

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 08-13241-D

VICTOR DIMAIO,
Plaintiff-Appellant,

v.

DEMOCRATIC NATIONAL COMMITTEE

Defendant/Appellee.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
(CASE NO.: 8:08-672-T-26EAJ)
THE HONORABLE RICHARD A. LAZARRA, JUDGE PRESIDING
BRIEF OF PLAINTIFF - APPELLANT

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DiMaio v. DNC
Case No: 08-13241-D

CERTIFICATE OF INTERESTED PERSONS

The following persons have an interest in the outcome of this litigation:

1. Victor DiMaio, Appellant;
2. Katherine Eastmore Giddings, Akerman Senterfitt, Counsel, Democratic National Committee;
3. Richard A. Lazzara, United States District Judge;
4. Joseph E. Sandler, General Counsel, Democratic National Committee;
5. Michael A. Steinberg, Counsel for Plaintiff-Appellant;

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. APP. P. 26.1, Michael Steinberg makes the following disclosure:

Neither Counsel for Plaintiff-Appellant, nor the Plaintiff-Appellant, Victor DiMaio, is a subsidiary or affiliate of any publicly owned corporation.

Dated this 18th day of July 2008.

s/Michael A. Steinberg
Michael A. Steinberg
Florida Bar No. 340065

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rules of Appellate Procedure 34(A), oral argument is not required when the facts and the legal arguments are adequately presented in the briefs and transcripts. Appellant, Victor DiMaio, believes that oral argument would significantly aid in the Court's decisional process.

CERTIFICATE OF TYPE OF SIZE AND STYLE

Pursuant to Eleventh Circuit Rule 28-2, Appellant hereby certifies that Appellant's Brief was printed in a Courier 12 point, non-proportionally spaced font.

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INTRODUCTION AND PRELIMINARY STATEMENT

The case presents questions about what constitutes a compelling interest that may justify a national political party, which receives federal financial assistance in putting on its national nominating convention, to give scheduling preferences to certain states based on racial and national origin demographics. The District Court resolved this issue by concluding that the action of a national political party, in setting up a schedule for states to conduct their presidential preference primary elections and caucuses, for the purpose of selecting delegates to its national nominating convention, does not constitute state action, for fourteenth amendment purposes, and even if it did, the actions of the Democratic National Committee did not constitute discrimination against Mr. DiMaio.

STATEMENT TO JURISDICTION

The District Court entered its order on May 28, 2008, and a judgment on May 28, 2008. The case is docketed in the Court of Appeals at 08-13241-D.

CONSTITUTIONAL AND STATUTORIAL PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides "that no state shall deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE ISSUES

1. Whether Action of a national political party in the allocation of delegates to its national nominating convention constitutes state action for purposes of determining whether an individual's equal protections rights under the Fourteenth Amendment to the United States constitution have been violated.
2. Whether the District court erred by finding that under the circumstances presented, herein, Democratic National Committee's significant consideration of

racial and national origin demographics, in adopting a presidential preference primary schedule, for the purpose of selecting delegates to its national nominating convention, violate the equal protection

clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF FACTS

This case pertains to the legality of the actions of a national political party to disallow participation of duly elected delegates from the State of Florida, to its national nominating convention, in selecting its nominee to be a candidate for President of the United States.

Florida Statute 103.101 explicitly provides that on the last Tuesday in January in each year, the number of which is a multiple of four, each party shall elect one person to be the candidate for nomination of such party for President of the United States or select delegates to the national nominating convention, as provided by party rule. The statute does not

provide for an alternate method for the state party branch of the national political party to select delegates.

The aforesaid statute further provides that the state executive committee of each party, by rule adopted at least 120 days prior to the presidential preference primary election, shall determine the number, and establish procedures to be followed in the selection of delegates and delegate alternates from each candidate's supporters. A copy of any rule adopted by the executive committee shall be filed with the Department of State

within seven days after its adoption and shall become a public record. The Department of State shall review the procedures and shall notify the state executive committee of each political party of any ballot limitation. The Department of State may promulgate rules for the orderly conduct of the presidential preference primary ballot.

