THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Roque "Rocky" De La Fuente Guerra,
Victor Di Maio, Jose Ramon Bolano Valladares,
Ada L. Hernandez, Marco A. Bolano Hernandez,
Carlos H. Aleman Gonzalez, Sobeida Aleman, and
Carlos Heriberto Aleman,

Plaintiffs,

CASE NO.: 4:16-cv-00026-RH-CAS

vs.

Democratic Party of Florida and
Ken Detzner, Secretary of State of Florida,

Defendants.
_____/

MOTION FOR PRELIMINARY INJUNCTIVE RELIEF AND/OR MOTION FOR SUMMARY JUDGEMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Plaintiffs, Roque "Rocky" De La Fuente Guerra, Victor Di Maio, Jose Ramon Bolano Valladares, Ada L. Hernandez, Marco A. Bolano Hernandez, Carlos H. Aleman Gonzalez, Sobeida Aleman, and Carlos Heriberto Aleman, , pursuant to Rule 56 and Rule 65(a) Fed.R.Civ.P., hereby move for preliminary injunctive relief and/or partial summary judgment based on grounds stated herein.

I. BACKGROUND

There is only one method for admitting a presidential candidate to the Florida primary ballot:

Florida Statute 103.101(2) provides: By November 30 of the year preceding the presidential preference primary, each political party shall submit to the Secretary of State a list of its presidential candidates to be placed on the presidential preference primary ballot or candidates entitled to have delegates appear on the presidential preference primary ballot. The Secretary of State shall prepare and publish a list of the names of the presidential candidates submitted not later than on the first Tuesday after the first Monday in December of the year preceding the presidential preference primary. The Department of State shall immediately notify each presidential candidate listed by the Secretary of State. Such notification shall be in writing, by registered mail, with return receipt requested.

Defendant, Florida Democratic Party, is the official representative entity of the Democratic National Committee in Florida, and is responsible for, among other things, promulgating delegate selection rules for Florida for the 2016 Democratic National Convention. The Florida Democratic Party adopted a Delegate Selection Plan which among other things set forth how Presidential candidates attain ballot access. Section II provides:

Section II Presidential Candidates

A. Ballot Access a presidential candidate gains access to the Florida presidential preference primary ballot by the following procedure:

Florida Statute 103.101, paragraph 2, provides "By November 30 of the year preceding the presidential preference primary, each political party shall submit to the Secretary of State a list of its presidential candidates to be placed on the presidential preference primary ballot or candidates entitled to have delegates appear on the presidential preference primary ballot."

(1) The Florida Democratic Party will prepare and approve a list of recognized Democratic presidential candidates. By Monday, November 30, 2015, the Florida Democratic Party will submit a list of its presidential candidates to the Secretary of State to be placed on the Presidential Preference Primary ballot.

(2) The Secretary of State shall prepare and publish a list of names of the presidential candidates submitted no later than December 15, 2015.

(3) The Department of State shall immediately notify each presidential candidate listed by the Secretary of State. Such notification shall be in writing, by registered mail, with return receipt requested.

(4) There is no other procedure (i.e., filing process) by which presidential candidates gain access to the Florida Presidential Preference Primary ballot.

B. Other Requirements

1. Each presidential candidate shall certify in writing to the State Democratic Chair, the name(s) of his or her authorized representative(s) by December 1, 2015. Individuals who announce their candidacy after this date must provide this information

to the Chair of the Florida Democratic Party not later than ten (10) days after their announcement. (Rule 12.D.1)

2. Each presidential candidate shall use his or her best efforts to ensure that his or her respective delegation within the state delegation achieves the affirmative action goals established by this Plan and is equally divided between men and women. (Rule 6.I)

On or about November 1, 2015, the Florida Democratic Party submitted a list of its presidential candidates to the Secretary of State to be placed on the Presidential Preference Primary ballot. This list included Hillary Clinton, Bernie Sanders, and Martin O'Malley. On November 11, 2015, the Plaintiff requested that the Defendant, Florida Democratic Party, include his name on the list of candidates to be placed on the Florida presidential primary ballot for the Democratic Party, but the Defendant refused to include his name on the list.

