyev, 339 So. 3d 449, 2022 Fla. App. LEXIS 3212 (Fla. 2nd DCA 2022).

Civil Procedure: Remedies: Costs & Attorney Fees: Attorney Expenses & Fees: English Rule

Overview: *Where the animal shelter's defamation suit against the volunteer was resolved by arbitration, the trial court correctly denied her motion for attorney's fees under the Anti-SLAPP statute, § 768.295(4), Fla. Stat. because the trial court made no specific findings that the animal shelter's actions violated the Anti-SLAPP statute.*

- Section 768.295, Fla. Stat. provides for an award of attorney's fees to a party who prevails on an Anti-SLAPP claim: A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section.

Lee v. Animal Aid, Inc., 2024 Fla. App. LEXIS 1508 (Fla. 4th DCA Feb. 28, 2024).

Civil Procedure: Remedies: Costs & Attorney Fees: Attorney Expenses & Fees: Statutory Awards

Overview: *Trial court correctly denied plaintiff's motion for attorney's fees under the provision of the Anti-SLAPP statute, § 768.295(4), Fla. Stat., since she never obtained a ruling that defendant's claim violated the Anti-SLAPP statute. Plaintiff, as a pro se litigant on her Anti-SLAPP motion, was not entitled to attorney's fees.*

- Further, § 768.295, Fla. Stat. provides for an award of attorney's fees to a party who prevails on an Anti-SLAPP claim: A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action

or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response. The court may award, subject to the limitations in s. 768.28, the party sued by a governmental entity actual damages arising from a governmental entity's violation of this section. The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section.

- A party who prevails on an Anti-SLAPP claim is entitled to attorney's fees under § 768.295(4), Fla. Stat.
- Merely raising the Anti-SLAPP statute as an affirmative defense, where the court's order granting summary judgment neither mentioned nor relied on the Anti-SLAPP provision, will not entitle the party to fees under the Anti-SLAPP statute. It is clear that there must be an express finding by the trial court that the petitioner's suit violated the Anti-SLAPP statute for the defendant to be entitled to fees under § 768.295(4), Fla. Stat.
- The Anti-SLAPP statute provides only for attorney fees and costs incurred in connection with a claim that an action was filed in violation of this sectionâ in other words, fees and costs incurred in connection with the SLAPP motion itself. § 768.295(4), Fla. Stat.

Lee v. Animal Aid, Inc., 388 So. 3d 25, 2024 Fla. App. LEXIS 4562 (Fla. 4th DCA 2024).

Overview: *Where the animal shelter's defamation suit against the volunteer was resolved by arbitration, the trial court correctly denied her motion for attorney's fees under the Anti-SLAPP statute, § 768.295(4), Fla. Stat. because the trial court made no specific findings that the animal shelter's actions violated the Anti-SLAPP statute.*

- Section 768.295, Fla. Stat. provides for an award of attorney's fees to a party who prevails on an Anti-SLAPP claim: A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section.
- A party who prevails on an Anti-SLAPP claim is entitled to attorney's fees under § 768.295(4), Fla. Stat.
- It is clear that there must be an express finding by the trial court that the petitioner's suit violated the Anti-SLAPP statute for the defendant to be entitled to fees under § 768.295(4), Fla. Stat.

Lee v. Animal Aid, Inc., 2024 Fla. App. LEXIS 1508 (Fla. 4th DCA Feb. 28, 2024).

Civil Procedure: Appeals: Appellate Jurisdiction: State Court Review

In a suit arising from a lost election, the court dismissed the petition for a writ of certiorari because petitioners failed to demonstrate the jurisdictional prerequisite by failing to make a prima facie showing of irreparable harm sufficient to invoke the court's certiorari jurisdiction based on the underlying action being barred under Florida's Anti-SLAPP statute, which protects the exercise of the right of free speech in connection with public issues. WPB Residents for Integrity in Gov't, Inc. v. Materio, 284 So. 3d 555, 2019 Fla. App. LEXIS 16456 (Fla. 4th DCA 2019).

Residents were granted a writ of certiorari and the order denying their motion to dismiss was quashed because the trial court departed from the essential requirements of law and failed to adhere to the language of the SLAPP statute by not dismissing the developer's counterclaim as a SLAPP suit since vagueness of the developer's allegations did not permit trial court to determine if the developer's claims were primarily based on protected activities. Gundel v. AV Homes, Inc., 264 So. 3d 304, 2019 Fla. App. LEXIS 1339 (Fla. 2nd DCA 2019).

Civil Procedure: U.S. Supreme Court Review

Court granted a writ of certiorari and quashed the trial court's order denying defendants' motion to dismiss plaintiff's action for defamation and intentional interference with a business relationship because defendants established a departure from the essential requirements of law by applying an incorrect motion-to-dismiss standard rather than the standard applied to motions to dismiss filed pursuant to Florida's Anti-SLAPP statute. Davis v. Mishiyev, 339 So. 3d 449, 2022 Fla. App. LEXIS 3212 (Fla. 2nd DCA 2022).

Constitutional Law: Bill of Rights: Fundamental Freedoms: Freedom of Speech: Scope of Freedom

Overview: *Where the animal shelter's defamation suit against the volunteer was resolved by arbitration, the trial court correctly denied her motion for attorney's fees under the Anti-SLAPP statute, § 768.295(4), Fla. Stat. because the trial court made no specific findings that the animal shelter's actions violated the Anti-SLAPP statute.*

- Florida's anti-SLAPP statute prohibits a person from filing a cause of action that is: (a) without merit; and (b) primarily because the defendant exercised the constitutional right of free speech in connection with a public issue. § 768.295(3), Fla. Stat. A SLAPP is a lawsuit, cause of action, claim, cross-claim, or counterclaim filed against a person or entity that is without merit and filed primarily because the person or entity engaged in the exercise of a right protected by the First Amendment, U.S. Const. amend. I.

Lee v. Animal Aid, Inc., 2024 Fla. App. LEXIS 1508 (Fla. 4th DCA Feb. 28, 2024).

Constitutional Law: Bill of Rights: Fundamental Freedoms: Freedom of Speech: Strategic Lawsuits Against Public Participation

Overview: *Trial court correctly denied plaintiff's motion for attorney's fees under the provision of the Anti-SLAPP statute, § 768.295(4), Fla. Stat., since she never obtained a ruling that defendant's claim violated the Anti-SLAPP statute. Plaintiff, as a pro se litigant on her Anti-SLAPP motion, was not entitled to attorney's fees.*

- Florida's anti-SLAPP statute prohibits a person from filing a cause of action that is (a) without merit and (b) primarily because the defendant exercised the constitutional right of free speech in connection with a public issue. § 768.295(3), Fla. Stat.
- The legislature outlined within the statute the purpose of the Anti-SLAPP provision:It is the intent of the Legislature to protect the right in Florida to exercise the rights of free speech in connection with public issues, and the rights to peacefully assemble, instruct representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. It is the public policy of this state that a person or governmental entity not engage in SLAPP suits because such actions are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues. § 768.295(1), Fla. Stat. (2018).
- A party who prevails on an Anti-SLAPP claim is entitled to attorney's fees under § 768.295(4), Fla. Stat.
- Merely raising the Anti-SLAPP statute as an affirmative defense, where the court's order granting summary judgment neither mentioned nor relied on the Anti-SLAPP provision, will not entitle the party to fees under the Anti-SLAPP statute. It is clear that there must be an express finding by the trial court that the petitioner's suit violated the Anti-SLAPP statute for the defendant to be entitled to fees under § 768.295(4), Fla. Stat.

- The Anti-SLAPP statute provides only for attorney fees and costs incurred in connection with a claim that an action was filed in violation of this sectionâ in other words, fees and costs incurred in connection with the SLAPP motion itself. § 768.295(4), Fla. Stat.

Lee v. Animal Aid, Inc., 388 So. 3d 25, 2024 Fla. App. LEXIS 4562 (Fla. 4th DCA 2024).

Overview: *Where the animal shelter's defamation suit against the volunteer was resolved by arbitration, the trial court correctly denied her motion for attorney's fees under the Anti-SLAPP statute, § 768.295(4), Fla. Stat. because the trial court made no specific findings that the animal shelter's actions violated the Anti-SLAPP statute.*

- Florida's anti-SLAPP statute prohibits a person from filing a cause of action that is: (a) without merit; and (b) primarily because the defendant exercised the constitutional right of free speech in connection with a public issue. § 768.295(3), Fla. Stat. A SLAPP is a lawsuit, cause of action, claim, cross-claim, or counterclaim filed against a person or entity that is without merit and filed primarily because the person or entity engaged in the exercise of a right protected by the First Amendment, U.S. Const. amend. I.
- Section 768.295, Fla. Stat. provides for an award of attorney's fees to a party who prevails on an Anti-SLAPP claim: A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section.
- A party who prevails on an Anti-SLAPP claim is entitled to attorney's fees under § 768.295(4), Fla. Stat.
- It is clear that there must be an express finding by the trial court that the petitioner's suit violated the Anti-SLAPP statute for the defendant to be entitled to fees under § 768.295(4), Fla. Stat.

Lee v. Animal Aid, Inc., 2024 Fla. App. LEXIS 1508 (Fla. 4th DCA Feb. 28, 2024).

Overview: *Writ of certiorari granted because defendants established a departure from the essential requirements of law by applying an incorrect motion-to-dismiss standard rather than the standard applied to motions to dismiss filed pursuant to Florida's Anti-SLAPP statute, § 768.295, Fla. Stat. (2020).*

- A SLAPP suit is defined in relevant part as any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue. § 768.295(3), Fla. Stat. (2020). The statute defines free speech in connection with public issues as any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work. § 768.295(2)(a).

- Section 768.295, Fla. Stat. (2020), was enacted because the legislature acknowledged the inconsistency between SLAPP suits and the constitutional right to free speech in connection with public issues and, therefore, that the statute was intended to assist in expeditiously disposing of such suits. § 768.295(1). The very filing and continuation of such suits had a chilling effect on constitutional rights and the harm that results from the court's improper denial of a motion to dismiss is precisely the harm that the Anti-SLAPP statute seeks to preventâ unnecessary litigation. The protection afforded by § 768.295 could not be restored once it was lost through litigation and that without the availability of certiorari review, the substantive right created by the Anti-SLAPP statute is illusory, the policy underlying the creation of the statute is frustrated, and the protection afforded by the statute is rendered meaningless for defendants.

- Section 768.295(4), Fla. Stat. (2020), permits a SLAPP defendant to file a motion to dismiss, a motion for final judgment entered in favor of the SLAPP defendant, or a motion for summary judgment.

Davis v. Mishiyev, 339 So. 3d 449, 2022 Fla. App. LEXIS 3212 (Fla. 2nd DCA 2022).

Court granted a writ of certiorari and quashed the trial court's order denying defendants' motion to dismiss plaintiff's action for defamation and intentional interference with a business relationship because defendants established a departure from the essential requirements of law by applying an incorrect motion-to-dismiss standard rather than the standard applied to motions to dismiss filed pursuant to Florida's Anti-SLAPP statute. Davis v. Mishiyev, 339 So. 3d 449, 2022 Fla. App. LEXIS 3212 (Fla. 2nd DCA 2022).

Final order dismissing appellants' defamation action with prejudice pursuant to Florida's Anti-SLAPP Statute was proper even though the court agreed that the statute did not create a different motion to dismiss standard because appellants failed to plead facts that, if proven, would establish actual malice. However, the dismissal with prejudice was improper and the court remanded without prejudice to amend the complaint. Lam v. Univision Communs., Inc., 329 So. 3d 190, 2021 Fla. App. LEXIS 13845 (Fla. 3rd DCA 2021).

In the school's action against a parent for tortious interference, certiorari was the appropriate mechanism for review of the order denying his motion to dismiss pursuant to the Anti-SLAPP statute; however, the petition was denied as he failed to show that the trial court departed from the essential requirements of the law. Because the action was based on the parent's private social media communications that were not privileged, the school met its burden to demonstrate that its claims were not "primarily" based on the exercise of First Amendment rights. Baird v. Mason Classical Acad., Inc., 317 So. 3d 264, 2021 Fla. App. LEXIS 5027 (Fla. 2nd DCA 2021).

In a suit arising from a lost election, the court dismissed the petition for a writ of certiorari because petitioners failed to demonstrate the jurisdictional prerequisite by failing to make a prima facie showing of irreparable harm sufficient to invoke the court's certiorari jurisdiction based on the underlying action being barred under Florida's Anti-SLAPP statute, which protects the exercise of the right of free speech in connection with public issues. WPB Residents for Integrity in Gov't, Inc. v. Materio, 284 So. 3d 555, 2019 Fla. App. LEXIS 16456 (Fla. 4th DCA 2019).

Residents were granted a writ of certiorari and the order denying their motion to dismiss was quashed because the trial court departed from the essential requirements of law and failed to adhere to the language of the SLAPP statute by not dismissing the developer's counterclaim as a SLAPP suit since vagueness of the developer's allegations did not permit trial court to determine if the developer's claims were primarily based on protected activities. Gundel v. AV Homes, Inc., 264 So. 3d 304, 2019 Fla. App. LEXIS 1339 (Fla. 2nd DCA 2019).

Constitutional Law: Bill of Rights: Fundamental Freedoms: Freedom to Petition

Overview: *Trial court correctly denied plaintiff's motion for attorney's fees under the provision of the Anti-SLAPP statute, § 768.295(4), Fla. Stat., since she never obtained a ruling that defendant's claim violated the Anti-SLAPP statute. Plaintiff, as a pro se litigant on her Anti-SLAPP motion, was not entitled to attorney's fees.*

- The legislature outlined within the statute the purpose of the Anti-SLAPP provision:It is the intent of the Legislature to protect the right in Florida to exercise the rights of free speech in connection with public issues, and the rights to peacefully assemble, instruct representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. It is the public policy of this state that a person or governmental entity not engage in SLAPP suits because such actions are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues. § 768.295(1), Fla. Stat. (2018).

Lee v. Animal Aid, Inc., 388 So. 3d 25, 2024 Fla. App. LEXIS 4562 (Fla. 4th DCA 2024).

Overview: *Where the animal shelter's defamation suit against the volunteer was resolved by arbitration, the trial court correctly denied her motion for attorney's fees under the Anti-*

SLAPP statute, § 768.295(4), Fla. Stat. because the trial court made no specific findings that the animal shelter's actions violated the Anti-SLAPP statute.

- Florida's anti-SLAPP statute prohibits a person from filing a cause of action that is: (a) without merit; and (b) primarily because the defendant exercised the constitutional right of free speech in connection with a public issue. § 768.295(3), Fla. Stat. A SLAPP is a lawsuit, cause of action, claim, cross-claim, or counterclaim filed against a person or entity that is without merit and filed primarily because the person or entity engaged in the exercise of a right protected by the First Amendment, U.S. Const. amend. I.

Lee v. Animal Aid, Inc., 2024 Fla. App. LEXIS 1508 (Fla. 4th DCA Feb. 28, 2024).

Governments: Local Governments: Claims By & Against

Overview: *Trial court correctly denied plaintiff's motion for attorney's fees under the provision of the Anti-SLAPP statute, § 768.295(4), Fla. Stat., since she never obtained a ruling that defendant's claim violated the Anti-SLAPP statute. Plaintiff, as a pro se litigant on her Anti-SLAPP motion, was not entitled to attorney's fees.*

- Further, § 768.295, Fla. Stat. provides for an award of attorney's fees to a party who prevails on an Anti-SLAPP claim: A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the

claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response. The court may award, subject to the limitations in s. 768.28, the party sued by a governmental entity actual damages arising from a governmental entity's violation of this section. The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section.

Lee v. Animal Aid, Inc., 388 So. 3d 25, 2024 Fla. App. LEXIS 4562 (Fla. 4th DCA 2024).

Overview: *Where the animal shelter's defamation suit against the volunteer was resolved by arbitration, the trial court correctly denied her motion for attorney's fees under the Anti-SLAPP statute, § 768.295(4), Fla. Stat. because the trial court made no specific findings that the animal shelter's actions violated the Anti-SLAPP statute.*

- Section 768.295, Fla. Stat. provides for an award of attorney's fees to a party who prevails on an Anti-SLAPP claim: A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section.

Lee v. Animal Aid, Inc., 2024 Fla. App. LEXIS 1508 (Fla. 4th DCA Feb. 28, 2024).

Torts: Business Torts: Commercial Interference: Contracts: Defenses

In the school's action against a parent for tortious interference, certiorari was the appropriate mechanism for review of the order denying his motion to dismiss pursuant to the Anti-SLAPP statute; however, the

petition was denied as he failed to show that the trial court departed from the essential requirements of the law. Because the action was based on the parent's private social media communications that were not privileged, the school met its burden to demonstrate that its claims were not "primarily" based on the exercise of First Amendment rights. Baird v. Mason Classical Acad., Inc., 317 So. 3d 264, 2021 Fla. App. LEXIS 5027 (Fla. 2nd DCA 2021).

Torts: Public Entity Liability: Liability: General Overview

Trial court erred in granting summary judgment to a deputy sheriff in a wrongful death action as a jury question remained as to whether the sheriff acted in a willful and wanton manner in placing the decedent in a more dangerous situation than he would have been in had the sheriff simply left him alone, so as to justify the imposition of liability against the sheriff, in spite of Fla. Stat. § 768.28(9)(a); further, the issue was not whether the deputy should have taken the decedent into custody. Lemay v. Kondrk, 923 So. 2d 1188, 2006 Fla. App. LEXIS 3442 (Fla. 5th DCA 2006).

Research References & Practice Aids

RESEARCH REFERENCES & PRACTICE AIDS

Treatises

Florida Torts, V. Actions Involving Specific Parties, Chapter 80 Liabilities of Public Entities and Employees, I. Legal Background, E. Specific Public Entities, Functions, and Employees, § 80.56 SLAPP Suits by Governmental Entities.