Rules of the National Party provide that no state presidential preference primary election may be held prior to the 1st Tuesday in February or after the 2nd Tuesday in June, in the calendar year of the national convention, except for the States of New Hampshire, Iowa, Nevada, and South Carolina. These rules further provide that the National Party may impose sanctions for violations by a state of these rules, including

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the reduction or elimination of the number of delegates to the national convention. In addition, the rules of the National Party provide that a state party may be required by a vote of the DNC Executive Committee, upon recommendation of the DNC rules and bylaws committee, to adopt and implement an alternate party-run delegate selection, which does not conflict with their rules.

The Democratic National Committee admits that they used race and national origin as a factor in determining which states would be permitted to vote in an early tier of the presidential preference primary schedule, and that South Carolina and Nevada (in addition to Iowa and New Hampshire) were permitted to vote earlier than the other 46 states, due in large part to the racial and national origin demographics of those states.

The Democratic National Committee justifies the use of race and national origin as a factor in the scheduling of its presidential preference primary, in order to achieve its goal of racial and ethnic diversity in the contests which may occur during the "pre-window period". Other criteria include regional diversity and economic diversity, including union density.

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The Plaintiff sought a declaration that the rules of the Defendant and their decision to not allow delegates from the state of Florida to be seated at its national nominating convention, based on Florida's January 29, 2008 presidential preference primary, violates Plaintiff's rights under the 14th Amendment to the United States Constitution.

Procedural History

This current action commenced in April, 2008. The Complaint alleged that the Defendant promulgated delegates selection rules, that illegally discriminated on the basis of race and national origin, in violation of the Fourteenth Amendment to the United States Constitution. Plaintiff sought, among other things, declaratory and injunctive relief.

The District Court heard the parties' Motions for Summary Judgment on May 28, 2008. In an order entered on May 28, 2008 and judgment entered on May 29, 2008, the District Court denied Plaintiff's Motion for Summary Judgment and granted Defendant's Cross Motion for Summary Judgment. In its opinion announced

orally and referred to in its order, the District Court concluded that the Democratic National Committee was not a state actor for Fourteenth Amendment purposes, and even if it was, the facts did not establish discrimination against DiMaio.

ARGUMENT

- I. **The District Court erred by finding that the actions of the Democratic National Committee did not constitute the exercise of power conferred or delegated by the State of Florida, and therefore, was not state action Invoking the provisions of 28 U.S.C section 1343.**

The actions of the DNC constitute state action with respect to application of the Fourteenth Amendment of the United States Constitution and 28 U.S.C. § 1343.

The Supreme Court has not yet addressed the issue of whether actions of a national political party at its national nominating convention constitute state action for purposes of a citizen invoking his equal protection rights under the Fourteenth Amendment of the United States Constitution. However, the Supreme Court has held that a nominee selected by a state party convention is engaged in "state action" for purposes of jurisdiction under the Voting Rights Act. There is no logical basis for finding state action for purposes of the Voting Rights Act, but not for purposes of invoking the Fourteenth Amendment. Both require the same degree of state action for the court to have jurisdiction.

In Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) the facts were as follows: the state election code provided that the nominees of the two major political parties would automatically appear on the general election ballot without the need to declare their candidacy or to demonstrate their support for the nominating petition. Virginia law authorized the two parties to determine for themselves how they would select their nominees, by primary, nominating convention, or by some other method. The Supreme Court stated that the parties "act under authority" of Virginia when they decide who will appear on the general election ballot. Virginia had the sole authority to set the qualifications for ballot access. Virginia prescribed stringent criteria for access with which nearly all independent candidates and political organizations must comply, but reserved two places on its ballot, the top two positions, for the major parties to fill with their nominees, however chosen. Those parties were granted the power to enact their own qualifications for placement of candidates on the ballot, which the Commonwealth ratified by adopting their nominees. The court further stated that the party was delegated the power to determine part of the field of candidates from

which the voters must choose. Therefore, when Virginia incorporated the party's selection, it endorsed, adopted, and

enforced the delegate qualifications set by the party for the right to choose that nominee. The Court cited Smith v. Allright 321 U.S. 649, 664 (1944). The Court iterated that major parties have no inherent right to decide who may appear on the ballot. The privilege was conferred by Virginia law, not natural law, and if the party chooses to avail itself of this delegated power over the electoral process, it necessarily becomes subject to the regulation.