The Defendant, Ken Detzner, Secretary of State of Florida, is the agent of the State of Florida responsible for administering elections in the State of Florida. On December 15, 2015, he issues the following announcement:

Secretary Detzner Certifies Candidate Names for Presidential Preference Primary

TALLAHASSEE –

As required by law, Secretary of State Ken Detzner has certified to the Supervisors of Elections the following names of major political party candidates to be printed on the ballot for the Presidential Preference Primary on March 15, 2016:

Republican Party of Florida:

Jeb Bush

Ben Carson

Chris Christie

Ted Cruz

Carly Fiorina

Jim Gilmore

Lindsey Graham

Mike Huckabee

John R. Kasich

Rand Paul

Marco Rubio

Rick Santorum

Donald J. Trump

Florida Democratic Party:

Hillary Clinton

Martin O'Malley

Bernie Sanders

On January 15, 2015, Plaintiffs filed this action for mandatory injunctive relief. They claim that their constitutional rights have been violated because Defendants' decision to exclude De La Fuente Guerra from the ballot was arbitrary and capricious and in violation of Plaintiff's due process and equal protection rights. Furthermore, plaintiffs contend that the statutory procedure governing ballot access and the Florida Democratic Delegate Plan implementing the statute is unconstitutional.

II. DISCUSSION REGARDING PRELIMINARY INJUNCTION REEQUEST

In deciding a, this Court must consider the following four factors:

(1) The potential for irreparable injury to plaintiffs if injunctive relief is denied;(2) The balance of hardship to defendant if the relief is granted;(3) The effect on the public interest of a grant or denial of relief; and(4) The plaintiffs' likelihood of success on the merits.

Narragansett Indian Tribe v. Guilbert, 934 F.2d 4 (1st Cir. 1991); *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc*., 887 F.2d 1535 (11th Cir. 1989); *Eric v. McGraw-Hill*, 809 F.2d 223, 226 (3d Cir. 1987); *National Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987); *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5th Cir. 1985); see also *Hunt v. Bankers Trust Co*., 646 F. Supp. 59 (N.D. Tex. 1986).

The Plaintiffs have met their burden under this four-part test.

First, Plaintiffs will suffer irreparable injury if the motion for a preliminary injunction is denied. The ballots are scheduled to be printed. If Detzner does not add De La Fuente Guerra's name before then he will be precluded from running in the primary on March 15, 2016, and his Florida supporters will be denied the opportunity to vote for him and, more importantly, the opportunity to run as delegates to the National Republican Convention pledged to him. In effect the denial of a preliminary injunction would serve to deny plaintiffs all permanent relief. Therefore, there is clearly no adequate remedy at law.

Second, Secretary of State Detzner will suffer no hardship if relief is granted. Because the ballots have not yet been printed, De La Fuente Guerra's name may be added without delaying the process or increasing the expenses of the primary.

Third, the public interest will not be adversely affected by granting the motion. Expanding political opportunity by allowing reasonably broad access to the ballot benefits the political process and the voting public. *Lubin v. Panish*, 415 U.S. 709, 713, 94 S.Ct. 1315, 1318, 39 L.Ed.2d 702 (1974).

Finally, as will be explicated below, plaintiffs are likely to succeed on the merits because they have established a violation of their constitutional rights on equal protection and due process grounds.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

Constitutional challenges to state election procedures are governed by the following method of inquiry:

[The 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 the Plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983). A threshold matter concerns whether De La Fuente Guerra's exclusion from the ballot constituted state action. *Belluso v. Poythress*, 485 F.Supp. 904, 910 (N.D.Ga.1980). In Florida the Secretary of State has ultimate control over access to the primary ballot although the parties are delegated the authority to determine the criteria for their candidates to gain ballot access. The parties actions are so inextricably intertwine with the state funded election process that this Court should have no difficulty finding that the requisite state action exists.