End of Document

Gundel v. AV Homes, Inc.

Court of Appeal of Florida, Second District

February 1, 2019, Opinion Filed

Case No. 2D18-899

Reporter

264 So. 3d 304 *; 2019 Fla. App. LEXIS 1339 **; 44 Fla. L. Weekly D 351; 2019 WL 405843

NORMAN GUNDEL; WILLIAM MANN; and BRENDA N. TAYLOR, individually and on behalf of all similarly situated persons, Petitioners, v. AV HOMES, INC. and AVATAR PROPERTIES, INC., Respondents.

Subsequent History: Decision reached on appeal by, Remanded by Gundel v. AV Homes, Inc., 2020 Fla. App. LEXIS 2168 (Fla. Dist. Ct. App. 2d Dist., Feb. 21, 2020)

Prior History: [**1] Petition for Writ of Certiorari to the Circuit Court for Polk County; Andrea Teves Smith, Judge.

Core Terms

Residents, Anti-SLAPP, motion to dismiss, counterclaim, trial court, amenities, lawsuit, summary judgment motion, claimant, government entity, entity, summary judgment, pleadings, contesting, meetings, allegations, attended, damages, posted, rights, essential requirement, certiorari review, cause of action, public issue, free speech, expeditiously, homeowners, immunity

Case Summary

Overview

HOLDINGS: [1]-The residents were granted a writ of certiorari and the order denying their motion to dismiss was quashed because the trial court departed from the essential requirements of law and failed to adhere to the language of the Strategic Lawsuit Against Public Participation statute (SLAPP), §§ 720.304 and 768.295, Fla. Stat., (2017), by not dismissing the developer's counterclaim as a SLAPP suit as the

vagueness of the developer's allegations did not permit the trial court to determine if the developer's claims were primarily based on protected activities, as the SLAPP statute requires.

Outcome

Petition granted; order denying residents' motion to dismiss quashed.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Before a court may grant certiorari relief from the denial of a motion to dismiss, the petitioner must establish the following three elements: (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal. The latter two elements are jurisdictional. Certiorari review has been limited as a matter of policy to avoid piecemeal review of pretrial orders. However, in numerous cases, Florida courts have permitted certiorari review to determine whether a party was afforded the proper process through procedural compliance with the statutory requirements. Appellate courts do have certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of § 768.72, Fla. Stat., (1993). Moreover, certiorari review is appropriate where an order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN2[] **Defenses, Demurrers & Objections, Motions to Dismiss**

An alleged error arising from a motion to dismiss is remediable on appeal regardless of whether the motion is granted or denied. Certiorari may be precluded not by the availability of a mechanism for correcting the error itself; rather, the remedy must alleviate the harm that results from the error.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN3[] **Appellate Jurisdiction, State Court Review**

In the context of the Anti-SLAPP statute, § 768.295, Fla. Stat., the harm that results from the court's improper denial of a motion to dismiss or in its failure to rule on pending motions for summary judgment and judgment on the pleadings is precisely the harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation. That is, if certiorari review is not available, the substantive right created by the Anti-SLAPP statute is illusory and the very policy that animates the decision to prevent SLAPP suits is frustrated such that the "statutory protection becomes essentially meaningless for the individual defendant.

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN4[] **Summary Judgment, Motions for Summary Judgment**

The Anti-SLAPP statute, § 768.295, Fla. Stat., plainly authorizes the filing of a motion to dismiss or motion for summary judgment. While it does not elaborate on a motion seeking dismissal, the statute expressly provides that once a motion for summary judgment, together with supplemental affidavits, has been filed, the claimant shall thereafter file a response and any supplemental affidavits. The statute then

establishes the duty of the court to, as soon as practicable, set a hearing on the motion, which shall be held at the earliest possible time after the claimant files its response. Therefore, the statute sets forth the procedural mechanisms by which a SLAPP defendant may invoke its substantive right—a motion seeking dismissal or summary judgment—as well as the requirement to hear such motions expeditiously. The language of §§ 720.304(4)(c) and 768.295(4), Fla. Stat., are identical in terms of the procedure to be used by the parties and the trial court.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] **Entitlement as Matter of Law, Appropriateness**

Although it is true that motions for dismissal and motions for summary judgment serve separate purposes, are not interchangeable, and one may not be substituted for another,. That one motion cannot substitute for the other does not allow the court to decline to rule on an otherwise facially and substantively sufficient motion.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

HN6[] **Entitlement as Matter of Law, Appropriateness**

Fla. R. Civ. P. 1.510 governs summary judgment and provides that a party against whom a claim or counterclaim is asserted or a declaratory judgment is sought may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits. Fla. R. Civ. P. 1.510(b). It further provides that the judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). The content of the

document and its attachments must support the relief requested, thereby allowing the court to rule upon the motion based upon its respective purpose and standard. The character of a motion will depend upon its grounds or contents, and not on its title.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN7[] **Entitlement as Matter of Law, Appropriateness**

The Anti-SLAPP statute, § 768.295(3), Fla. Stat., authorizes the filing of a motion seeking dismissal and a motion seeking summary judgment. Whereas the statute sets forth the procedures for considering a motion for summary judgment, the statute is silent as to the burden or procedure for considering a motion to dismiss. The language of the statute does, however, attach the action to the claimant rather than the SLAPP defendant: a person or governmental entity in this state may not file, thus prohibiting the claimant from taking action, rather than a person or entity may not be sued by a governmental entity or another person. § 768.295(3). The statutory language supports requiring the claimant to meet a burden.

Counsel: Kristin A. Norse and Stuart C. Markman of Kynes, Markman & Felman, P.A., Tampa; and Kenneth G. Turkel and Shane B. Vogt of Bajo Cuva Cohen & Turkel, P.A., Tampa, for Petitioners.

Daniel J. Fleming and Christian M. Leger of Gray Robinson, P.A., Tampa, for Respondents.

Judges: BLACK, Judge. MORRIS and LUCAS, JJ., Concur.

Opinion by: BLACK

Opinion

[*306] BLACK, Judge.

Norman Gundel, William Mann, and Brenda N. Taylor (the Residents) seek a writ of certiorari quashing the trial court's order denying their motion to dismiss the counterclaim filed by Avatar Properties, Inc., in the Residents' class action lawsuit against Avatar Properties and its parent company, AV Homes, Inc. The Residents assert that by failing to adhere to the language of sections 720.304 and 768.295, Florida Statutes (2017), and by not dismissing the counterclaim as a Strategic Lawsuit Against Public Participation (SLAPP) suit the court departed from the essential requirements of law. We grant the petition and quash the order denying the Residents' motion to dismiss.

I. Background

[**2] The Residents filed a class action complaint against AV Homes and Avatar Properties alleging violations of Florida's Homeowners' Association Act, §§ 720.301-720.407, and Florida's Deceptive and Unfair Trade Practices Act, §§ 501.201-501.213, Fla. Stat. (2017), and seeking declaratory relief, injunctive relief, and damages. A brief discussion of the claims in the Residents' complaint and Avatar Properties' counterclaim is necessary to provide context to our decision.

Avatar Properties is the developer of Solivita, the community in which the Residents own homes. In their complaint, the Residents claimed that Avatar Properties and AV Homes violated the law when they created both the Solivita Community Association and the Club Plan, each of which require Solivita homeowners to pay fees.[1] [*307] The Residents claim that the imposition of both of these fees is not legal and that certain marketing for the community was deceptive. In creating Solivita, Avatar Properties also established two community development districts (CDDs) to fund infrastructure within the community through additional assessments on homeowners.

The Residents' lawsuit arose after Avatar Properties proposed to sell the Club amenities, as established by the Club Plan, to the CDDs at a cost of $73.7 million. The purchase would be financed through the issuance of bonds, to be repaid by Solivita homeowners [**3] including the Residents. The Residents

[1] Membership in both the Solivita Community Association and the Club Plan are mandatory for Solivita homeowners. The association fee is an assessment. The Club Plan governs the "Club amenities" and establishes the "Club dues" or Club fees, which include both expenses, similar to common-area upkeep expenses, and "Club membership fees." The Club amenities are exclusively owned by the "Club Owner," Avatar Properties, and as alleged by the Residents, the Club membership fees are collected "without deduction of expenses or charges in respect of the Club" as profit to Avatar Properties.

expressed concerns about the proposed sale and publicly commented on the propriety of the $73.7 million suggested purchase price and bond validation proceedings.[2] They posted on Internet blogs, spoke at Solivita CDD meetings, distributed handouts at CDD meetings, commented at other local meetings at which Solivita homeowners were present, and circulated a petition to have the Club amenities appraised. The Residents obtained an appraisal setting the fair market value of the Club amenities at $19.25 million. The Residents also posted on the Internet information about the Bond Validation Case, the mechanism by which the CDDs would be granted the bonds to purchase the amenities. The posts included links to the court filings and summaries of the allegations.

After a failed motion to dismiss the Residents' lawsuit, Avatar Properties filed its answer and a counterclaim. The counterclaim raised three counts which the Residents allege seek to hold the Residents liable for damages based on constitutionally protected conduct: engaging in free speech, defending and prosecuting lawsuits, and engaging in discourse with governmental entities, the CDDs. Count I [**4] of the counterclaim alleged that the Residents breached the purchase and sale agreements "by actively and vocally contesting the validity and enforceability of: (1) the mandatory nature of the membership in the Club; (2) the Club Dues and Membership Fees; and (3) [Avatar Properties'] right to sell the Club [amenities] at its sole discretion." Count II alleged that the Residents breached the affirmative covenant running with the land—the requirements of membership in the Club Plan—"by contesting the validity of the Club Plan, [Avatar Properties'] right to collect Club Dues, and [Avatar Properties'] right to sell the Club [amenities]." Count III of the counterclaim sought a declaratory judgment finding "that the Club [amenities] (and the fees associated therewith) are not subject to [chapter 720]." Count IV claimed tortious interference with contractual relations, alleging that the Residents "unjustifiably interfered with [Avatar Properties'] agreement with the CDDs by contesting the enforceability of the Club Plan." Each count realleged the paragraphs outlining the Residents' conduct: (1) engaging in "extra judicial conduct aimed at frustrating" the sale of the Club amenities to the [**5] CDDs, including posting "misleading information" on the Solivita blog, "handing out fliers to residents that included inaccurate information[,] and contesting [*308] [Avatar Properties'] right to collect Club [d]ues"; (2) attending meetings of local

[2] The bond litigation (Bond Validation Case) remains pending below but has not been consolidated with the action at issue here.

clubs/classes for homeowners and contesting the sale of the Club amenities to the CDDs for the requested price; (3) asking residents "to sign petitions contesting [Avatar Properties'] right to sell the Club [amenities]"; and (4) "by virtue of this [lawsuit]" continuing to frustrate Avatar Properties' "contractual interests." Avatar Properties claimed damages of "increased attorneys' fees in the Bond Validation Case, as well as the delay, frustration, and potential loss of the planned sale to the CDDs," and it argued that the Residents "unjustifiably interfered with [Avatar Properties'] agreement with the CDDs." The purchase agreement between Avatar Properties and the CDDs, dated December 1, 2016, was included in the attachments to the counterclaim.

In their answer, the Residents admitted that they posted information on the Solivita blog and that they "distributed handouts at CDD public meetings"; they admitted to attending classes for residents [**6] held by a local club and speaking about the proposed sale of the Club amenities to the CDDs; they admitted that they sought and obtained signatures on a petition for a fair market value appraisal of the Club amenities; and they admitted that Avatar Properties "is trying to sue [the Residents] for filing the above styled class action." The Residents also admitted that they "vocally contested the validity of certain aspects of the Club Plan and the proposed sale of the Club [amenities], as asserted in the official court records in the Bond Validation Case." The Residents filed the affidavit of Mr. Gundel, one of the Residents. Mr. Gundel averred that he made comments and distributed handouts about the proposed purchase of the Club amenities at public CDD meetings "in late 2015 or 2016"; that he posted on the Solivita blog about the Bond Validation Case; that he attended a February 10, 2017, CDD meeting and distributed information about the proposed purchase; that he attended a March 15, 2017, CDD meeting and presented the appraisal petition; and that he attended an April 19, 2017, CDD meeting and presented the appraisal report and another handout. He further averred that after the class [**7] action lawsuit was filed, he attended three more meetings of the CDD and spoke about the proposed purchase.

II. The Anti-SLAPP motion

Simultaneously with their answer, the Residents also filed a "Motion to Dismiss, For Judgment on the Pleadings or For Summary Judgment on Counterclaim and For Award of Attorneys' Fees and Costs Under Florida's Anti-SLAPP Statutes." The motion alleged that Avatar Properties' counterclaim "openly violates

Florida's Anti SLAPP Statutes because it seeks damages from the [Residents] because they assembled, engaged in free speech, and sought redress before their government," citing sections 768.295 and 720.304.[3]

The Anti-SLAPP statute provides, in pertinent part:

> A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, [*309] or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, [**8] as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

§ 768.295(3). The Anti-SLAPP statute defines "[f]ree speech in connection with public issues" as

> any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.

§ 768.295(2)(a). "Governmental entity" is defined as "the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof." § 768.295(2)(b).

The Residents' motion quotes the Anti-SLAPP statute and the operative paragraphs from the counterclaim, and it cites Mr. Gundel's affidavit. The Residents argued that "simply allowing SLAPPs to proceed violates the very constitutional rights Florida's Anti-SLAPP Statutes were implemented to protect" and that [**9] the trial court was tasked with determining two issues: (1) whether the

[3] For purposes of this opinion, we will refer to section 768.295 as Florida's Anti-SLAPP statute. Both chapter 718 and chapter 720 also contain anti-SLAPP provisions, respectively related to condominium unit owners and parcel owners. §§ 718.1224, 720.304(4), Fla. Stat. (2017).

counterclaim was brought "primarily" because the SLAPP defendants engaged in a protected activity, and (2) whether the counterclaim is "without merit." As to the first issue, the Residents argued that the counterclaim was based solely on protected activities relating to either the Bond Validation Lawsuit or the class action. As to the second issue, the Residents outlined in detail why Avatar Properties' claims were meritless. The Residents sought an expeditious hearing of the motion and dismissal of the counterclaim or judgment in favor of the Residents.

In response, Avatar Properties argued that the Residents expressly waived any constitutional protections afforded to them when they contractually agreed to the Club Plan. In essence, Avatar Properties argued that the contract paragraphs which the Residents claim are legally invalid are the paragraphs which form Avatar Properties' defense. Avatar Properties did not argue that material facts remained in dispute.

Following a hearing, the trial court entered its order denying the Residents relief. The court treated the Residents' motion only as a motion to dismiss, stating [**10] that the Residents could not "substitute a motion to dismiss for either a motion for summary judgment or a motion for judgment on the pleadings." As a result, the court did not consider the motion as a motion for summary judgment or motion for judgment on the pleadings. Based only on the allegations of Avatar Properties' counterclaim, the court found that the Residents failed to show that their conduct fell within the protections of the Anti-SLAPP statute and that the Residents failed to establish that their conduct was made "in connection with" an existing judicial proceeding.

III. Analysis

A. Certiorari jurisdiction

HN1[↑] "Before a court may grant certiorari relief from the denial of a motion to dismiss, the petitioner must establish the [*310] following three elements: '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.'" *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011) (quoting *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004)). The latter two elements are jurisdictional. *Id.*

Certiorari review has been limited "as a matter of policy to avoid piecemeal review of pretrial orders." *Id.* at 1134. "However, in numerous cases, Florida courts have permitted certiorari review to determine [**11] whether [a party] was afforded the proper process through procedural compliance with the statutory requirements." *Id.; see also Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995) ("[A]ppellate courts do have certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of section 768.72[, Florida Statutes (1993)] . . . ."). Moreover, certiorari review is appropriate where an "order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review." *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1163 (Fla. 3d DCA 1999); *see also SP Healthcare Holdings, LLC v. Surgery Ctr. Holdings, LLC*, 110 So. 3d 87, 91 (Fla. 2d DCA 2013) (citing *Rodriguez* for this standard).

Here, the Residents contend that "the legislature has made it a matter of Florida public policy to recognize and dismiss SLAPP suits expeditiously because the very filing and continuation of" SLAPP suits has the chilling effect on constitutional rights that the Anti-SLAPP statute was enacted to prevent and that, therefore, the jurisdictional prongs of the certiorari standard have been met. We agree.

The legislature enacted the Anti-SLAPP statute in 2000. In creating section 768.295, the legislature specifically found that

> "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as unconstitutional, but often not before the defendants are put to great expense, harassment, [**12] and interruption of their duties, and . . . these lawsuits are an abuse of the judicial process and are used to censor, intimidate, or punish citizens, businesses, and organizations for involving themselves in public affairs . . . .

Ch. 2000-174, § 1, Laws of Fla. The legislature further found that "it is essential in our democracy that the constitutional rights of citizens to participate fully in the process of government be uniformly, consistently, and comprehensively protected and encouraged" and that "the threat of financial liability, litigation costs, . . . and other personal losses from groundless lawsuits seriously affects . . . individual rights," which courts have recognized as harming individuals' fundamental rights. *Id.*

The statutory language and its stated purpose, in addition to case law governing similar statutes, supports our conclusion that the jurisdictional prongs of the certiorari standard have been met. Section 768.295(3) creates a right not to be subject to meritless suits filed "primarily because [the defendant] has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition [**13] for redress of grievances before the various governmental entities of this state." *Cf. Globe Newspaper*, 658 So. 2d at 519 ("We read section 768.72 to create a substantive legal right not to be subject to a punitive damages claim . . . until the trial court makes a determination that there is a reasonable [*311] evidentiary basis for recovery of punitive damages.").