In the case herein, Florida Statute 101.2512 states "the Supervisor of Elections of each county shall print on ballots to be used in the county at the next general election, the names of candidates who have been nominated by a political party and the candidates who have otherwise obtained a position on the general election ballot in compliance with the requirement of this code". The State of Florida has given the candidate that emerges from the Democratic Nominating Convention preference in access to the state's general election ballot. In Mrazek v. Suffix County Board of Elections, 630 F.2d 840, 894 (2nd Cir. 1980), the court suggested that nominating procedures must

conform to constitutional requirements, because insured access to the ballot may constitute a form of state action.

In the case of Smith v. Allright, 321 U.S. 649(1994) Petitioner was an individual voter who was denied the right to vote in a primary election conducted by a political party. The

political party adopted a rule that all white citizens of the State of Texas... shall be eligible for membership in the Democratic Party, and, as such, entitled to participate in its deliberations. As a result of that rule, Petitioner, a negro, was not permitted to vote in the primary election conducted by the party.

As in this case, the party argued that the Democratic Party of Texas was a voluntary organization and free to select its own membership, and to limit to whites, participation in the party primary. They further asserted that the Fourteenth Amendment only applied to general elections and that primaries are political affairs handled by party, not governmental officers.

The Court concluded that while membership of a party was of no concern to the state, when that privilege was also the essential qualification for voting to select nominees for a

general election, the state makes the action of the party, the action of the state.

In Terry v. Adams, 345 U.S. 461 (1953), Petitioners, qualified negro voters of a Texas county, sued to determine the legality of their being excluded, solely because of their race and color, from voting in elections held by an association consisting of all qualified white voters in the county. In that case, the association's elections, as in the case at bar, were

not governed by state laws. The District Court issued a declaratory judgment holding invalid racial discrimination in a pre-primary election.

In the case of Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971), the Court found state action in the formulas the National Party's used to allocate delegates to a National Nominating Convention. The Court concluded that by placing the nominee of the convention on the ballot, the states "have adopted this narrowing process as a necessary adjunct of their election procedures" id. 1276.

In the case of Bode v. National Democratic Party, 452 F.2d 1304 (D.C. Cir. 1972), the Court held that the DNC's adoption of a formula for the allocation of delegates to its 1972 National

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Convention was "tantamount to a decision of the states acting in concert and therefore subject to constitutional standards, applicable to state action".

However, in Brown v. O'Brien, 469 F.2d 563 (D.C. Cir. 1972), when the Circuit Court for the District of Columbia found that a delegate seating decision by the credential committee constituted state action, and that the actions against the State of California were unconstitutional, the Supreme Court stayed the order. While the Supreme Court did not decide the issue, it found that there was a highly important question to be answered, to wit: "whether the action of the credentials committee was state action". In this case, the Court stated "this is not a case in which claims are made that injury arises from invidious

discrimination based on race in a primary contest within a single state".

In the case of Cousins v. Wigoda, 419 U.S. 477 (1975), the Supreme Court held that an Illinois court had unconstitutionally attempted to enjoin delegates selected pursuant to Democratic Party Rules, from taking their seats at the 1972 National Convention. Because the case arose in the context of a State Court Injunction, the Court found state action was clear, and it

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was not necessary to determine whether the decisions of a National Party, in the area of delegate selection, constitute state or government action.

In Ripon Society v. National Republican Party, 523 F.2d 567 (D.C. Cir. 1975) the D.C. Circuit Court pointed out that the nexus between the state and the delegate allocation formula is open to question, since the Supreme Court in Cousins v. Wigoda, 419 U.S. 477 (1975) held that an individual state is without power to interfere with the delegate selection procedures of a National Convention. The Court concluded that since the case failed on its merits, they declined to decide the state action question. Id. at 576.