The right of a candidate to gain access to a ballot, while less compelling than the right to vote, is nevertheless an important and related interest. *Kay v. Austin*, 621 F.2d 809, 811 (6th Cir.1980). "[A]ny regulation of access to the ballot must conform to the principles of equal protection and due process, guaranteed by the fourteenth amendment." *Kay v. Mills*, 490 F.Supp. 844, 849 (E.D.Ky.1980). Statutes restricting such access infringe upon both "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968).

Balanced against the candidate's right of access is the legitimate state interest in regulating the number of candidates on a ballot in order to avoid voter confusion and frustration of the democratic process. *Lubin*, 415 U.S. at 715, 94 S.Ct. at 1319. Any restrictions on access, however, must be reasonably necessary to achieve the legitimate state interest. *Id.* at 716, 94 S.Ct. at 1320. Therefore, states may require candidates to demonstrate sufficient public support in order to prevent the ballot from becoming a laundry list of candidates, not all of whom are serious contenders. *Id.* at 715, 94 S.Ct. at 1319. This requirement serves to protect the integrity of the political process.

The issue, therefore, is whether the Florida Democratic Party's method of determining ballot access to the presidential primary is reasonably necessary to achieve the legitimate state interest of regulating ballot access.

B. Void for Vagueness

Plaintiffs contend that the Florida Democratic Party's procedure cannot withstand constitutional challenge because it is unduly vague. A vague statute, therefore, is not reasonably necessary to achieve the legitimate state interest of regulating ballot access.

A statute may be found void for vagueness if a reasonable person must necessarily guess at its meaning. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976) There are three potentially fatal infirmities. First, the applicable coverage of the statute may be unclear. Second, the statute may fail to specify what those within its reach are required to do in order to comply. Third, the statute may permit public officials to exercise unreviewable discretion in their enforcement of the statute because of a lack of standards. *Id.* at 621-22, 96 S.Ct. at 1761-62. All three infirmities are present in this case.

With respect to the first *Hynes* infirmity, the provision does not provide any meaningful criteria. Section II of the Florida Democratic Delegate Selection Plan does not define "recognized" The language fails to specify *by whom* a candidate must be recognized. Therefore, a candidate cannot discern whether he or she will be among the chosen few. *Kay v. Mills*, 490 F.Supp. at 852.

Regarding the second *Hynes* infirmity, the provision fails to specify what a candidate must do in order to comply, and in attempting to comply, a candidate must necessarily guess at its meaning. *Id.* Would it be sufficient to show that the candidate has

supporters in more than one state? If so, how many states would suffice? Several states permit a candidate to be placed on the ballot if he or she has been generally advocated or recognized by the national news media. Some courts have upheld statutes saying that reference to the media as a source of candidate recognition permits the statutes to be reasonably applied. *See Kay v. Austin*, 621 F.2d at 812 (upholding Michigan statute); *see also LaRouche v. Sheehan*, 591 F.Supp. 917, 925 (D.Md.1984); *Belluso v. Poythress*, 485 F.Supp. at 913. But those decisions are questionable at best. In the latter two cases the courts admitted that the media-recognition standard was somewhat nonspecific. *LaRouche*, 591 F.Supp. at 925; *Belluso*,485 F.Supp. at 913. In any event the media-recognition standard provides more objective criteria than the Florida Democratic Delegate Selection Plan, which is devoid of any standard.

Finally, Section II of Florida Democratic Delegate Selection Plan permits the Florida Democratic Party to exercise unreviewable discretion in its determination of De La Fuente Guerra 's candidacy. "The fact that an unduly vague law deprives a court of the ability to review potentially arbitrary or discriminatory decisions of public officials, is one of the principal reasons for the void-for-vagueness doctrine." *Kay v. Mills*, 490 F.Supp. at 852. See also *Duke v. Connell*, 790 F. Supp. 50 (D.R.I. 1992)

Accordingly, this Court must hold that Section II of Florida Democratic Delegate Selection Plan is unconstitutional on their face.