To the extent that Avatar Properties argues that the Residents have not established that this court may exercise certiorari jurisdiction because ***HN2***[⬆] "an alleged error arising from a motion to dismiss is remediable on appeal regardless of whether the motion is granted or denied," Avatar Properties misconstrues the certiorari standard. As this court has stated, "certiorari may be precluded not by the availability of a mechanism for correcting the error itself; rather, the remedy must alleviate *the harm that results from the error*." *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 132 (Fla. 2d DCA 2015).

HN3[⬆] In the context of the Anti-SLAPP statute, the harm that results from the court's improper denial of a motion to dismiss or in its failure to rule on pending motions for summary judgment and judgment on the pleadings is precisely the harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation. *See* ch. 2000-174, § 1; *cf. Williams*, 62 So. 3d at 1133-34 ("The certiorari exception [**14] for the chapter 766 presuit requirements is premised on the purpose of the Medical Malpractice Reform Act—to avoid meritless claims and to encourage settlement for meritorious claims." (footnote omitted)); *Globe Newspaper*, 658 So. 2d at 520 ("[A] plenary appeal cannot restore a defendant's statutory right under section 768.72 to be free of punitive damages allegations in a complaint until there is a reasonable showing by evidence in the record or proffered by the claimant."); *Fla. Hosp. Med. Servs., LLC v. Newsholme*, 255 So. 3d 348, 350 (Fla. 4th DCA 2018) ("Certiorari jurisdiction lies to review whether a trial court has complied with the procedural requirements of section 768.72(1)." (citing *Tilton v. Wrobel*, 198 So. 3d 909, 910 (Fla. 4th DCA 2016))). In that way, the Anti-SLAPP statute bears some similarity to statutes providing for immunity from suit where the statutory protection cannot be adequately restored

once it is lost through litigation and trial. *See James v. Leigh*, 145 So. 3d 1006, 1008 (Fla. 1st DCA 2014) ("When the trial court denies a motion to dismiss on immunity grounds, certiorari review of the non-final order is proper because absolute immunity protects a party from having to defend a lawsuit at all and waiting until final appeal would render such immunity meaningless if the lower court denied dismissal in error." (citing *Fla. State Univ. Bd. of Trs. v. Monk*, 68 So. 3d 316, 318 (Fla. 1st DCA 2011))); *see also LoBiondo v. Schwartz*, 199 N.J. 62, 970 A.2d 1007, 1020 (N.J. 2009) (discussing the two categories of anti-SLAPP statutes and citing Florida's as within [**15] the category that "include[s] a legislative declaration that a public participant who has exercised his or her free speech right, sometimes in statutorily defined manner, enjoys immunity"). That is, if certiorari review is not available, the substantive right created by the Anti-SLAPP statute "is illusory and the very policy that animates the decision to" prevent SLAPP suits is frustrated such that the "statutory protection becomes essentially meaningless for the individual defendant." *See Keck v. Eminisor*, 104 So. 3d 359, 365-66 (Fla. 2012) (quoting *Tucker v. Resha*, 648 So. 2d 1187, 1190 (Fla. 1994)).[4]

[*312] B. Departure

1. Procedural mechanisms for resolution

The Residents contend that the trial court departed from the essential requirements of law by failing to adhere to the procedures set forth in the Anti-SLAPP statute. They argue that the statute expressly permits

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[4] We have found only two Florida state cases discussing SLAPP suits: *Two Islands Development Corp. v. Clarke*, 239 So. 3d 115 (Fla. 3d DCA 2018), and *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So. 2d 562 (Fla. 5th DCA 1993). Neither case discusses whether certiorari relief is warranted in the context of SLAPP suits. *Two Islands* does, however, affirm the dismissal with prejudice of three counts of a lawsuit against homeowners who protested the development of land and "interfer[ed] in and prevent[ed] a settlement" of an ongoing action involving the vested rights of property owners, holding—without elaboration—that the trial court properly dismissed those counts "upon a determination that those counts were barred by Florida's anti-SLAPP statute, section 720.304, Florida Statutes (2015)." 239 So. 3d at 121, 126 n.10. *Florida Fern Growers*, in addressing the argument that a particular lawsuit was a SLAPP suit, stated, "[a] SLAPP suit has been described as 'one filed by developers, unhappy with the public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development.'" 616 So. 2d at 570 (quoting *Westfield Partners, Ltd. v. Hogan*, 740 F.Supp. 523, 525 (N.D. Ill. 1990)). We note, too, that "[l]itigants' right to interlocutory appeal of anti-SLAPP motion decisions has been acknowledged in state courts in California, Georgia, Maine, Massachusetts, New Mexico, and Pennsylvania, and federal courts have allowed immediate appeal of holdings under the anti-SLAPP statutes of California, Louisiana, and Georgia." Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 Ohio St. L.J. 845, 879-80 (2010) (footnotes omitted). The Maine Supreme Court has stated that it permits "interlocutory appeals from denials of special motions to dismiss brought pursuant to the anti-SLAPP statute because a failure to grant review of these decisions at this stage would impose additional litigation costs on defendants, the very harm the statute seeks to avoid, and would result in a loss of defendants' substantial rights." *Schelling v. Lindell*, 2008 ME 59, 942 A.2d 1226, 1229-30 (Me. 2008).

resolution of SLAPP claims through a motion for summary judgment and that the court's failure to consider their motion as both a motion to dismiss and a motion for summary judgment constitutes a departure.

The Anti-SLAPP statute provides that

> [a] person or entity sued by a governmental entity or another person in violation of this section has a right to [**16] an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response.

§ 768.295(4).[5] ***HN4***[↑] The Anti-SLAPP statute plainly authorizes the filing of a motion to dismiss or motion for summary judgment. While it does not elaborate on a motion seeking dismissal, the statute expressly provides that once a motion for summary judgment, "together with supplemental affidavits," has been filed, the claimant (Avatar Properties) "shall thereafter file a response and any supplemental affidavits." *Id.* The statute then establishes the duty of the court to, "[a]s soon [**17] as practicable, . . . set a hearing on the motion, which shall be held at the earliest possible time after" the claimant files its response. *Id.* Therefore, the statute sets forth the procedural mechanisms by which a SLAPP defendant may invoke its substantive right—a motion seeking dismissal or summary [*313] judgment—as well as the requirement to hear such motions expeditiously.[6]

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[5] The language of sections 720.304(4)(c) and 768.295(4) are identical in terms of the procedure to be used by the parties and the trial court, as applicable to this case.

[6] We note that while the statute does not state that a SLAPP defendant may file a motion for judgment on the pleadings, as it does a motion for summary judgment, it provides that a defendant "may move the court for an order . . . granting final judgment." § 768.295(4).

HN5[] And although it is true that motions for dismissal and motions for summary judgment serve separate purposes, "are not interchangeable, and one may not be substituted for another," contrary to the trial court's determination not to hear the motion for summary judgment filed by the Residents with their motion to dismiss, motions filed in the alternative are permitted. *See U.S. Bank Nat'l Ass'n on Behalf of Holders of the Home Equity Asset Tr. 2002-4 Home Equity Pass-Through Certificates, Series 2002-4 v. Doepker*, 223 So. 3d 1083, 1084 (Fla. 2d DCA 2017) (citing *Holland v. Anheuser Busch, Inc.*, 643 So. 2d 621, 622-23 (Fla. 2d DCA 1994)). That one motion cannot substitute for the other does not allow the court to decline to rule on an otherwise facially and substantively sufficient motion.

As relevant here, ***HN6***[] Florida Rule of Civil Procedure 1.510 governs summary judgment and provides that "[a] party against whom a claim [or] counterclaim . . . is asserted or a declaratory judgment [**18] is sought may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits." Fla. R. Civ. P. 1.510(b). It further provides that "[t]he judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(c). The content of the document and its attachments must support the relief requested, thereby allowing the court to rule upon the motion based upon its respective purpose and standard. *Cf. HSBC Bank USA, Nat'l Ass'n for Deutsche Alt-A Sec. Mortg. Loan Tr., Series 2007-OA5 v. Nelson*, 246 So. 3d 486, 489 (Fla. 2d DCA 2018) ("[T]he character of a motion will depend upon its grounds or contents, and not on its title." (quoting *Jones v. Denmark*, 259 So. 2d 198, 200 n.1 (Fla. 3d DCA 1972))). The Residents' motion for summary judgment was supported by the contemporaneously filed affidavit of Mr. Gundel and sought judgment in favor of the Residents; Avatar Properties did not raise any material facts in dispute in its response to the motion, and it did not file any affidavits in opposition. That the Residents' motion was filed as a motion to dismiss, motion for summary judgment, and motion for [**19] judgment on the pleadings does not relieve the trial court of its statutory obligations to consider the motion under each standard where the motion was facially sufficient and in compliance with the rules of civil procedure and to set a hearing "[a]s soon as practicable" and "at the earliest possible time."

Because the statute allows for the filing of either or both a motion to dismiss and a motion for summary judgment, and because the motions may be filed within one document under an alternative heading, the trial court departed from the essential requirements of the law in declining to consider the Residents' motion as a motion for summary judgment. The motion should be heard on the evidence and pleadings on record as of the date of the hearing on the motion to dismiss.

2. Dismissal

The Residents also contend that the trial court departed from the essential requirements of law in denying the motion to dismiss based on its application of an "inapt" [*314] dismissal standard, that applied to motions to dismiss for failure to state a cause of action. *See, e.g., Blue Supply Corp. v. Novos Electro Mech., Inc.*, 990 So. 2d 1157, 1159 (Fla. 3d DCA 2008). The Residents argue that the motion to dismiss was not based on Avatar Properties' failure to state a cause of action because the Anti-SLAPP [**20] statute focuses not on whether a cause of action has been sufficiently alleged but on whether the activity that is alleged to have given rise to the cause of action is protected activity; they contend that the trial court's failure to consider Mr. Gundel's affidavit and Avatar Properties' failure to file any conflicting evidence constitutes a departure. The Residents' argument suggests that a motion to dismiss based on the Anti-SLAPP statute requires the trial court to do more than accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant. We agree.

As discussed above, ***HN7***[⬆] the Anti-SLAPP statute authorizes the filing of a motion seeking dismissal and a motion seeking summary judgment. Whereas the statute sets forth the procedures for considering a motion for summary judgment, the statute is silent as to the burden or procedure for considering a motion to dismiss. The language of the statute does, however, attach the action to the claimant rather than the SLAPP defendant: "[a] person or governmental entity in this state may not file," thus prohibiting the claimant from taking action, rather than "a person [**21] or entity may not be sued by a governmental entity or another person." § 768.295(3). The statutory language supports requiring the claimant to meet a burden.

Placing the initial burden on the SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies and then shifting the burden to the claimant to demonstrate that the claims are not "primarily" based on First Amendment rights in connection with a public issue and not "without merit" serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss. *See, e.g., Volkswagen Aktiengesellschaft v. Jones*, 227 So. 3d 150, 155 (Fla. 2d DCA 2017) (discussing the shifting burden for motions to dismiss based on lack of personal jurisdiction); *Becker v. Clark*, 722 So. 2d 232, 233 (Fla. 2d DCA 1998) (discussing the shifting burden for motions to dismiss based on qualified immunity). In considering motions to dismiss as to its anti-SLAPP statute, the Maine Supreme Court has stated that "the defendant carries the initial burden to show that the suit was based on some activity that would qualify as an exercise of the defendant's First Amendment right to petition the government" such that the anti-SLAPP statute applies and then "the burden falls on the plaintiff to demonstrate that the defendant's activity" is actionable. *Schelling v. Lindell*, 2008 ME 59, 942 A.2d 1226, 1229 (Me. 2008) (quoting [**22] Title 14 M.R.S. § 556). The trial court here found that the Residents (1) "failed to show that [their] alleged conduct . . . constitute[d] protected statements before government entities" based on the "[in]sufficient context" in Avatar Properties' counterclaim and (2) "failed to show that their alleged conduct was made 'in connection with' or 'in the course of' an existing judicial proceeding" based on the conduct being "limitedly described [and] lack[ing] sufficient context and temporality" in Avatar Properties' counterclaim. The effect of placing the burden exclusively on the SLAPP defendant based only on the claimant's allegations allows the claimant to avoid dismissal by being intentionally vague, thus thwarting the purpose of the statute.

[*315] Here, the vagueness of Avatar Properties' allegations as to the dates of specific conduct and as to the conduct itself prevents the trial court from determining from the face of the counterclaim that the Residents' actions constitute "free speech in connection with public issues" or instruction of representatives of government. Thus, while it may be clear from the face of the counterclaim that Avatar Properties has based some part of its claims on [**23] the filing of the class action and on the Residents' opposition to the Bond Validation Case, the trial court could not determine that Avatar Properties' claims were primarily based on protected activities, as the Anti-SLAPP statute requires. The Residents' motion

and supporting affidavit attempt to provide the facts necessary to support dismissal. The trial court must expeditiously address the merits of the Residents' motion under the appropriate standard. *See* § 768.295(4).

IV. Conclusion

The petition for writ of certiorari is granted. The order denying the Residents' "Motion to Dismiss, For Judgment on the Pleadings or For Summary Judgment on Counterclaim and For Award of Attorneys' Fees and Costs Under Florida's Anti-SLAPP Statutes" is quashed for the reasons stated herein.

Petition granted; order quashed.

MORRIS and LUCAS, JJ., Concur.

End of Document

Davis v. Mishiyev

Court of Appeal of Florida, Second District

May 11, 2022, Decided

No. 2D21-1726

Reporter

339 So. 3d 449 *; 2022 Fla. App. LEXIS 3212 **; 47 Fla. L. Weekly D 1039; 2022 WL 1482687

ORLANDO DAVIS and BEASLEY MEDIA GROUP, LLC, Petitioners, v. ERIK MISHIYEV, Respondent.

Prior History: [**1] Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Caroline Tesche Arkin, Judge.

Core Terms

trial court, motion to dismiss, deny a motion, allegations, essential requirement, certiorari review, public issue, defamation, defamatory

Case Summary

Overview

HOLDINGS: [1]-The court granted a writ of certiorari and quashed the trial court's order denying defendants' motion to dismiss plaintiff's action for defamation and intentional interference with a business relationship because defendants established a departure from the essential requirements of law by applying an incorrect motion-to-dismiss standard rather than the standard applied to motions to dismiss filed pursuant to Florida's Anti-SLAPP statute, § 768.295, Fla. Stat. (2020).

Outcome

Petition granted; conflict certified.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN1[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

A SLAPP suit is defined in relevant part as any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity

without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue. § 768.295(3), Fla. Stat. (2020). The statute defines free speech in connection with public issues as any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work. § 768.295(2)(a).

Civil Procedure > US Supreme Court Review > Jurisdiction on Certiorari

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN2[] **US Supreme Court Review, Jurisdiction on Certiorari**

In order to obtain certiorari relief based on the denial of a motion to dismiss, a petitioner must establish a departure from the essential requirements of the law that results in a material injury that cannot be corrected on post-judgment appeal. Certiorari review may be utilized to determine whether a party was afforded the proper process through procedural compliance with the statutory requirements. Moreover, certiorari review is appropriate where an order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN3[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

Section 768.295, Fla. Stat. (2020), was enacted because the legislature acknowledged the inconsistency between SLAPP suits and the constitutional right to free speech in connection with public issues and, therefore, that the statute was intended to assist in expeditiously disposing of such suits. § 768.295(1). The very filing and continuation of such suits had a chilling effect on constitutional rights and the harm that results from the court's improper denial of a motion to dismiss is precisely the harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation. The protection afforded by § 768.295 could not be restored once it was lost through litigation and that

without the availability of certiorari review, the substantive right created by the Anti-SLAPP statute is illusory, the policy underlying the creation of the statute is frustrated, and the protection afforded by the statute is rendered meaningless for defendants.

Civil Procedure > US Supreme Court Review > Jurisdiction on Certiorari

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN4[] **US Supreme Court Review, Jurisdiction on Certiorari**

The availability of a mechanism for correcting an error in a post-judgment appeal is not dispositive of the court's certiorari jurisdiction, and in order for the court to conclude that there is no irreparable harm, the remedy must alleviate the harm that results from the error. But because a post-judgment appeal cannot remedy the very harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation—a petitioner clearly establishes irreparable harm when seeking review of an order denying a motion to dismiss under the Anti-SLAPP statute.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

HN5[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss based on the Anti-SLAPP statute requires the trial court do more than accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

HN6[] **Motions to Dismiss, Failure to State Claim**

Section 768.295(4), Fla. Stat. (2020), permits a SLAPP defendant to file a motion to dismiss, a motion for final judgment entered in favor of the SLAPP defendant, or a motion for summary judgment.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Strategic Lawsuits Against Public Participation

Evidence > Burdens of Proof > Allocation

HN7[] **Freedom of Speech, Strategic Lawsuits Against Public Participation**

The Anti-SLAPP statute places the initial burden on a SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies and that once that burden is met, the burden is shifted to the SLAPP plaintiff to demonstrate that the claims are not primarily based on First Amendment rights in connection with a public issue and not without merit. Applying the statute in this manner serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss. Otherwise, if the burden was placed exclusively on the SLAPP defendant based solely on the plaintiff's allegations, the plaintiff could avoid dismissal by being intentionally vague, thus thwarting the purpose of the statute.

Counsel: Rachel E. Fugate, Allison S. Lovelady, and Minch Minchin of Shullman Fugate PLLC, Tampa, for Petitioners.

Erik Mishiyev, Pro se.

Judges: MORRIS, Chief Judge. LAROSE and BLACK, JJ., Concur.

Opinion by: MORRIS

Opinion

[*450] MORRIS, Chief Judge.