In the case at bar, under the District Court analysis, an individual voter could never successfully bring an action against a National Political Party, for violation of that voter's equal protection rights, under the Fourteenth Amendment, because the National Nominating Convention (in reference to delegate

allocation at a National Nominating Convention) does not amount to state action.

II. DISTRICT COURT ERRED BY FINDING THAT UNDER THE CIRCUMSTANCES PRESENTED HEREIN THE, DEMOCRATIC NATIONAL COMMITTEE'S SIGNIFICANT CONSIDERATION OF RACIAL AND NATIONAL ORIGIN DEMOGRAPHICS, IN ADOPTING A PRESIDENTIAL PREFERENCE PRIMARY SCHEDULE, FOR THE PURPOSE OF ELECTING DELEGATES TO ITS NATIONAL NOMINATING CONVENTION DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

This court has never directly addressed the issue of whether a national political party may give significant consideration to the racial and national origin demographics of a state, in permitting one state to conduct its presidential preference primary, earlier than other states. However, there are other cases which address consideration of race in order to achieve the goal of ethnic diversity. For instance, in the case of Regions of the University of California v. Backe, 438 U.S. 265 (1978) the Supreme Court found that the admissions program of the University of California Medical School at Davis, that would set aside 16 percent of the places in the class for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(D). The court held that the Davis Program unlawfully considered race in the

admissions process. In a more recent case of Gratz v. Bollinger, 539 U.S. 244 (2003), the court held that because the

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University of Michigan's use of race in its freshman admissions policy was not narrowly tailored to achieve their asserted interest in diversity, the policy violated the equal protection clause of the Fourteenth Amendment to the United States constitution. The court further stated that the University's policy which automatically distributed 20 points to every single (under represented minority) applicant solely because of race, was not narrowly tailored to achieve the interest in educational diversity, that Respondent claims justifies their program. However, in a sister case of Grutter v. Bollinger, 539 U.S. 306 (2003) in a 5 to 4 split decision, the court held that the law school's race-conscious admissions program, does not unduly harm non-minority applicants, and did not violate the Fourteenth Amendment to the United States constitution or the Civil Rights Act.

In a more recent case of Parents Involved In Community Schools v. Seattle School District, 551 U.S. (2007), school districts adopted student assignment plans that relied upon race to determine which public schools certain children may attend. The court stated that "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification". The court held that

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the districts plan was unconstitutional.

The fundamental question in this case, which must be resolved, is whether a national political party has the unfettered discretion to seat delegates at its national nominating convention, at which time these delegates elect a nominee to appear on the ballots of the 50 United States. While a political party is not recognized in the United States constitution, and while Mr. DiMaio and all other citizens are free to start or join any political party, as a practical matter, the Republican and Democratic parties have a dualopoly in the United States. Both parties are entitled to automatic placement on the ballots of the respective states, and unless a citizen votes in either the Republican or Democratic primary, he or she will have no say-so in determining the candidates for President of the United States. This court must determine whether the Fourteenth Amendment applies to national political parties in the conduct of nominating their candidate for president. If the Fourteenth Amendment do not apply to national political parties, then theoretically, the national political parties may discriminate maliciously and invidiously, based on race and national origin, if they so choose and deem it politically expedient.

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While in this case, DiMaio does not contend that the Democratic National Committee was engaged in malicious discrimination, and in fact their intent in promoting diversity was perceived by them to be a good thing, nonetheless, diversity

for diversity sake alone, cannot justify race-based decision making.

CONCLUSION

This cause should be reversed with a finding that the DNC, in conducting its National Nominating Convention, is engaged in state action, and that the decision of the DNC to strip Florida of its delegates to the National Nominating Convention, violates DiMaio's Fourteenth Amendment rights, because it treats him differently, than voters in other states, on the basis of the racial and national origin demographics.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY than on 18th day of July, 2008, a true and correct copy was filed in the Eleventh Circuit Court of Appeals via CM/ECF System and a copy serviced upon counsel for Defendant, Democratic National Committee, Joseph E. Sandler, Sandler, Reiff & Young, P.C., 50 E. Street, S.E., #300, Washington DC 20003; and

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