The Court should also find that the Florida Democratic Party discriminated against De La Fuente Guerra. A primary election allows voters to choose one candidate to

represent their party, but "it is essential that the choice of candidates not be limited to those arbitrarily selected by persons whose motives may be of a partisan political nature." *Kay v. Mills*, 490 F.Supp. at 853. The statute and Florida Democratic Delegate Selection Plan allow the Defendant, Florida Democratic Party to narrow the field of candidates for whom the public would be allowed to vote in the primary, thereby depriving voters of the opportunity to effectively exercise their voting rights. The public has the right to choose from as large a field of candidates as can demonstrate sufficient support to establish their seriousness. *Lubin*, 415 U.S. at 718-19, 94 S.Ct. at 1320-21. Allowing the Secretary of State and the State Party Chairman to make preliminary decisions in these matters corrupts the democratic process. There was no rational basis for the Florida Democratic Party and Detzner to have treated De La Fuente Guerra differently from any other serious candidate. The only proper method of ballot access is one that establishes a level playing field for all candidates and leaves the ultimate decision to the voters. *Duke v. Connell*, 790 F. Supp. 50 (D.R.I. 1992)

***B*. Remedy**

The Court must decide upon an appropriate remedy in this case. De La Fuente Guerra has not requested that any other candidate be removed, only that he be granted access. Were the Court to deny relief, a grave inequity would result because Clinton, O'Malley, and Sanders have gained access to the ballot by unconstitutional means. Furthermore, De La Fuente Guerra should be afforded some form of relief because he was discriminated

To remove Clinton, O'Malley, and Sanders from the ballot, would not help De La Fuente Guerra, nor would it be equitable. The voters would suffer most of all if they were deprived of any choice in the primary. Therefore, the Court has only two possible alternatives.

First, the Court can order that the primary be delayed to allow the Defendants, Detzner and Florida Democratic Party sufficient time to satisfy the requirements of Section II of Florida Democratic Delegate Selection Plan and Florida Statute 103.101, paragraph 2, in a manner which treats all candidates equally. The advantage of this remedy is that all candidates would gain ballot access pursuant to the same burden, thereby leveling the playing field. The disadvantage is that the ballots are due to be printed in the immediate future, and any delay would disrupt the entire primary schedule.

Second, the Court can order Detzner to add De La Fuente Guerra's name to the ballot. As the District Court in *Kay v. Mills, supra*, stated:

The solution to the problem is to be found in practicality and common sense. It would do the plaintiff no good to strike the names of the other candidates from the ballot, and such a course of action would be unconscionable both to those candidates and to the public interest. The fairest and most practicable solution, which will preserve the rights of the plaintiff, and also the rights of the other candidates and the public, is to order the plaintiff's name placed on the ballot. The hallmark of a court of equity is its ability to frame its decree to effect a balancing of all the equities and to protect the interests of all

affected by it, including the public. That goal is best served here by ordering the plaintiff's name placed on the ballot.

Kay v. Mills, 490 F.Supp. at 854-55 (following the examples set by *Williams v. Rhodes*,393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), and *Hudler v. Austin*, 419 F.Supp. 1002(E.D.Mich.1976)). The Plaintiffs ask that this court adopt this reasoning, and therefore, grant the mandatory preliminary injunction requiring Detzner to place De La Fuente Guerra's name on the ballot.

III. CONCLUSION AND ORDER

Plaintiffs' motion for preliminary injunctive relief should be granted. Defendant Detzner should be mandated to place the name of De La Fuente Guerra on the ballot for the Democratic Presidential Primary to be held in Florida on March 15, 2016.

Respectfully Submitted,

s/Michael A. Steinberg_____
Michael A. Steinberg, Esquire
Florida Bar No.: 340065
Michael Steinberg & Associates
4925 Independence Parkway, Suite 195
Tampa, FL 33634
Telephone: (813) 221-1300
Facsimile: (813) 221-1702
Frosty28@aol.com
Attorney for Plaintiff