Orlando Davis and Beasley Media Group, LLC, seek a writ of certiorari to quash the trial court's order denying their motion to dismiss Erik Mishiyev's suit for defamation and intentional interference with a business relationship. The underlying suit was based on alleged defamatory statements made by Davis, as an employee and representative of Beasley, about Mishiyev.[1] We

[1] Mishiyev brought his action against Davis "in his capacity as [a] Radio Personality for" Beasley as well as against Davis individually. Mishiyev alleged that his damages were caused by Davis on behalf

conclude that the trial court departed from the essential requirements of law by applying an incorrect motion-to-dismiss standard rather than the standard applied to motions to dismiss filed pursuant to Florida's Anti-SLAPP statute, section 768.295, Florida Statutes (2020).[2] We therefore grant the petition.

BACKGROUND

Davis is a program director for Beasley's radio station WiLD 94.1. Mishiyev is a rival entertainment personality whose professional name is "DJ Short-E."

In the portion of his complaint alleging defamation, Mishiyev alleged generally [**2] that Davis and Beasley published defamatory statements between 2004 and 2020 and that Davis made untrue statements about him. Mishiyev referred to one specific incident, occurring on or about April 17, 2020, where he claimed that Davis uploaded a video to Instagram wherein he promoted his radio show and then claimed he was the reason DJ Short-E "ain't made it." Mishiyev also alleged that in 2017, a Facebook video related to Davis's show accused Mishiyev of abusing drugs. He asserted that Davis used social media "to falsely claim, orally and in writing, that [Mishiyev] abused drugs and other slanderous statements," but Mishiyev did not provide the dates of these statements nor did he provide any additional details relating to those statements or the "other slanderous statements" referenced. Mishiyev also did not provide dates or further details about other specific incidences of alleged defamatory conduct. Mishiyev did assert, however, that Davis continuously disrespected him which resulted in a lack of opportunities for Mishiyev in the music industry. He further argued that his success as a DJ was "hindered greatly" by Davis and Beasley's conduct, including Mishiyev's YouTube channels [**3] being terminated and his being denied the opportunity to play in local venues. He contended that Davis gained attention by defaming Mishiyev and continuing to slander him on and off air. He asserted that the defamatory statements were intentionally published and distributed among "dozens of associates in the [m]usic industry."

In his claim for intentional interference with a business relationship, Mishiyev essentially relied on his allegations from the defamation claim and asserted that he had a business relationship "with the Defendants." He then argued that Davis's

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of Beasley. We therefore refer to Davis and Beasley jointly when referring to the alleged wrongful conduct.

[2] "SLAPP" stands for Strategic Lawsuits Against Public Participation.

actions in defaming him constituted interference with the business relationship.

Attached to the complaint were screenshots of Davis's Facebook page wherein he mentioned Mishiyev and stated in relevant part that "[i]t's DJ Short-E Job Fair Day, the day where I get to listen to how I'm crazy and a hater for NOT offering this guy a job, or guess [sic] spot or moral support." The date of that post was February [*451] 13, 2017. Another attached screenshot of what appears to be comments made by third parties on a Facebook post contains a circled post that says simply, "Orlando dropped the 'Cocaine-yyy' and 'Booger Sugar' Oh lawd." It [**4] is not clear whether those comments were from the original Facebook post as the screenshot indicates it was taken on February 16, 2017. Other attached screenshots of what appear to be comments from another social media platform briefly mention Mishiyev, but there is no indication what Mishiyev found problematic in those comments.

Davis and Beasley moved to dismiss Mishiyev's complaint pursuant to section 768.295, arguing that Mishiyev's complaint was a SLAPP suit.[3] In their motion, Davis and Beasley argued that it was apparent on the face of the complaint that the challenged speech was made on Beasley's radio broadcasts or in connection with such broadcasts and that the speech thus constituted free speech in connection with a public issue which was protected under the statute. Davis and Beasley also raised other arguments attacking the merit of Mishiyev's claims, but due to our disposition, those arguments need not be discussed.

In response to the argument that the Anti-SLAPP statute applied, Mishiyev did not offer any evidence relating to his claims beyond what was alleged in the complaint. He admitted that the challenged statements were made on Beasley's radio broadcasts or in connection therewith, but he contended that the statute did not apply because Beasley did not file any affidavits and because the statements were not made before a governmental entity and were not related to an issue under review by a governmental entity.

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[3] *HN1*[] A SLAPP suit is defined in relevant part as "any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue." § 768.295(3). The statute defines "free speech in connection with public issues" as

> any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, [**5] audiovisual work, book, magazine article, musical work, news report, or other similar work.

§ 768.295(2)(a).

The trial court conducted a hearing on Davis and Beasley's motion but did not make any oral rulings. Thereafter, the trial court entered an order denying the motion. The order contained no findings or reasoning.

ANALYSIS

HN2[] In order to obtain certiorari relief based on the denial of a motion to dismiss, a petitioner must establish a departure from the essential requirements of the law that results in a material injury that cannot be corrected on postjudgment appeal. *See Sabra Health Care Holdings III, LLC v. Est. of DeSantis ex rel. DeSantis*, 331 So. 3d 1258, 1259-60 (Fla. 2d DCA 2022). This court has recognized that certiorari review may be utilized "to determine whether [a party] was afforded the proper process [**6] through procedural compliance with the statutory requirements." *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 310 (Fla. 2d DCA 2019) (alteration in original) (quoting *Williams v. Oken*, 62 So. 3d 1129, 1134 (Fla. 2011)). "Moreover, certiorari review is appropriate where an 'order implicates a violation of the parties' constitutional rights which cannot be remedied on plenary review.'" *Id.* (quoting *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1163 (Fla. 3d DCA 1999)).

[*452] *Gundel* squarely addressed whether certiorari review was appropriate to review an order denying a motion to dismiss a SLAPP suit. ***HN3***[] We recognized that section 768.295 was enacted because the legislature acknowledged the inconsistency between SLAPP suits and the constitutional right to free speech in connection with public issues and, therefore, that the statute was intended to assist in expeditiously disposing of such suits. *Gundel*, 264 So. 3d at 310; *see also* § 768.295(1). We explained that "the very filing and continuation of" such suits had a "chilling effect on constitutional rights" and that "the harm that results from the court's improper denial of a motion to dismiss . . . is precisely the harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation." *Gundel*, 264 So. 3d at 310-11. We further explained that the protection afforded by section 768.295 could not be restored once it was lost through litigation and that without the availability of certiorari review, "the substantive right created [**7] by the Anti-SLAPP statute 'is illusory,'" the policy underlying the creation of the statute is frustrated, and the protection afforded by the statute is rendered meaningless for defendants. *Id.* at 311 (quoting *Keck v. Eminisor*, 104 So. 3d 359, 365 (Fla. 2012)). ***HN4***[] We also explained that the availability of a mechanism for correcting

an error in a postjudgment appeal is not dispositive of this court's certiorari jurisdiction and that in order for this court to conclude that there is no irreparable harm, "the remedy must alleviate *the harm that results from the error*." *Id.* (quoting *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 132 (Fla. 2d DCA 2015)); *accord Baird v. Mason Classical Acad., Inc.*, 317 So. 3d 264, 267-68 (Fla. 2d DCA 2021) (quoting *Fountainbleau, LLC v. Hire Us, Inc.*, 273 So. 3d 1152, 1155 (Fla. 2d DCA 2019)). But because a postjudgment appeal cannot remedy the very harm that the Anti-SLAPP statute seeks to prevent—unnecessary litigation—a petitioner clearly establishes irreparable harm when seeking review of an order denying a motion to dismiss under the Anti-SLAPP statute. *Baird*, 317 So. 3d at 267-68; *Gundel*, 264 So. 3d at 311.

We acknowledge that one Florida court expressly disagrees with this court as to whether a petitioner can establish irreparable harm from an order denying a motion to dismiss a SLAPP suit for purposes of obtaining certiorari review. *See WPB Residents for Integrity in Gov't, Inc. v. Materio*, 284 So. 3d 555, 559-61 (Fla. 4th DCA 2019) (certifying conflict with *Gundel*). Thus we certify conflict with *Materio* as to this issue only.

But having concluded in accordance with this district's case [**8] law that irreparable harm has been established where a trial court denies a motion to dismiss under section 768.295, we must focus on the issue of whether the denial was a departure from the essential requirements of the law.

In *Gundel*, the petitioners argued in part that the trial court departed from the essential requirements of the law because it applied an incorrect standard: the standard for dismissal applied to motions to dismiss based on failure to state a cause of action. 264 So. 3d at 313-14.[4] The petitioners [*453] argued that the motion to dismiss was not based on a failure to state a cause of action because the Anti-SLAPP statute "focuses not on whether a cause of action has been sufficiently alleged but on whether the activity that is alleged to have given rise to the cause of action is protected activity." *Id.* at 314. ***HN5***[↑] We agreed that "a motion to dismiss based on the Anti-SLAPP statute requires the trial court do more than accept as true the factual

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[4] ***HN6***[↑] Section 768.295(4) permits a SLAPP defendant to file a motion to dismiss, a motion for final judgment entered in favor of the SLAPP defendant, or a motion for summary judgment. And in *Gundel*, the SLAPP defendants filed their motion in the alternative as a motion to dismiss, motion for summary judgment, and motion for judgment on the pleadings. 264 So. 3d at 313. We granted the petition primarily based on the trial court's failure to alternatively consider the motion to dismiss as a motion for summary judgment, but as explained herein, we agreed with the SLAPP defendants that in construing their motion exclusively as a motion to dismiss, the trial court erred by applying the burden of proving the application of the Anti-SLAPP statute solely on them. *Id.* at 314.

allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant." *Id.*

HN7[⬆] We explained that the statute places the initial burden on a "SLAPP defendant to set forth a prima facie case that the Anti-SLAPP statute applies" and that once [**9] that burden is met, the burden is shifted to the SLAPP plaintiff "to demonstrate that the claims are not 'primarily' based on First Amendment rights in connection with a public issue and not 'without merit.'" *Id.* Applying the statute in this manner "serves the purpose of the statute and conforms with the procedures employed in considering other statutorily-based motions to dismiss." *Id.* Otherwise, if the burden was placed exclusively on the SLAPP defendant based solely on the plaintiff's allegations, the plaintiff could avoid dismissal "by being intentionally vague, thus thwarting the purpose of the statute." *Id.*

This court found it problematic that the trial court solely applied the burden to the SLAPP defendants and failed to consider one of the SLAPP defendants' affidavits; we also took issue with the trial court's conclusion that the SLAPP defendants failed to show that their conduct was protected activity under the Anti-SLAPP statute and that they failed to establish their conduct was made "in connection with" an existing judicial proceeding. *Id.* at 309, 314. We explained in relevant part that the vagueness of the SLAPP counterplaintiff's allegations as to the dates of specific conduct and as to the conduct [**10] itself prevented the trial court from determining from the face of the counterclaim that the SLAPP defendants' actions constituted "free speech in connection with public issues." *Id.* at 315. Consequently, the trial court could not determine that the counterclaims were primarily based on protected activities. *Id.*

Here too the vagueness of Mishiyev's allegations regarding the dates of the alleged defamatory statements as well as the conduct itself necessarily prevented the trial court from determining whether Davis and Beasley's conduct constituted "free speech in connection with public issues" and from determining whether Mishiyev's complaint was based primarily on protected conduct.

We note that our review was somewhat hampered by the lack of findings—such as those made in *Gundel*—either orally at the hearing or in the trial court's written order denying Davis and Beasley's motion. The trial court simply denied the motion without explanation. But due to the vagueness of Mishiyev's allegations, it appears that the trial court did not analyze the Anti-SLAPP statute when

ruling on the motion to dismiss because, as already explained, the trial court could not have made the necessary determinations under [**11] the statute. Rather, the unelaborated order of dismissal suggests that the trial court denied the motion utilizing an incorrect motion-to-dismiss standard.[5] We therefore conclude [*454] that Davis and Beasley established a departure from the essential requirements of law, and we grant the petition. In accordance with *Gundel*, we note that the trial court must review the merits of Davis and Beasley's motion under the appropriate standard for motions to dismiss filed pursuant to the Anti-SLAPP statute.

Petition granted; conflict certified.

LAROSE and BLACK, JJ., Concur.

End of Document

[5] We note that Davis and Beasley raised additional arguments such as Mishiyev's claims being barred by the expiration of the statute of limitations and that the statements constituted pure opinion. Clearly, due to the trial court's denial of their motion, it rejected those claims. We need not address the merits of those arguments given our holding that the petition should be granted for other reasons.

Kissinger v. Mahoning Cnty. Republican Party

United States District Court for the Northern District of Ohio, Eastern Division
June 16, 2023, Decided; June 16, 2023, Filed
CASE NO. 4:22-CV-00709

Reporter

677 F. Supp. 3d 716 *; 2023 U.S. Dist. LEXIS 105560 **

DAVID KISSINGER, et al., Plaintiffs, vs. MAHONING COUNTY REPUBLICAN PARTY, et al., Defendants.

Core Terms

state actor, Sanctions, proposed amended complaint, Elections, motion to dismiss, county board, allegations, Amend, candidate, state action, futile, subject matter jurisdiction, Defendants', protested, rights, political party, private conduct, emails, oppose, nexus, lack of subject matter jurisdiction, election process, district court, existing law, state law, circumstances, Headquarters, deprivation, pleaded, shouted

Counsel: [**1] For David Kissinger, Cheryl Kissinger, Plaintiffs: Sarah Thomas Kovoor, Kovoor Law, Warren, OH.

For Mahoning County Republican Party, Thomas P. McCabe, In his professional and personal capacity, Defendants: A. Ross Douglass, Boardman, OH; Frank G. Mazgaj, Hanna, Campbell & Powell, Akron, OH; Robert E. Duffrin, Whalen Duffrin, Canton, OH.

For Robert L. Aurandt, In his professional and personal capacity, Defendant: Frank G. Mazgaj, Hanna, Campbell & Powell, Akron, OH; Martin P. Desmond, Youngstown, OH.

For David W. Johnson, In his professional and personal capacity, Defendant: Craig G Pelini, Pelini, Campbell & Williams - North Canton, North Canton, OH; Curt C. Hartman, Cincinnati, OH; Stephen J. Chuparkoff, Cincinnati Insurance - Akron, Akron, OH.

Judges: CHARLES E. FLEMING, UNITED STATES DISTRICT JUDGE.

Opinion by: CHARLES E. FLEMING

Opinion

[*720] **MEMORANDUM OPINION AND ORDER**

Although in its procedural infancy, the contentiousness of the dispute in this case is plain: before the Court is (1) Defendant David Johnson's Motion to Dismiss for Lack of Jurisdiction (ECF No. 18); (2) Defendants Mahoning County Republican Party ("MCRP") and Thomas McCabe's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim (ECF [**2] No. 21); (3) Defendant Robert Aurandt's Motion to Dismiss (ECF NO. 22); (4) Johnson's Motion for Sanctions made under Fed. R. Civ. P. 11 (ECF No. 24); (5) Plaintiffs' Cross-Motion for Sanctions against all Defendants (ECF No. 29); (6) Johnson's Motion to Strike Portions of Plaintiffs' Response to Johnson's Motion for Sanctions (ECF No. 31); and (7) Plaintiffs' Motion for Leave to Amend Complaint (ECF No. 36).

For the reasons stated in this Memorandum Opinion and Order, Defendants' Motions to Dismiss made under Rule 12(b)(1) are **GRANTED**; Defendants' Motions to Dismiss made under Rule 12(b)(6) are **DENIED AS MOOT**; Plaintiffs' Motion for Leave to Amend Complaint is **DENIED** on futility grounds; Johnson's Motion for Sanctions is **DENIED**; Johnson's Motion to Strike is **GRANTED**; and Plaintiffs' Cross-Motion for Sanctions is **STRICKEN**.

I. FACTUAL BACKGROUND

A. The Incident at MCRP Headquarters

Plaintiffs allege that they went to MCRP Headquarters on April 27, 2022, to deliver political campaign signs supporting political candidates whom Former President Donald Trump had not endorsed. (ECF No. 1, Compl., PageID# 4). Senator J.D. Vance, who had at that time been campaigning for the position he now holds and had received the Former President's [**3] endorsement, was at the MCRP Headquarters that day for a scheduled speech. (*Id.* at PageID# 4-5; ECF No. 36-1, Proposed Am. Compl., PageID# 193). Plaintiffs protested the speech from outside the building, and Plaintiff David Kissinger held a sign that stated, "VANCE IS A FRAUD / TRUMP IS SELLING US OUT TO PETER THIEL," apparently offending the attendees inside. (*Id.*). Plaintiff alleges that Aurandt "led a physical assault on Mr. Kissinger" by taking his sign and throwing Mr. Kissinger to the ground. (*Id.*). The Proposed Amended Complaint explains that proposed new-

party defendants, Dennis Zimmet and Brian Devine, also participated in the assault on Mr. Kissinger, and that all three men threatened the protestors, claiming they would to "kick their asses." (ECF No. 36-1, PageID# 188, 194). Plaintiffs claim that they were business invitees expressing purely political speech, and that their removal from Senator Vance's speech violated their First Amendment rights. (ECF No. 1, PageID# 5, 7). (These events are collectively referred to as the "Incident").

While the Incident precipitated the instant lawsuit, the parties' contretemps did not begin or end there. The Proposed Amended Complaint alleges that the [**4] parties had been at odds in early 2021 over a vote by the members of the Columbiana County Board of Elections (for which Johnson serves as Chairman); the vote regarded the purchase of new voting machines. (ECF No. 36-1, PageID# 191). Mr. Kissinger and Johnson exchanged heated words over the vote, and Plaintiffs collected over 600 signatures opposing the new machines. (*Id.*). In September of 2021, Plaintiffs protested a fundraising event for Governor Mike DeWine at the Columbiana County Republican Party ("CCRP") headquarters, during which Johnson shouted to [*721] Plaintiffs that they are "RINOs" ("Republican In Name Only"); Johnson's brother also threatened protestors and shouted obscenities until police asked him to leave. (*Id.* at PageID# 192).

On April 10, 2022, Plaintiffs and Johnson were again at loggerheads. This time it was about Johnson's alleged involvement in a scandal involving money that was missing from the Ohio GOP. (*Id.*). Plaintiff Cheryl Kissinger alleges that an editorial letter she drafted and sent to three Columbiana County newspapers entitled "Audit Lies" was not immediately published because it referred to Johnson as a liar, a term to which the editor objected. (*Id.*). The [**5] letter was eventually published on April 28, 2022 (one day after the Incident), with a new title, "Local Business Owner-Citizen Offers Opinion."[1] On May 2, 2022, Johnson published a letter to the editor of the Morning Journal, purportedly containing false, offensive, and derogatory statements about Plaintiffs. (ECF No. 1, PageID# 10). Johnson also posted derogatory comments about Plaintiffs on the Columbiana County Republican Party's Facebook page on the same day. (*Id.*). Johnson allegedly called Ms. Kissinger "a liar, a lunatic, a 'nut job,' an

[1] The Proposed Amended Complaint suggests that the editor sent a copy of Ms. Kissinger's letter to Johnson prior to its publication, and made changes to the title because of sympathies for Johnson.

anarchist, ANTIFA, etc." (ECF No. 36-1, PageID# 192). At another point over the last year, Plaintiffs claim that they placed a four-foot sign in front of their business that read, "Don't forget to vote for Rick Barron," an apparent political adversary of Johnson. (*Id.* at PageID# 193). A known Johnson associate and CCRP volunteer came to Plaintiffs' business and shouted at them for supporting Barron. (*Id.*).

B. The Complaint and Proposed Amended Complaint

The tension between Plaintiffs and Johnson culminated in Plaintiffs' filing of their seven-count Complaint against Defendants on May 2, 2022—the same day that Johnson's editorial was published. [**6] (ECF No. 1). The Complaint bases federal court jurisdiction on 28 U.S.C. § 1343 (civil rights) and 28 U.S.C. § 1367 (supplemental jurisdiction). (ECF No. 1, PageID# 6; ECF No. 36-1, PageID# 189-90). Specifically, Plaintiffs seek to invoke this Court's subject matter jurisdiction in Count One of the Proposed Amended Complaint, which asserts that all Defendants conspired to violate Plaintiffs' First Amendment rights in violation of 42 U.S.C. § 1983.[2] The Proposed Amended Complaint alleges that the current Defendants are all state actors, and thus properly subject to a § 1983 claim, based on the following facts:

- MCRP is a subsidiary of the Republican National Committee ("RNC") and recipient of Federal Elections Commission funding. (ECF No. 36-1, PageID# 185, ¶ 7).

- McCabe is an agent and/or employee of MCRP, and Director of the Mahoning County Board of Elections. (*Id.* at PageID# 185-86, ¶ 9).

- Aurandt is an agent and/or employee of MCRP, a member of the Mahoning County Board of Elections with one of four votes in matters relating to McCabe's employment and compensation. (*Id.* at PageID# 186, ¶ 10).

- Johnson serves on the Columbiana County Board of Elections as its Republican Chairman (*id.* at ¶ 11), and [*722] he is an agent and/or employee acting on behalf of [**7] the Columbiana County Republican Party, Mahoning County Republican Party, and Ohio Republican Party (*id.* at ¶ 12); the Treasurer of

[2] The original Complaint also included a § 1983 claim, but it was asserted only against McCabe and MCRP.

the Ohio Republican Party (*id.* at ¶ 13); and the State Central Committeeman for the Republican Party in the 33rd State Senate District, which includes Columbiana and Mahoning Counties (*id.* at PageID# 186-87, ¶¶ 14-15).

• John Doe 3 is an agent and or employee of MCRP. (*Id.* at PageID# 187, ¶ 20).

The Proposed Amended Complaint seeks to add two additional defendants, Dennis Zimmet and Brian Devine, to replace John Does 1 and 2 named in the original Complaint, respectively. Plaintiffs allege that Zimmet and Devine are both agents and/or employees of the MCRP and/or the Ohio Republican Party. Beyond Plaintiffs' § 1983 claim against all of the existing and additional Defendants, Plaintiffs assert state-law claims for Battery, Assault, Negligence, Loss of Consortium, Defamation, False Light, and Civil Conspiracy. (ECF No. 36-1, PageID# 195-200). (Zimmet and Devine, together with Johnson, McCabe, and Aurandt, are referred to as the "Individual Defendants").

C. The Pending Motions

1. Motions to Dismiss

Johnson, McCabe, MCRP, and Aurandt all filed Motions to Dismiss the Complaint, [**8] primarily focused on whether this Court has subject matter jurisdiction to hear this case. (*See* ECF Nos. 18, 21, & 22). Defendants argue that none of the defendants are state actors against whom a § 1983 claim may lie, and therefore there is no valid federal question to support this Court's jurisdiction. (ECF No. 18, PageID# 72-75; ECF No. 21, PageID# 84-86; ECF No. 22, PageID# 97-98). Plaintiffs respond that the defendants are state actors for the reasons explained in the Proposed Amended Complaint. (*See* ECF No. 35, PageID# 167, 171). Plaintiffs suggest that Defendants had two distinct goals on the day of Senator Vance's speech: "to one end acting out their individual political aims but for a second end, doing so with their offices in mind and with the ends they could achieve by way of those positions likewise in mind." (*Id.*).

2. Motion for Sanctions and Motion to Strike

Johnson filed a Motion for Sanctions, in which he asserts that Plaintiffs' Complaint violates Fed. R. Civ. P. 11 because it is not supported by existing

law or by a nonfrivolous argument for extending, modifying, or reversing existing law. (ECF No. 24). Johnson claims that the allegations in Plaintiffs' Complaint are nothing more than political [**9] grandstanding; he asserts Plaintiffs know that their claims are based on private, not state, action, and that the law does not support federal court jurisdiction nor a valid § 1983 claim. (*Id.*).

Plaintiffs opposed Johnson's Motion on August 7, 2022, and moved for Cross-Sanctions, claiming that Johnson's Motion for Sanctions is itself sanctionable because it was filed solely to gain leverage in this case. (ECF No. 29, PageID# 151). Plaintiffs also oppose Johnson's Motion for Sanctions within their response to the defendants' Motions to Dismiss, arguing that this case presents an opportunity for this Court to expand existing law relating civil liability for political parties. (ECF No. 35, PageID# 165). Johnson moved to strike Plaintiffs' Cross-Motion for Sanctions, asserting that Plaintiffs failed to serve him with their Cross-Motion as required by Rule 11(c)(2). (ECF No. 31, PageID# 157-58). Plaintiffs did not oppose Johnson's Motion to Strike.

[*723] *3. Motion for Leave to Amend Complaint*

Finally, Plaintiffs have moved to amend their Complaint. (ECF No. 36). The Proposed Amended Complaint substitutes Dennis Zimmet for John Doe 1 and Brian Devine for John Doe 2. (*Id.* at PageID# 179-80). Substantively, the Proposed [**10] Amended Complaint seeks to expand their § 1983 claim to all defendants under a theory that they were all conspiring with one another to violate Plaintiffs' civil rights. (*Id.* at PageID# 181). It also explains that Defendants hold various state-government offices, which clarifies Plaintiffs' allegations of state action supporting their § 1983 claim. (*Id.*). Johnson opposes Plaintiffs' Motion for Leave on futility grounds, claiming that the Proposed Amended Complaint does not cure the jurisdictional defect within the original Complaint. (ECF No. 39, PageID# 217).

II. MOTION STANDARDS

A. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1)

Defendants each filed a Motion to Dismiss this case under Rule 12(b)(1) and/or 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim upon which

relief can be granted. (ECF Nos. 18, 21 & 22). The Court must first determine whether it has subject matter jurisdiction under Rule 12(b)(1), since a lack of subject matter jurisdiction renders Defendants' Rule 12(b)(6) motions moot. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990) (citing *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946)). Title 28 U.S.C. § 1331 provides for what is commonly referred to as federal question jurisdiction: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." [**11] Determining whether a district court has federal question jurisdiction requires the Court to look beyond the plaintiff's characterization of his claim and "see whether the alleged claim actually 'arises under' the Constitution or federal statutes and is not made solely for the purpose of obtaining jurisdiction." *Bush v. State Indus., Inc.*, 599 F.2d 780, 784 (6th Cir. 1979).

When a defendant challenges subject matter jurisdiction, "the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Moir*, 895 F.2d at 269 (citing *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986)). A facial attack like that which Defendants assert "challenges the sufficiency of the pleading, and the court takes the allegations in the complaint as true and construes them in the light most favorable to the plaintiff." *Cox v. Bd. of Cnty. Comm'rs of Franklin Cnty.*, 436 F. Supp. 3d 1070, 1077 (S.D. Ohio 2020) (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1187 (6th Cir. 1994).

B. Motion for Leave to Amend Complaint

Pleading amendments are governed by Fed. R. Civ. P. 15. Rule 15(a)(2), which provides that, in instances of amendment other than amending within 21 days of service of the initial complaint, "a party may amend its pleading only with the opposing party's written consent or the court's leave," and that "[t]he court should freely give [**12] leave when justice so requires." Plaintiffs' Complaint was filed on May 2, 2022. (EFC No. 1). Plaintiffs filed their Motion for Leave to Amend Complaint on September 13, 2022. (EFC No. 36). The 21 [*724] days allowed to amend without leave had expired, meaning that Fed. R. Civ. P. 15(a)(2) applies. Johnson opposes the

proposed amendment. (EFC No. 39).

The Supreme Court, in *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), held that courts may not deny an amendment request without explaining its reasoning for doing so, and clarified the grounds that could justify denial of such a request:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires" . . . . In the absence of any apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice to the opposing party by virtue of allowance of the amendment, *futility of the amendment*, etc.—the leave should, as the rule requires, be "freely given." . . . outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion.

(Emphasis added).

Whether a proposed amendment is "futile" is governed by the standard applicable to a motion [**13] to dismiss. *Miller v. Calhoun Cnty.*, 408 F.3d 803, 817 (6th Cir. 2005) (citing *Neighborhood Dev. Corp. v. Advisory Council on Historic Pres.*, 632 F.2d 21, 23 (6th Cir. 1980)). The Sixth Circuit recognizes that "a proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000); *see Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216, 224-25 (2d Cir. 2017) ("Futility is a determination, as a matter of law, that proposed amendments would fail to cure prior deficiencies or fail to state a claim under Rule 12(b)(6)."); *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997) ("A court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason.").

III. DISCUSSION

A. The State Action Doctrine

The question central to nearly every motion before the Court is whether the Complaint (or Proposed Amended Complaint) establishes a federal question that invokes this Court's subject-matter jurisdiction. Plaintiffs' only federal claim, made under § 1983, requires that the defendants were state actors acting

under color of state law when they allegedly conspired to deprive Plaintiffs of their constitutional right to engage in free speech and political protest. 42 U.S.C. § 1983; *see Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) (holding that § 1983 liability cannot attach to "merely private conduct, no matter how discriminatory or wrongful").

A § 1983 claim requires (1) "the deprivation of a right secured by the Constitution or laws of the United States" and (2) that "the [**14] deprivation was caused by a person acting under color of state law." *Tahfs v. Proctor*, 316 F.3d 584, 590 (6th Cir. 2003) (quoting *Ellison v. Garbarino*, 48 F.3d 192, 194 (6th Cir. 1995). The absence of either element means that the § 1983 claim has not been pleaded. *Lausin v. Bishko*, 727 F. Supp. 2d 610, 625 (N.D. Ohio 2010). Whether a party is a state actor is a question of law. *Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982).

State action occurs when a defendant exercised power "possessed by virtue of state law ***and made possible only because*** the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, [*725] 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (emphasis added). *See Almand v. DeKalb Cnty., Ga.*, 103 F.3d 1510, 1513 (11th Cir. 1997) (finding that police officer who used his position to gain access to victim's home to rape her was not a state actor because the break-in and rape were not accomplished nor made possible solely because of the police officer's state employment). The Court must therefore determine whether Defendants impinged Plaintiffs' civil rights via the powers they possess by virtue of their respective offices, or as mere private individuals. *Monroe v. Pape*, 365 U.S. 167, 183-84, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), overruled on other grounds by *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (discussing *United States v. Classic*, 313 U.S. 299, 325-26, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941), which held that election officials obligated to count ballots by statute could be held liable under a statute, which criminalized the deprivation of constitutional rights by a person acting under color of any law, when they allegedly failed to count all ballots cast).

Private conduct becomes state action under [**15] § 1983 when the conduct is "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). Federal courts use several tests for determining whether a defendant should be a state actor for the purpose of a § 1983 claim: the public function, state

compulsion, and nexus tests are three of the most common. *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). The state official test, which is derivative of the nexus test, is also useful when a private party holds a state office. *Lindke v. Freed*, 37 F.4th 1199, 1202-03 (6th Cir. 2022). Relevant here,[3] the public function tests provides that private conduct is deemed state action when a person "exercised powers traditionally reserved exclusively to the state." *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003). The doctrine is interpreted narrowly, with only functions like holding elections, exercising eminent domain, and operating a company-owned town falling within its scope. *Id.* at 833-34 (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 157-58, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *Marsh v. Alabama*, 326 U.S. 501, 505-09, 66 S. Ct. 276, 90 L. Ed. 265 (1946)).

Also relevant is the nexus test, under which a private party may be a state actor if her actions are either subject to the government's "management or control" or "entwined with governmental policies." *Lindke*, 37 F.4th at 1203 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)). Since § 1983 cannot apply to private individuals engaged in purely private conduct, the nexus test asks whether a sufficiently close nexus exists "between the state and the *challenged action*." *Blackwell v. Allen*, No. 22-1300, 2022 U.S. App. LEXIS 35494, 2022 WL 17832191, at *4 (6th Cir. Dec. 21, 2022) (citing *Wilcher v. City of Akron*, 498 F.3d 516, 520 (6th Cir. 2007)) (emphasis in original). This is [**16] because "not every action undertaken by a person who happens to be a state actor is attributable to the state." *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001). To be a state actor, a public official's relevant conduct must have occurred "in the course of performing an actual or apparent duty of his office . . . unless the conduct is such that the actor could not have behaved as [*726] he did without the authority of his office." *Waters*, 242 F.3d at 359 (citing West, 487 U.S. at 49-50).

In *Blackwell*, for example, an attorney acting as a city's law director as part of his overall private law practice was alleged to have used his position to deny Freedom of Information Act ("FOIA") requests from a concerned citizen inquiring as to the contract between the city and the attorney's law

[3] The Court will not analyze Defendants' conduct under the state compulsion test since none of the parties have argued for its application and it is inapposite to the allegations in the Complaint.

firm. 2022 U.S. App. LEXIS 35494, [WL] at *1. The citizen responded to the denial by sending a self-generated internet meme of the attorney and his law partner wearing women's clothing, and the attorney responded to the citizen with personal attacks targeting the citizen's character and physical disability. *Id.* The Sixth Circuit found that, although the attorney held an official position with the city and used the same email address to issue the personal attacks that he used to transmit the FOIA request denials, the personal-attack emails were private conduct not suitable for a § 1983 claim. [**17] 2022 U.S. App. LEXIS 35494, [WL] at *5. This was because there were no allegations in the complaint that the city supervised or approved the emails or that they were somehow entwined with a governmental policy; rather, the attorney sent the emails from his personal law-firm email address, mostly outside business hours, and without any apparent connection to his role as the city's law director. *Id.*

B. MCRP is Not a State Actor

Plaintiffs allege that MCRP is a state actor because it is "a subsidiary of the Republican National Committee ("RNC"), [and] a recipient of Federal Elections Commission ("FEC") funding." (ECF No. 36-1, PageID# 185). MCRP's Motion to Dismiss argues that the law does not transform political parties into state actors unless they are required to follow a legislative directive pertaining to the election process. (ECF No. 21, PageID# 85). Since MCRP was not engaged in conduct directed by the RNC or State of Ohio, MCRP argues that it cannot be a state actor for § 1983 purposes. (*Id.* at PageID# 186).

Indeed, the times in which a political party may be considered a state actor are few and far between. In *Smith v. Allwright*, 321 U.S. 649, 659-64, 64 S. Ct. 757, 88 L. Ed. 987 (1944), the Supreme Court determined that the Texas Democratic Party (a private organization) was a state actor because [**18] the state's legislature directed the Party to decide the primary election participants, thus limiting the choice of the general-voting electorate. In *Terry v. Adams*, 345 U.S. 461, 469-70, 73 S. Ct. 809, 97 L. Ed. 1152 (1953), the Court held in a plurality decision that a private democratic club, the "Jaybird Association," was also a state actor because its primary had "become an integral part, indeed the only effective part, of the elective process that determine[d] who shall rule and govern in the county."

On the other side of the coin, the Sixth Circuit has

clarified that "[t]he primary election cases do not hold that a political party is part of the state, or that any action by a political party other than conducting an election is state action." *Banchy v. Republican Party of Hamilton Cnty.*, 898 F.2d 1192, 1196 (6th Cir. 1990) (quoting *California Republican Party v. Mercier*, 652 F. Supp. 928, 934 (C.D. Cal. 1986)). Instead, the political parties in those cases "were state actors[] acting under color of state law insofar as they had been assigned an 'integral part' in the election process, a governmental function." *Id.* That principle directed the result in *Banchy*, in which the Sixth Circuit found that the Ohio Republican Party was a private actor when it did not permit its newly-elected precinct executives to participate in the election of their respective ward chairmen. (*Id.*). The same principle applied in *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 396 (6th Cir. 2016), [*727] where [**19] the Ohio Republican Party was *not* a state actor when it used the process dictated by statute to file protests against nomination petitions filed by the Ohio Libertarian Party; since "any private citizen with standing is authorized by Ohio law to file a protest against a candidate's nominating petition," the Ohio Republican Party's protests were not fairly attributable to the state, and thus were private conduct.

Applying the same principle here, MCRP is not a state actor for the purpose of Plaintiffs' § 1983 claim. MCRP permitted then-senatorial-candidate Vance to use its private headquarters to speak to supporters. (ECF No. 36-1, PageID# 188, ¶ 26; PageID# 193, ¶ 44). Providing a forum for a political candidate to speak is not analogous to participating in the election process. Like the Ohio Republican Party in both *Banchy* and *Libertarian Party of Ohio*, MCRP was not assigned an "integral part in the election process" when it permitted candidate Vance to speak. Private individuals and organizations alike routinely invite political candidates to speak on private property to support fundraising and voter outreach efforts. Since neither the Complaint nor the Proposed Amended Complaint includes allegations that MCRP engaged [**20] in the type of activity that is typically considered state action, Plaintiffs' § 1983 claim is not pleaded against MCRP. *See Lausin v. Bishko*, 727 F. Supp. 2d 610, 625 (N.D. Ohio 2010) (explaining that an absence of state action on the part of a defendant means that "a § 1983 claim has not been pleaded" against them).

C. The Individual Defendants Are Not State Actors For The Purpose of This Case

The same result must be reached with respect to Johnson, McCabe, Aurandt, and the John Does, Zimmet and Devine. Under the state official derivative of the nexus test, these Defendants (and proposed defendants) can only be state actors if their actions in relation to Plaintiffs were occasioned in some way by the positions that Plaintiffs allege they hold.

1. McCabe, Aurandt, Zimmet, and Devine

McCabe, the chairman of the MCRP and Director of the Mahoning County Board of Elections (ECF No. 36-1, PageID# 185, ¶ 9), is generally alleged to have conspired with the other defendants to deprive Plaintiffs of their constitutional rights prior to and during the Incident. This Court has already determined that MCRP is not a state actor under the circumstances alleged. Therefore, McCabe's position as Chairman and the other Individual Defendants' alleged associations with the [**21] MCRP are irrelevant to this inquiry. Aurandt, who purportedly attacked Mr. Kissinger with Zimmet and Devine, serves with McCabe on the Mahoning County Board of Elections.

Whether any Individual Defendants hold positions on county boards of election is similarly irrelevant. Like the city attorney in *Blackwell*, whose derogatory and offensive emails were not the product of his position, neither the Complaint nor the Proposed Amended Complaint allege facts supporting the claim that the Individual Defendants' attendance at candidate Vance's speech was related to their state positions. The Proposed Amended Complaint describes candidate Vance's speech as a private gathering on private property, meaning that all one needed to gain access was an invitation. (*See* ECF No. 36-1, PageID# 194, ¶ 46[4]). While the Individual Defendants allegedly did much more than [*728] simply attend candidate Vance's speech, the Proposed Amended Complaint does not allege that they attacked Mr. Kissinger or attempted to remove him at the direction of a state actor, be it a county board of elections or any other political or governmental office. That said, none of the Individual Defendants are state actors in the eyes of the law.

*2. [**22] Johnson*

The Proposed Amended Complaint alleges that Defendants' conspiracy produced more than just the

[4] The Proposed Amended Complaint explains that Senator Vance was speaking from inside the MCRP Headquarters, and that protesters remained outside near the building's entrance. Plaintiffs do not allege that MCRP Headquarters is public property.

Incident. Plaintiffs also allege that Johnson began harassing and threatening them in furtherance of the conspiracy in early 2021. (ECF No. 36-1, PageID# 191, ¶ 38). Four discreet events to achieve this end are alleged: (1) Johnson and his brother taunted Plaintiffs while they protested a fundraising event for Governor Mike DeWine, calling them RINOs and shouting obscenities (*id.* at PageID# 191-92, ¶ 39); (2) Johnson responded to Ms. Kissinger's letter to the editor with his own letter to the editor and social media posts, calling her "a liar, a lunatic, a 'nut job,' an anarchist, ANTIFA, etc." (*id.* at PageID# 12, ¶ 41); (3) an unnamed Johnson associate harassed and shouted at Plaintiffs over a political sign they posted in front of their business (*id.* at PageID# 193, ¶ 43); and (4) after the Incident, Johnson posted photos of and messages concerning Plaintiffs, claiming that Ms. Kissinger "is a fringe lunatic nut job...a vindictive hater and proven LIAR. If she could spell anarchist, she'd be one" (*id.* at PageID# 194, ¶ 47).

There are no factual allegations in the Proposed Amended [**23] Complaint that support a finding that the Columbiana County Board of Elections or another state entity[5] directed Johnson to engage in a name-calling and intimidation campaign targeting Plaintiffs. Instead, the Proposed Amended Complaint tells the story of former friends and political allies—Johnson and Plaintiffs—whose relationship soured over time due to differences of opinion relating to Republican Party initiatives and candidates. (ECF No. 36-1, PageID# 191-94). Any member of the public can write letters to the editor, make antagonistic social media posts, and harass other members of the public about their political opinions; these activities allegedly undertaken by Johnson, however unflattering and juvenile they may have been, were not the product of an actual or apparent duty Johnson has to the Columbiana County Board of Elections, nor occasioned by the authority he has as a board member. *See Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001). Since there are no facts pleaded in the Proposed Amended Complaint connecting Johnson's alleged conduct with Johnson's position at the Columbiana County Board of Elections or some other state entity, and since any member of the public could have engaged in all of the conduct that Johnson [**24] is alleged to have committed,

[5] In addition to his position with the Columbiana County Board of Elections, Plaintiffs allege that Johnson is an agent and/or employee of the CCRP and MCRP, the Treasurer of the Ohio Republican Party, and the State Central Committeeman for the Republican Party in the 33rd State Senate District. (ECF No. 36-1, PageID# 186-87). The analysis for determining whether other branches of the Republican Party are state actors is identical to this Court's analysis of whether MCRP is a state actor. Thus, Johnson's positions within various levels of the Republican Party are not relevant.

Johnson also is not a state actor.

Absent any state action pleaded in the § 1983 claim in Plaintiffs' Complaint and the Proposed Amended Complaint, this [*729] Court lacks subject matter jurisdiction to hear this case. Because the Proposed Amended Complaint does not cure this Court's lack of subject matter jurisdiction, its filing would be futile.

D. Defendant Johnson's Motion for Sanctions, Plaintiffs' Cross-Motion for Sanctions, and Johnson's Motion to Strike Plaintiffs' Cross-Motion for Sanctions

Consistent with the tone of the dispute between Johnson and Plaintiffs, both parties have asked the Court to award sanctions against the other for their court filings. (ECF No. 24; ECF No. 29). The district court is empowered to award sanctions for party or counsel misconduct even when it lacks subject matter jurisdiction to hear the case in which the request for sanctions is made, so long as the misconduct is collateral to the merits of the case. *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992). *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (affirming award of sanctions after the plaintiff had voluntarily dismissed the case). "[It is well established that a federal court may consider collateral issues after an action is no longer pending . . . . [An] imposition [**25] of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Willy*, 503 U.S. at 138 (quoting *Cooter*, 496 U.S. at 395-96).

Fed. R. Civ. P. 11(b) provides that an attorney submitting a court filing to the Court represents, *inter alia*, that the filing "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," and that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(1) and (2). Rule 11(c) provides the enforcement mechanism for Rule 11(b)'s requirements, and states that a court may impose sanctions on a party and his attorney. When a party asks the Court to sanction another party, "[t]he motion must be served under Rule 5, but it must not be filed or be

presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets."

Rule 11(c)(1) gives the Court discretion to award sanctions, and Rule 11(c)(4) requires [**26] that any sanction the Court imposes is "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." The Sixth Circuit does not permit district courts to use Rule 11 as a "general fee-shifting device." *Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414, 420 (6th Cir. 1992) (quoting Stephen B. Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11*, 12 (1989)). District courts are instead encouraged to consider "the nature of the violation committed, the circumstances in which it was committed, the circumstances (including the financial state) of the individual to be sanctioned, and those sanctioning measures that would suffice to deter that individual from similar violations in the future." *Id.* (quoting Burbank, *supra*, at 40).

First, Johnson's Motion to Strike informs the Court that Plaintiffs' Cross-Motion for sanctions did not comply with the safe-harbor provision in Rule 11(c)(2). (ECF No. 31, PageID# 158). Plaintiffs did not oppose this Motion nor provide any evidence of compliance with the Rule. Johnson's Motion to Strike is therefore granted, and Plaintiffs' Cross-Motion for Sanctions is denied.

[*730] As for Johnson's Motion for Sanctions, the Court does not agree that Plaintiffs' Complaint warrants sanctions, monetary or otherwise. [**27] While this Court ultimately finds that it does not have subject matter jurisdiction to hear Plaintiffs' case, it does so only after the foregoing lengthy analysis. Each of the defendants could be state actors under circumstances other than those present in this case, and the Court's analysis and conclusion does not suggest that Plaintiffs' attempt at a § 1983 claim was so wrong that they or future plaintiffs need to be deterred from filing such a pleading. Further, while the Court understands that the parties' motions and briefs likely generated significant attorney fees, this case does not present the Court with cause to depart from the American Rule, which requires parties to pay for their own lawyers. *See Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414, 420 (6th Cir. 1992). The Plaintiffs are individuals, presumably without deep corporate pockets, and the nature and circumstances of the conduct for which Johnson seeks sanctions simply do not warrant same.

IV. CONCLUSION

None of Defendants are state actors for the purpose of Plaintiffs' only federal claim, which is made under 42 U.S.C. § 1983. This Court is therefore without jurisdiction to hear Plaintiffs' Complaint, and the Proposed Amended Complaint does not cure the jurisdictional deficiency present in this case. As [**28] such, Johnson's Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. 18), McCabe and MCRP's Motion to Dismiss under Federal Rule 12(b)(1) (ECF No. 21), and Aurandt's Motion to Dismiss under Federal Rule 12(b)(1) (ECF No. 22) are **GRANTED**. Plaintiff's Motion for Leave to Amend Complaint (ECF No. 36) is **DENIED**. McCabe, MCRP, and Aurandt's Motions to Dismiss under Federal Rule 12(b)(6) are **DENIED AS MOOT**.

Futher, since Plaintiffs failed to comply with the safe-harbor portion of Rule 11, Johnson's Motion to Strike (ECF No. 31) is **GRANTED**, and Plaintiffs' Cross-Motion for Sanctions (ECF No. 29) is hereby **STRICKEN**. Finally, Johnson's Motion for Sanctions is **DENIED**.

IT IS SO ORDERED.

Dated: June 16, 2023

/s/ Charles E. Fleming

CHARLES E. FLEMING

U.S. DISTRICT COURT JUDGE

JUDGMENT ENTRY

For the reasons stated in the accompanying Memorandum Opinion and Order, this matter is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Dated: June 16, 2023

/s/ Charles E. Fleming

CHARLES E. FLEMING

U.S. DISTRICT COURT JUDGE

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Emmanuelli v. Priebus

United States District Court for the Middle District of Florida, Tampa Division
April 13, 2012, Decided; April 13, 2012, Filed
Case No. 8:12-cv-199-T-24-AEP

Reporter

2012 U.S. Dist. LEXIS 52064 *; 2012 WL 1252827

RALPH A. EMMANUELLI, and HILLSBOROUGH HISPANIC COALITION, INC., Plaintiffs, v. REINCE PRIEBUS, in his official capacity as Chair of the Republican National Committee, Defendant.

Subsequent History: Affirmed by Emmanuelli v. Priebus, 2012 U.S. App. LEXIS 25245 (11th Cir. Fla., Dec. 11, 2012)

Core Terms

delegates, state action, national convention, allegations, convention, election, voting, joint action, presidential, percent, rights, voters

Counsel: [*1] For Ralph A. Emmanuelli, Hillsborough Hispanic Coalition, Inc., Plaintiffs: Michael Alan Steinberg, LEAD ATTORNEY, Michael A. Steinberg & Associates, Tampa, FL.

For Reince Priebus, in his official Capacity as Chair of the Republican National Committee, Defendant: Bradford D. Kimbro, Joseph H. Varner, III, LEAD ATTORNEYS, Holland & Knight, LLP, Tampa, FL; John R. Phillippe, Jr., LEAD ATTORNEY, PRO HAC VICE, Republican National Committee, Washington, DC.

Judges: SUSAN C. BUCKLEW, United States District Judge.

Opinion by: SUSAN C. BUCKLEW

Opinion

ORDER

This cause comes before the Court on Defendant Reince Priebus' Motion to Dismiss (Doc. No. 4). Plaintiffs Ralph A. Emmanuelli and Hillsborough Hispanic Coalition, Inc. ("Coalition") have filed a response in opposition (Doc. No. 8). The Court directed the parties to supply supplemental briefing addressing the issue of "whether, and in what circumstances, political parties are considered

covered entities *for purposes of Section 2 of the Act*," (Doc. No. 9), and the parties filed memoranda in response to that order (Doc. Nos. 10, 11). For the reasons stated herein, the motion to dismiss is GRANTED.

I. Background

Plaintiffs have alleged the following: Emmanuelli is a citizen [*2] and registered Republican voter in Pinellas County, Florida. The Coalition is a non-profit corporation with the stated purpose of promoting, protecting, and defending the rights of the Hispanic community under the constitution and laws of the United States of America. Priebus is the Chair of the Republican National Committee ("RNC").

The RNC's rules mandate that "no primary, caucus, or convention to elect . . . delegates to the national convention shall accrue prior to the first Tuesday in March in the year in which a national convention is held, except Iowa, New Hampshire, South Carolina and Nevada may begin their processes at any time on or after February 1 [of a national convention year] . . . ." (Doc. No. 1 at 1). The RNC's rules also mandate that if a state violates the rules relating to the timing of the delegate-selection process, the number of that state's convention delegates will be reduced by fifty percent.

Florida's legislature set the state's presidential primary for January 31, 2012, and the State Republican Party opted to accept the results of the primary to determine its delegate selection for the national convention. In reaction, New Hampshire, Iowa, and South Carolina [*3] scheduled their primaries and caucuses in January, before the Florida primary. The RNC reduced the delegates from all of these states.

Plaintiffs allege that, by allowing Iowa, New Hampshire, South Carolina and Nevada to hold their primaries first, the RNC has given those states "significant influence" on the selection of a presidential nominee, power to eliminate candidates who are not top vote-getters, and ability to skew the debate to reflect their own dominant demographics. Because the percentage of registered Republican Hispanic voters in the early voting states is small compared to the percentage of registered Republican Hispanic voters nationwide, Plaintiffs contend "presidential candidates often stake out positions that are contrary to the positions supported by Hispanic American voters." (Doc. No. 1 at 3).

Plaintiffs seek "a judicial declaration concerning whether the 50 percent delegate reduction penalty imposed by the RNC against the State of Florida for holding its Presidential Primary Election on January 31, 2012, violates the due process [1] and equal protection clauses of the United States Constitution, as well as 42 U.S.C. § 1983 and Section Two of the Voting Rights Act, [*4] 42 U.S.C. § 1973." (Doc. No. 1 at 4).

The crux of Plaintiffs' argument is that, by reducing Florida's number of delegates to the Republican National Convention by fifty percent, Priebus has "underenfranchised" Hispanic Republican voters. Priebus moves for dismissal on four grounds: (1) the complaint fails properly to assert subject matter jurisdiction because Plaintiffs lack standing; (2) Plaintiffs' claims are nonjusticiable; (3) the complaint fails to allege a claim under the Fourteenth Amendment; and (4) the complaint fails to state a claim under Section Two of the Voting Rights Act ("Act"). However, because the Court has determined that there is no state action implicated in this case, which is a required element for both of Plaintiffs' claims, the Court will address only that issue. [2]

II. Standard of Review

In deciding a motion to dismiss, the district court must view the complaint in the light most favorable to the plaintiff. *Murphy v. Fed. Deposit Ins. Corp.*, 208 F.3d 959, 962 (11th Cir. 2000). Federal Rule of Civil Procedure 8(a)(2) requires a pleading to contain a short and plain statement of the claim showing the pleader is entitled to relief so that the defendant receives fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Rule 8 does not require a claimant to set out in detail the facts upon which he bases his claim, but "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). To survive a motion to dismiss, a complaint must allege sufficient facts, accepted as true, to state a plausible

[1] Although Plaintiffs refer to the due process clause under the "Preliminary Allegations" of their complaint, neither Count I nor Count II allege a violation of the due process clause.

[2] The Court notes, however, that the justiciability of Plaintiffs' claims and the applicability of the Act are far from clear. *See, e.g., Wymbs v. Republican State Exec. Comm. of Fla.*, 719 F.2d 1072, 1076-77 (11th Cir. 1983) [*5] (addressing justiciability); *Nelson v. Dean*, 528 F. Supp. 2d 1271, 1282 (N.D. Fla. 2007) (citing *LaRouche v. Fowler*, 77 F. Supp. 2d 80 (D.D.C. 1999) (addressing the Act)).

claim for relief. *Id.* If a complaint's well-pleaded facts "do not permit the court to infer more than the mere possibility of misconduct," the complaint stops [*6] short of plausibility and does not show the plaintiff is entitled to relief. *Id.* at 1950. Furthermore, while the Court must assume that all of a complaint's factual allegations are true, this assumption is inapplicable to legal conclusions. *Id.* at 1949. A plaintiff may not open the door to discovery "armed with nothing more than [legal] conclusions." *Id.* at 1950.

However, regardless of the factual allegations, a court "may dismiss a complaint on a dispositive issue of law." *Acosta v. Campbell*, 309 F. App'x 315, 318 (11th Cir. 2009) (per curiam). Dismissal is proper when "no construction of the factual allegations will support the cause of action." *Marshall Co. Bd. of Educ. v. Marshall Co. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

III. Whether there was State Action in this Case?

Count I is a claim under 42 U.S.C. § 1983 based on Priebus' alleged violation of the equal protection clauses of the Constitution; therefore, Plaintiffs must demonstrate that Priebus was a state actor. 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen [*7] of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."); *Peterson v. Ramirez*, 428 F. App'x 908, 909 (11th Cir. 2011) ("Section 1983 claims can only be asserted against state actors.").

Count II claims a violation of Section 2 of the Act, which similarly governs conduct of only states or political subdivisions thereof. 42 U.S.C. § 1973(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."). The Act provides: "[t]he term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." *Id.* at §

1973l(c)(2).

Priebus contends that, in order to state a claim of deprivation of their [*8] equal protection rights via § 1983, Plaintiffs must establish that the alleged deprivation was committed under the color of state law. He argues that the RNC is a private, unincorporated entity, and that Plaintiffs' allegations are legally insufficient to establish that the RNC's delegate selection rules are state action. In support, Priebus notes that Florida has not endorsed, adopted, or enforced the RNC's delegate selection rules; and that the outcome of Florida's primary does not determine who will appear on the ballot for the general election, but instead, the Republican nominee will be selected at the Republican National Convention.

Plaintiffs cite *Nelson v. Dean* as suggesting that under certain circumstances, a political party's actions may constitute state action, and that there is a reasonable probability that state action would be found where there is evidence of racial discrimination in the primary process. 528 F. Supp. 2d 1271, 1276-77 (N.D. Fla. 2007). However, Plaintiffs concede that *Nelson* was not decided on the issue of state action, that *Nelson* made no ruling with respect to that issue, and that neither the Supreme Court nor any federal court of appeals has addressed [*9] state action under the circumstances presented in this case.

The Eleventh Circuit has employed three tests to determine whether the action of a private entity may be attributed to the state: "(1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277 (11th Cir. 2003).

> The public function test limits state action to instances where private actors are performing functions traditionally the exclusive prerogative of the state. The state compulsion test limits state action to instances where the government has coerced or at least significantly encouraged the action alleged to violate the Constitution. The nexus/joint action test applies where the state has so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the enterprise.

Id. (internal quotation marks and alterations omitted). To charge a private party with state action under the nexus/joint action standard, "the governmental body and private party must be intertwined in a symbiotic relationship [, and] . . . the symbiotic relationship must involve the specific

[*10] conduct of which the plaintiff complains." *Id.* at 1278 (internal quotation marks omitted).

Plaintiffs do not contend that the state somehow coerced or compelled Priebus to reduce Florida's number of convention delegates; rather, their argument focuses on "the public functions and joint action" that are entailed in Florida's Republican primary process. (Doc. No. 1 at 6). For example, Plaintiffs contend that Florida and the RNC operate jointly. Specifically, Plaintiffs have alleged that because Florida "violate[d] the rules of the Republican party relating to the timing of" its primary, and because the State Republican Party "has opted to accept the results of this election to determine its delegate selection to the Republican National Convention," the RNC has decided to reduce Florida's delegate count by half. (Doc. No. 1 at 2). Essentially, Plaintiffs have alleged that because Florida disobeyed the RNC, the RNC is penalizing Florida by reducing its number of convention delegates. Priebus argues that it is inconsistent to claim that the RNC's punitive actions toward Florida can be attributed to the State of Florida. Priebus' point is well taken. The precipitating event in this case was [*11] the Florida legislature's decision to set Florida's presidential primary on January 31, 2012 — well before the time mandated by the RNC. As a result, the RNC decided to cut Florida's convention delegates by fifty percent. It is unclear to this Court how Plaintiffs can contend that Florida and the RNC operated jointly in this instance when Florida and the RNC are clearly at odds. *See Nelson*, 528 F. Supp. 2d at 1276 ("[T]he state had nothing to do with the adoption of the [Democratic National Committee's ("DNC")] delegate selection rules or the decision not to seat delegates chosen in violation of those rules. Indeed, the DNC has vigorously resisted the state's rescheduling of the primary and the state party's announced intention to use the primary results as a basis for selecting delegates. In that sense the DNC's decisions have been the very antithesis of state action."). Accordingly, the Court rejects Plaintiffs' argument that Florida and the RNC have operated jointly.

Additionally, Plaintiffs assert that the RNC is a political organization that performs significant public functions, as well as functions that are sufficiently intertwined with government operations as to constitute [*12] joint action with state authorities. (Doc. No. 1 at 5). Specifically, Plaintiffs note that: (1) Florida law establishes statutory regulations and requirements for the two major political parties; (2) the State of Florida

guarantees a position on the general election ballot for the RNC's nominee; (3) the RNC and a variety of government functionaries coordinate in the candidate selection process and the primary and general elections — including the determination of which names are included on the primary ballot; and (4) Florida law directs that the delegates for specific candidates be allocated by party rule to assure that those votes count in the nominating process. (Doc. No. 1 at 5-8).

However, the Court concludes that these allegations are insufficient to establish that — in enforcing its internal rules and decreasing Florida's convention delegates by fifty percent — the RNC either "performed [a] function[] traditionally the exclusive prerogative of the state," or engaged in a joint enterprise with the state. Consequently, Plaintiffs' complaint does not establish that there was any state action present in this case to state a claim under § 1983.

Similarly, Plaintiffs have failed to [*13] state a claim under Section 2 of the Act. Although the Supreme Court has determined that, in certain limited circumstances, a political party may be a covered entity under Section 5 of the Act, [3] Plaintiffs have not cited, and the Court has not found, any authority supporting the proposition that under these facts, a political party can be considered a "State or political subdivision" thereof for purposes of Section 2 of the Act. With no such supporting authority, the Court is disinclined to expand the purview of Section 2. This is especially true in a case like the one presented here, where the state and the RNC are so obviously at loggerheads.

IV. Conclusion

Accordingly, it is ORDERED AND ADJUDGED that Priebus' Motion to Dismiss (Doc. No. 4) is GRANTED. Because no construction of these factual allegations will establish a cause of action under § 1983 or Section 2 of the Act, amendment would be futile, and Plaintiffs' complaint is dismissed with prejudice. The Clerk is directed to enter judgment in favor of Priebus and to close this case.

DONE AND ORDERED at Tampa, Florida, this 13th day of April, 2012.

/s/ Susan C. Bucklew

SUSAN C. BUCKLEW [*14]

United States District Judge

[3] *Morse v. Republican Party of Va.*, 517 U.S. 186, 225, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996).

End of Document

Fla. Bar Reg. R. 4-3.7

Current through changes received by October 24, 2024.

FL - Florida Local, State & Federal Court Rules > Rules Regulating The Florida Bar > Chapter 4. Rules of Professional Conduct > 4-3. ADVOCATE

Rule 4-3.7. Lawyer as Witness.

(a) When Lawyer May Testify. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case; or

(4) disqualification of the lawyer would work substantial hardship on the client.

(b) Other Members of Law Firm as Witnesses. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9.

History

Amended eff. March 23, 2006 (933 So.2d 417).

Annotations

Commentary

COMMENT

Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

The trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The combination of roles may prejudice another party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

To protect the tribunal, subdivision (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified. Subdivision (a) (1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Subdivisions (a) (2) and (3) recognize that, where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these 2 exceptions, subdivision (a) (4) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in rules 4-1.7, 4.1-9, and 4-1.10 have no application to this aspect of the problem.

Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, subdivision (b) permits the lawyer to do so except in situations involving a conflict of interest.

In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with rules 4-1.7 or 4-1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with rule 4-1.7. This would be true even though the lawyer might not be prohibited by subdivision (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by subdivision (a)(3) might be precluded from doing so by rule 4-1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent. In some cases, the lawyer will be precluded from seeking the client's consent. See rule 4-1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, rule 4-1.10 disqualifies the firm also. See terminology for the definition of "confirmed in writing" and "informed consent."

Subdivision (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by subdivision (a). If, however, the testifying lawyer would also be disqualified by rule 4-1.7 or 4-1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by rule 4-1.10 unless the client gives informed consent under the conditions stated in rule 4-1.7.

Notes to Decisions

Civil Procedure: Counsel: General Overview

Allstate Ins. Co. v. English

Court of Appeal of Florida, Second District

October 30, 1991, Filed

Case No. 91-02620

Reporter

588 So. 2d 294 *; 1991 Fla. App. LEXIS 10872 **; 16 Fla. L. Weekly D 2774

ALLSTATE INSURANCE COMPANY, Petitioner, v. BRIAN ENGLISH and DIANE ENGLISH, Respondents

Notice: [**1] Released for Publication November 18, 1991.

Prior History: Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Daniel E. Gallagher, Judge.

Core Terms

summary judgment motion, respondents', disqualification motion, subrogation rights, opposing counsel, former counsel, trial court, disassociate, disqualified, authorities, proceedings, impairment, withdraw

Case Summary

Procedural Posture

In a breach of contract action, petitioner insurer sought review of the judgment of the Circuit Court for Hillsborough County (Florida). Petitioner sough a writ of certiorari to quash an order that granted respondent husband and wife's motion to disqualify petitioner's counsel.

Overview

In a breach of contract action, petitioner insurer sought a writ of certiorari to quash an order that granted the respondent husband and wife's motion to disqualify petitioner's counsel. The court granted certiorari, quashed the lower court order that disqualified petitioner's counsel, and remanded for further proceedings. The court held that the lower court departed from the essential requirements of the law in granting the respondents' motion to disqualify petitioner's counsel. The court determined that there was nothing to indicate that petitioner's counsel was likely to be a necessary witness on behalf of his client. The court further determined that even if counsel was called, there was no showing that any testimony he might give

would be sufficiently adverse to the factual assertions or account of events offered on behalf of the client. In addition, the court concluded that even if counsel's testimony were necessary, another member of the firm could represent petitioner.

Outcome

In a breach of contract case, the court granted certiorari to petitioner insurer, quashed the lower court order that disqualified petitioner's counsel, and remanded for further proceedings. The court held that the lower court departed from the essential requirements of the law in granting the respondents' motion to disqualify petitioner's counsel.

LexisNexis® Headnotes

Civil Procedure > Attorneys > General Overview

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN1[] **Civil Procedure, Attorneys**

The rule requiring a lawyer to withdraw when he expects to be a witness in a case was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel.

Counsel: W. Douglas Berry, and Melinda J. Brazel of Butler, Burnette & Pappas, Tampa, for Petitioner.

Bruce A. Walkley of Walkley & Walkley, Tampa, and Scott Charlton of Clark, Charlton & Martino, Tampa, for Respondents.

Judges: Danahy, A.C.J., and Frank and Hall, JJ., Concur.

Opinion by: PER CURIAM

Opinion

[*295] Allstate Insurance Company (Allstate) petitions this court for a writ of certiorari to quash an order that granted the respondents' motion to disqualify Allstate's counsel, the law firm of Butler, Burnette & Pappas. The respondents have brought an action against Allstate for breach of contract based upon a homeowner's insurance policy. Pursuant to the authorities cited below, we grant the petition and quash the order.

The motion to disqualify the firm was based in part on the fact that attached to Allstate's motion for summary judgment was a letter which Paul B. Butler, Jr., a member of the firm, had written to the

respondents' former counsel. The motion for summary judgment was based, in part, on the respondents' alleged impairment [**2] of Allstate's subrogation rights under the policy by entering into a third-party settlement. The letter attached to the motion advised the respondents' former counsel that any impairment of Allstate's subrogation rights could jeopardize a claim under the policy. The respondents alleged that they intend to depose Mr. Butler to refute the allegations contained in the letter, and as such, Mr. Butler will become a witness and therefore, should not be an advocate. Respondents also argued at the hearing on the motion that they intend to call Mr. Butler as a witness at trial to establish a material fact in their case against Allstate. The trial judge granted the motion because he did not want to "keep Mr. Butler in and then find out that his involvement is much more than he says it is."

After carefully reviewing the record provided to us, as well as the controlling authorities, we conclude that the trial court departed from the essential requirements of the law in granting the respondents' motion to disqualify Allstate's counsel. First, there is nothing, including Mr. Butler's letter attached to the motion for summary judgment, to indicate that he "is likely to be a *necessary* witness [**3] on behalf of his . . . client" on a contested matter. Fla. Bar Code Prof. Resp., D.R. 4-3.7(a) (emphasis added); *In re Estate of Gory,* 570 So. 2d 1381 (Fla. 4th DCA 1990). On the contrary, Mr. Butler represented to the trial court that he would not be testifying on behalf of Allstate, and it is apparent that the letter attached to the motion for summary judgment was not necessary. *Cf. Hardemon v. Fish,* 325 So. 2d 411 (Fla. 3d DCA 1976) (inappropriate for counsel to attach his affidavit in support of motion for summary judgment where affidavit went to material issue).

Second, even if the respondents called Mr. Butler as their witness, there has been no showing at this stage of the proceedings that any testimony he might give would be "sufficiently adverse to the factual assertions or account of events offered on behalf of the client." *Ray v. Stuckey,* 491 So. 2d 1211, 1213 (Fla. 1st DCA 1986).

Further, respondents have not demonstrated that Mr. Butler is an essential or indispensable witness in this proceeding, that is, there are other witnesses available to testify to the same information. *Arcara v. Philip M. Warren, P.A.,* 574 So. 2d 325 (Fla. 4th DCA 1991); [**4] *Laura McCarthy, Inc. v. Merrill-Lynch Realty/Cousins, Inc.,* 516 So. 2d 23 (Fla. 3d DCA 1987); *Ray,* 491 So. 2d at 1214. In

this regard we observe that our sister courts have stated:

HN1[↑] The rule requiring a lawyer to withdraw when he expects to be a witness in a case "was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel."

[*296] *Arcara,* 574 So. 2d at 326, quoting *Cazares v. Church of Scientology of California, Inc.,* 429 So. 2d 348, 350 (Fla. 5th DCA), *review denied,* 438 So. 2d 831 (Fla. 1983). *See also Ray*, 491 So. 2d at 1214 (same); *Beavers v. Conner,* 258 So. 2d 330 (Fla. 3d DCA 1972) (opposing counsel should not be permitted to force disassociation between counsel and client just by calling counsel as adverse witness); *Hill v. Douglass,* 248 So. 2d 182 (Fla. 1st DCA 1971), *quashed on other grounds,* 271 So. 2d 1 (Fla. 1972) (lawyer need not withdraw from case where possibility exists that he or she might be called to testify by adversary as this would create [**5] situation in which adversary could disassociate client's chosen counsel). We further note that even if Mr. Butler's testimony were necessary, another member of his firm may represent Allstate, unless precluded by disciplinary rules 4-1.7 or 4-1.9. Fla. Bar Code Prof. Resp., D.R. 4-3.7(b); *In re Estate of Gory,* 570 So. 2d at 1383.

Accordingly, we grant the petition, quash the trial court's order that disqualified Allstate's counsel, and remand for further proceedings consistent with this opinion.

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AlliedSignal Recovery Trust v. AlliedSignal, Inc.

Court of Appeal of Florida, Second District

August 9, 2006, Opinion Filed

Case No. 2D05-4251

Reporter

934 So. 2d 675 *; 2006 Fla. App. LEXIS 13247 **; 31 Fla. L. Weekly D 2087

ALLIEDSIGNAL RECOVERY TRUST,

Petitioner, v. ALLIEDSIGNAL, INC., Respondent.

Subsequent History: Released for Publication August 25, 2006.

Prior History: [**1] Petition for Writ of Certiorari to the Circuit Court for Polk County; Robert L. Doyel, Judge.

Allied Signal Recovery Trust v. Allied Signal, Inc., 298 F.3d 263, 2002 U.S. App. LEXIS 15346 (3d Cir. Del., 2002)

Disposition: Petition previously granted and the trial court order quashed.

Core Terms

disqualification, disqualify, founders, opposing party, trial court, conflicting interest, own client

Case Summary

Procedural Posture

Plaintiff debtor sued appellee corporation in the Circuit Court for Polk County (Florida), for fraud. After filing suit, the debtor filed for bankruptcy protection. The bankruptcy court authorized the formation of appellant trust to pursue for the debtor's creditors the claim against the corporation. After the trial court granted the corporation's motion to disqualify the trust's counsel, the trust petitioned for a writ of certiorari review.

Overview

After the debtor purchased a subsidiary of the corporation, the trust's attorney, who represented the debtor in the transaction, allegedly discovered misrepresentation's regarding the subsidiary's financial condition. The trust waived any potential conflict of interest that the attorney might have had in representing the trust. On appeal, the court found that the attorney's disqualification was inappropriate because Fla. R. Bar 4-3.7 was inapplicable as the rule contemplated the attorney

testifying on his client's behalf. However, the trust announced that it would not call the attorney to testify. Additionally, the corporation failed to articulate how any advice regarding asset protection planning that the attorney allegedly provided the debtor's founders created a conflict under Fla. R. Bar 4-1.7 and 4-1.9 as the founders and the trust shared an interest in securing a meaningful recovery from the corporation. Finally, any unsworn testimony issue could have been addressed by the trial court's diligent supervision. Therefore, by disqualifying the attorney, the trial court departed from the essential requirements of law, causing irreparable harm to the trust.

Outcome

The petition for a writ of certiorari was granted, and the order below was quashed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN1[] **Appellate Jurisdiction, State Court Review**

Certiorari is the proper remedy to seek review of an order granting or denying a motion to disqualify counsel or a law firm. After all, an order disqualifying counsel denies the right to choose one's counsel and works a material injury that cannot be remedied on appeal.

Civil Procedure > Attorneys > Disqualification of Counsel

HN2[] **Attorneys, Disqualification of Counsel**

The unsworn witness theory centers on the possibility that a lawyer with personal knowledge of the underlying facts could, through his demeanor or questioning of witnesses, improperly suggest the lawyer's personal views on a matter, thus providing the equivalent of unsworn testimony in a case.

Civil Procedure > Attorneys > Disqualification of Counsel

HN3[] **Attorneys, Disqualification of Counsel**

Disqualification is an extraordinary remedy to be used sparingly.

Civil Procedure > Attorneys > Disqualification of Counsel

HN4[] **Attorneys, Disqualification of Counsel**

Disqualification is an immensely unusual remedy.

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Client Relations > General Overview

Legal Ethics > Professional Conduct > General Overview

HN5[] **Attorneys, Disqualification of Counsel**

An order disqualifying counsel must be tested against the standards imposed by the Florida Rules of Professional Conduct.

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Client Relations > Appearance of Impropriety

Legal Ethics > Client Relations > Duties to Client > Effective Representation

Legal Ethics > Professional Conduct > Tribunals

HN6[] **Attorneys, Disqualification of Counsel**

See Fla. R. Bar 4-3.7.

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Client Relations > Appearance of Impropriety

Legal Ethics > Client Relations > Duties to Client > Effective Representation

Legal Ethics > Professional Conduct > Tribunals

HN7[] **Attorneys, Disqualification of Counsel**

Fla. R. Bar 4-3.7 prohibits a lawyer from serving as trial counsel for a client where he is likely to be a necessary witness for that client. Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client. This dual role could create a conflict if the lawyer's testimony is at odds with that of his client. Moreover, the dual role could prejudice the opposing party by bolstering the lawyer's testimony for his client because it comes from an advocate.

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Client Relations > Appearance of Impropriety

Legal Ethics > Client Relations > Duties to Client > Effective Representation

Legal Ethics > Professional Conduct > Tribunals

HN8[] **Attorneys, Disqualification of Counsel**

Fla. R. Bar 4-3.7 contemplates a lawyer testifying on his client's behalf.

Legal Ethics > Client Relations > Conflicts of Interest

HN9[] **Client Relations, Conflicts of Interest**

The general rule is that a lawyer may not represent a client if such representation will be directly or materially adverse to the interests of a current or former client. Fla. R. Bar 4-1.7 and 4-1.9.

Legal Ethics > Client Relations > Conflicts of Interest

HN10[] **Client Relations, Conflicts of Interest**

See Fla. R. Bar 4-1.7(a).

Legal Ethics > Client Relations > Conflicts of Interest

HN11[] **Client Relations, Conflicts of Interest**

See Fla. R. Bar 4-1.9(a).

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Professional Conduct > Tribunals

HN12[] **Attorneys, Disqualification of Counsel**

The requirement that a lawyer withdraw when he expects to be a witness is not intended to permit an opposing party to call him as a witness and disqualify him from serving as counsel.

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Professional Conduct > Tribunals

HN13[] **Attorneys, Disqualification of Counsel**

Florida has declined to adopt a proposed rule mandating automatic disqualification resulting from testimony for an opposing party.

Legal Ethics > Client Relations > Conflicts of Interest

Legal Ethics > Professional Conduct > Tribunals

***HN14*[] Client Relations, Conflicts of Interest**

Whether a lawyer who is likely to be called to testify for an adverse party should decline further representation of his client can be addressed under the framework of Fla. R. Bar 4-1.7 and 4-1.9.

Legal Ethics > General Overview

***HN15*[] Legal Ethics**

The Florida Code of Professional Responsibility has been replaced by the Florida Rules of Professional Conduct, effective January 1, 1987.

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Professional Conduct > Tribunals

***HN16*[] Attorneys, Disqualification of Counsel**

The actual or perceived evils of an attorney being an unsworn witness can be addressed by diligent supervision of trial proceedings by a trial judge.

Counsel: Donald B. Ayer, Gregory M. Shumaker, Edward K.M. Bilich, Michael S. Fried of Jones Day, Washington, D.C.; and John W. Frost, II, of Frost, Tamayo, Sessums & Aranda, P.A., Bartow, for Petitioner.

Benjamin H. Hill, III, and Dennis P. Waggoner of Hill, Ward & Henderson, P.A., Tampa; Steven D. McCormick, PC of Kirkland & Ellis, LLP, Chicago, Illinois; Major B. Harding and John Beranek of Ausley & McMullen, P.A., Tallahassee; Eugene F. Assaf and Craig S. Primis of Kirkland & Ellis, LLP, Washington, D.C., for Respondent.

Judges: LaROSE, Judge. CASANUEVA and CANADY, JJ., Concur.

Opinion by: LaROSE

Opinion

[*676] LaROSE, Judge.

AlliedSignal Recovery Trust (Trust), a group of creditors of Breed Technologies, Inc. (Breed), petitioned this court for certiorari review of an interlocutory order disqualifying its trial counsel, Geoffrey Stewart, in Breed's fraud lawsuit against

AlliedSignal, Inc. (AlliedSignal). In an [*677] earlier order, we granted the petition and quashed [**2] the trial court's order. We take this opportunity to explain our reasoning.

At the outset, we note that ***HN1***[⬆] "certiorari is the proper remedy to seek review of an order granting or denying a motion to disqualify counsel or a law firm." *Gonzalez v. Chillura*, 892 So. 2d 1075, 1076 (Fla. 2d DCA 2004). After all, an order disqualifying counsel denies the right to choose one's counsel and works a material injury that cannot be remedied on appeal. *Id.* at 1076-77; *City of Lauderdale Lakes v. Enter. Leasing Co.*, 654 So. 2d 645, 646 (Fla. 4th DCA 1995).

The underlying facts are straightforward. Breed manufactured automobile air bag systems. Safety Restraint Systems (SRS), an AlliedSignal division, also manufactured automobile safety products. Breed retained Mr. Stewart, long-time counsel for Breed and its founders, to negotiate the purchase of SRS from AlliedSignal. In late 1997, Breed acquired SRS for $ 710,000,000.

In mid-1998, Breed allegedly learned that SRS's financial condition was significantly worse than previously represented by AlliedSignal. Breed's financial condition deteriorated and bankruptcy loomed. In 1999, Mr. Stewart advised [**3] Breed's founders to restructure their personal financial affairs to avoid potential mismanagement claims by Breed's creditors. Mr. Stewart also conducted an investigation that allegedly revealed that AlliedSignal had concealed critical financial information about SRS and seriously misrepresented SRS's past and projected earnings. In the summer of 1999, Breed, represented by Mr. Stewart, sued AlliedSignal. In defense, AlliedSignal contended that Mr. Stewart concocted his discovery of alleged fraud to insulate Breed's founders from mismanagement claims.

Several weeks after filing suit, Breed filed for bankruptcy protection. As part of Breed's restructuring, the bankruptcy court authorized formation of the Trust to pursue the fraud claims against AlliedSignal on behalf of Breed's creditors. In effect, Breed's claims were transferred to the Trust. "After payment of fees and expenses, any recovery from Allied Signal by the Trust [would] be distributed to Breed's creditors." *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263, 266 n.2 (3d Cir. 2002). The Trust retained Mr. Stewart as its counsel.

AlliedSignal moved to disqualify Mr. Stewart. The motion [**4] stressed that Mr. Stewart had an

extensive and lengthy relationship with Breed and its founders, the fraud claims were based on Mr. Stewart's investigation, and the asset protection advice he gave to Breed's founders created a conflict between him and the Trust. According to AlliedSignal, Mr. Stewart would be a key trial witness or, at a minimum, an impermissible "unsworn witness." [1]

The Trust opposed the motion. It argued that disqualification was limited to two situations: (1) where the lawyer is a necessary witness for his own client; or (2) where the attorney, when called as a witness for the other side, will provide testimony prejudicial to his client and the client either does not consent to waive the conflict [**5] or does consent and the court finds the consent unreasonable.

Although the Trust saw no conflict, it waived any potential conflict of interest that Mr. Stewart might have in representing [*678] the Trust. Further, the Trust disavowed any need or intention to call Mr. Stewart to testify at trial. The Trust certainly did not act injudiciously; the trustee consulted with Trust beneficiaries, sophisticated business entities, and financial institutions represented by competent lawyers. They supported Mr. Stewart's continued role as counsel, recognizing his expertise, detailed knowledge of the legal and factual issues in the case, and familiarity with Breed and its personnel. Nevertheless, the trial court disqualified Mr. Stewart. It concluded that Mr. Stewart was a necessary witness for AlliedSignal, was likely to be an "unsworn witness" at trial, and that any conflict waiver by the Trust was unreasonable.

HN3[↑] Disqualification is an extraordinary remedy to be used sparingly. *Therriault v. Berghmans*, 788 So. 2d 1119, 1120 (Fla. 2d DCA 2001); *Arcara v. Philip M. Warren, P.A.*, 574 So. 2d 325, 326 (Fla. 4th DCA 1991). ***HN4***[↑] Disqualification is an "immensely unusual remedy. [**6] " *Whitener v. First Union Nat'l Bank of Fla.*, 901 So. 2d 366, 370 (Fla. 5th DCA 2005). ***HN5***[↑] An order disqualifying counsel "'must be tested against the standards imposed by [the] Rules of Professional Conduct.'" *Tobkin v. Tobkin*, 843 So. 2d 961, 962 (Fla. 4th DCA 2003) (quoting *City of Lauderdale Lakes*, 654 So. 2d at 646); *accord Ray v. Stuckey*, 491 So. 2d 1211, 1213 (Fla. 1st DCA 1986); *Cazares v. Church of Scientology of Cal., Inc.*, 429 So. 2d 348, 349 (Fla. 5th DCA 1983).

[1] ***HN2***[↑] The "unsworn witness" theory centers on the possibility that a lawyer with personal knowledge of the underlying facts could, through his demeanor or questioning of witnesses, improperly suggest the lawyer's personal views on a matter, thus providing the equivalent of unsworn testimony in the case.

Measured against these standards, Mr. Stewart's disqualification was inappropriate.

The Rules Regulating the Florida Bar provide:

> **Rule 4-3.7. Lawyer as witness***HN6*[] **(a) When Lawyer May Testify.** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services [**7] rendered in the case; or
>
> (4) disqualification of the lawyer would work substantial hardship on the client.

HN7[] Rule 4-3.7 prohibits a lawyer from serving as trial counsel for a client where he is likely to be a necessary witness for that client. "Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client." Rule 4-3.7 cmt. This dual role could create a conflict if the lawyer's testimony is at odds with that of his client. Moreover, the dual role could prejudice the opposing party by bolstering the lawyer's testimony for his client because it comes from an advocate. *See Scott v. State*, 717 So. 2d 908, 910 (Fla. 1998).

Rule 4-3.7 is inapplicable here, however; ***HN8***[] the rule contemplates the lawyer testifying on his client's behalf. The Trust conceded that Mr. Stewart was not a necessary witness and announced that it would not call him to testify. Nonetheless, the trial court disqualified Mr. Stewart because of potential prejudice to AlliedSignal if it called him to testify: "[T]he court's focus is on prejudice to the opposing party who calls him as a witness, not on the prejudice [**8] to his own client contemplated by the analysis under Rule 4-3.7." Neither the rule nor its comment supports disqualification on this basis.

[*679] As for AlliedSignal's concern that Mr. Stewart's prior representation of Breed's founders creates a conflict with the Trust, we do not quarrel with ***HN9***[] the general rule that a lawyer may not represent a client if such representation will be directly or materially adverse to the interests of a current or former client. *See* Rules Regulating the Florida Bar 4-1.7, 4-1.9:

Rule 4-1.7. Conflict of interest; general rule

HN10[] **(a) Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

. . . .

Rule 4-1.9. Conflict of interest; former client

HN11[] A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another [**9] person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation . . . .

The Trust retained Mr. Stewart solely to pursue claims against AlliedSignal and waived any conflict of interest. *See* rule 4-1.7 cmt. consultation and consent ("A client may consent to representation notwithstanding a conflict."). Any recovery would inure to the benefit of the Trust and, ultimately, to Breed's creditors. Any potential claim against Breed's founders was not a Trust asset; such a claim, if any, might belong to the reorganized Breed, an entity not represented by Mr. Stewart. [2] Under the circumstances, therefore, it is not evident that any conflict existed. Assuming that Mr. Stewart provided asset protection planning for Breed's founders, AlliedSignal failed to articulate how that advice created a conflict. It seems obvious that Breed's founders and the Trust shared an interest in securing a meaningful recovery from AlliedSignal.

[**10] We discern that AlliedSignal's central conflict concern is that Mr. Stewart will be a key witness for AlliedSignal, especially as to his investigation of AlliedSignal's alleged fraud. On our record, we are not persuaded that this rationale warrants disqualification. We find *Allstate Insurance Co. v. English*, 588 So. 2d 294 (Fla. 2d DCA 1991), instructive. In *English*, we quashed an order granting a motion to disqualify Allstate's lawyer because he would be called to testify for the other side. *Id.* at 295. We observed that there had

[2] We question AlliedSignal's standing to assert this actual or perceived conflict. AlliedSignal was not Mr. Stewart's current or former client as contemplated by rule 4-1.7 or rule 4-1.9. If anyone had an objection to Mr. Stewart's representation, it would have been Breed's creditors.

been no showing that any testimony the lawyer might give would be "'sufficiently adverse to the factual assertions or account of events offered on behalf of the client.'" *Id.* (quoting *Ray*, 491 So. 2d at 1213 (following old rule 5-102(B) that lawyer who might be witness for opposing party may continue representation until prejudice to his own client is apparent)); *see also Cazares*, 429 So. 2d at 350 (same).

Like Allstate's counsel in *English*, Mr. Stewart was not going to testify for his own client. *See* Rule 4-3.7. But, because AlliedSignal could call Mr. Stewart [*680] to testify [**11] against his client, the trial court concluded that any conflict waiver given by the Trust was unreasonable because "[a] disinterested lawyer would not take the chance" that a jury could react negatively to Mr. Stewart's extensive involvement with Breed. AlliedSignal, however, made no showing that Mr. Stewart would give any testimony "sufficiently adverse to the factual allegations or account of events offered on behalf of the [Trust]." To allow disqualification without such a showing invites mischief.

HN12[] The requirement that a lawyer withdraw when he expects to be a witness was not intended to permit an opposing party to call him as a witness and disqualify him from serving as counsel. *Id.* at 295-96; *Arcara*, 574 So. 2d at 326; *Ray*, 491 So. 2d at 1214; *Cazares*, 429 So. 2d at 350; *see also Beavers v. Conner*, 258 So. 2d 330, 332-33 (Fla. 3d DCA 1972) (stating opposing counsel should not be permitted to force disassociation between counsel and client just by calling counsel as adverse witness); *Hill v. Douglass*, 248 So. 2d 182, 183 (Fla. 1st DCA 1971), *quashed on other grounds*, 271 So. 2d 1 (Fla. 1972) [**12] (stating lawyer need not withdraw from case where he or she might be called to testify by adversary as this would create situation in which adversary could disassociate client's chosen counsel).

AlliedSignal's reliance on *Live & Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.-'73*, 388 So. 2d 629 (Fla. 1st DCA 1980), is misplaced. That case addresses the former code of professional responsibility. *See* Fla. Bar Code of Prof. Resp. D.R. 5-102(B). [3] [**13] In updating its

[3]

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness *other than on behalf of his client*, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client. (Emphasis supplied.)

The concern of rule D.R. 5-102(B) was that trial counsel "might be

professional conduct rules in 1987, ***HN13***[⬆] Florida declined to adopt a proposed rule mandating automatic disqualification resulting from testimony for an opposing party. [4]

AlliedSignal's reference to *Fleitman v. McPherson*, 691 So. 2d 37 (Fla. 1st DCA 1997), is also inapposite. *Fleitman*, decided after the adoption of the new rules, held that "when it is shown that the attorney will be an indispensable witness or when the attorney becomes a 'central figure' in the case, disqualification is appropriate." *Id.* at 38 (citing *City of Lauderdale Lakes*, 654 So. 2d at 646). However, the lawyers in *Fleitman* and *City of Lauderdale Lakes* were likely to be "featured witnesses" at trial for their own clients. Neither case, therefore, supports disqualification of Mr. Stewart because he might be a witness for AlliedSignal.

The trial court also found that Mr. Stewart should be disqualified as an "unsworn witness." This theory has no express support [**14] in the Rules Regulating the Florida Bar or Florida case law. The trial court nevertheless relied on *Marrero v. State*, 478 So. 2d 1155 (Fla. 3d DCA 1985), as a basis for disqualification. *Marrero*, however, involved a prosecutor whose improper [*681] questioning of a witness demonstrated his involvement in the underlying events and was an impermissible attempt at impeachment. *Id.* at 1157. That is not the case here. Further, ***HN16***[⬆] the actual or perceived evils of the "unsworn witness" can be addressed by diligent supervision of trial proceedings by the trial judge. *See Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608-09 (Fla. 1994) ("Clearly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice."); *accord Moakley v. Smallwood*, 826 So. 2d 221, 224 (Fla. 2002).

By disqualifying Mr. Stewart, the trial court departed from the essential requirements of law, causing irreparable harm to the Trust. We grant the petition for writ [**15] of certiorari and quash the order below.

Petition previously granted and the trial court order

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inhibited from attacking his own credibility or arguing to the fact-finder the lack of credibility of his testimony, thus affecting his ability to properly represent his client." *Ray*, 491 So. 2d at 1213 . ***HN14***[⬆] Whether a lawyer who is likely to be called to testify for an adverse party should decline further representation of his client can be addressed under the framework of rule 4-1.7 and rule 4-1.9. *See* rule 4-3.7, cmt.

[4] ***HN15***[⬆] The Code of Professional Responsibility was replaced by the Rules of Professional Conduct, effective January 1, 1987. *The Fla. Bar Re Rules Regulating the Fla. Bar*, 494 So. 2d 977 (Fla.), *opinion corrected by* 507 So. 2d 1366 (Fla. 1986).

quashed.

CASANUEVA and CANADY, JJ., Concur.

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