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

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

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,

vs.

DEMOCRATIC PARTY OF FLORIDA,[1] and
KEN DETZNER, SECRETARY OF STATE OF FLORIDA,

Defendants.

MOTION TO DISMISS OF DEFENDANT FLORIDA DEMOCRATIC PARTY AND MEMORANDUM OF LAW

Defendant Florida Democratic Party ("FDP"), by and through undersigned counsel, hereby moves this Court to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. As grounds therefore, Defendant states:

[1] There is no such entity as the "Democratic Party of Florida." The Charter of the Florida Democratic Party filed with the Department of State pursuant to Section 103.091(3), Florida Statutes, identifies it as the "Florida Democratic Party."

1. The first count of Plaintiffs' complaint against FDP and the Secretary of State purports to be brought for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction), 1343 (civil rights jurisdiction), 1361 (jurisdiction to compel an officer of the United States) and 2201 (declaratory judgment). Count I then makes numerous allegations concerning the deprivation of constitutional rights, without alleging a requisite statute that provides for the actual cause of action. Further, Count I does not name an officer of the United States as a party or actor for purposes of jurisdiction under 28 U.S.C. § 1361.

2. With respect to Count I, Plaintiffs allege that "[t]he decision of the Florida Democratic Party to include [Hillary Clinton, Bernie Sanders, and Martin O'Malley on the list of candidates to be placed on the Florida presidential primary ballot] has resulted in actual discrimination based on racial and national origin which serves no legitimate party goal." Compl. at ¶ 21.

3. The second count of Plaintiffs' complaint purports to be for relief under 42 U.S.C. § 200d et. seq.

4. With respect to Count II, Plaintiffs allege that the FDP's refusal to include his name "on the list of approved candidates to appear on the Florida Presidential preference primary on March 1, 2016 has resulted in de facto discrimination against the Plaintiffs based on national origin," in violation of 42 U.S.C. § 200d et. seq., Title VI of the Civil Rights Act of 1964. Compl. at ¶¶ 23-24.

5. Plaintiffs' Complaint fails to state a cause of action because it fails to give Defendant FDP fair notice of what its claims is, contains mere threadbare recitals of

elements of the respective causes of action and legal conclusions, as opposed to factual content that plausibly suggests entitlement to relief, and fails to allege (and cannot allege) requisite grounds for their claims.

4. Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

MEMORANDUM OF LAW

I. Plaintiffs' Complaint Should Be Dismissed for Failure to State a Claim Upon Which Relief can be Granted.

In considering a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true. *See Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009); *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n.1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). However, the plaintiff must still meet some minimal pleading requirements. For example, while "[s]pecific facts are not necessary[,]" the complaint should "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

The plaintiff must allege "enough facts to state a claim that is plausible on its face." *Twombly,* 550 U.S. at 570. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Iqbal,* 129 S. Ct. at 1949 (quoting *Twombly,* 550 U.S. at 556). A "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of

a cause of action will not do[.]" *Twombly,* 550 U.S. at 555 (internal quotations omitted). Further,

> the tenet that a court must accept as true all of the allegations in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

Iqbal, 129 S. Ct. at 1949-50.

Against the standard of *Twombly, Swierkiewicz* and *Iqbal,* the Plaintiffs' Complaint should be dismissed.

A. Count I should be dismissed.

With regard to Plaintiff's claims in Count I, although a basis for recovery is not actually pled, Plaintiffs allege that FDP violated the rights of Plaintiffs under the 14th Amendment to the Constitution, and that the Democratic Delegate Selection Plain is "unconstitutionally vague," thus depriving Plaintiffs of due process and equal protection under the law. (Complaint at ¶¶ 18 - 20) Plaintiffs also contend that the FDP's decision making process to determine placement on the Presidential Preference Primary Ballot "resulted in actual discrimination based on racial and national origin[,]" as well as "de facto discrimination against a candidate based on national origin." (Complaint at ¶¶ 21-22). Finally, in Count I, Plaintiffs contend that the FDP, "acting

under color of state law" is violating the 14th Amendment to the Constitution. (Compl. at ¶ 23).

Plaintiffs, however, note that a threshold matter in its constitutional challenge is whether the FDP's internal process to determine who shall be placed on the Presidential Preference Primary Ballot, and the Defendant Secretary of State's ("Secretary") duty to publish the names that a political party submits pursuant to Section 103.101(2), Florida Statutes, constitutes "state action" that would be subject to constitutional challenge (presumably under 42 U.S.C. § 1983). Plaintiffs' Complaint alleges that FDP "is responsible for . . . promulgating delegate selection rules for Florida[,]" and "ensuring compliance with the rules of the National Party regarding the delegate selection process for the 2016 Democratic National Convention." Compl. at ¶¶ 3, 4. Plaintiffs' only contentions on the point of "state action" (in its Motion for Preliminary Injunction, which this Court denied) is that the Secretary "has ultimate control over access" to the Presidential Preference Primary Ballot "although the parties are delegated the authority to determine the criteria for their candidates to gain ballot access[,]" and that:

> The parties actions are so inextricably interwine [sic] with the state funded election process that this Court should have no difficulty finding that the requisite state action exists.

Plaintiffs' Mot. at 8.

In an action brought under 42 U.S.C. § 1983, the initial inquiry must focus on whether the following two essential elements are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by

the Constitution or laws of the United States. *See Duke v. Cleland,* 5 F.3d 1339, 1403 (citing *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S. Ct. 1908, 1912, 68 L. Ed. 2d 420 (1981), *overruled on other grounds, Daniel v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)).

In Florida, Section 103.101, Florida Statutes (2015), governs the presidential preference process. Section 103.101(2) provides as follows:

> 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 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.

In the 1990's, the Eleventh Circuit considered various challenges to the decisions in Georgia and Florida to not place certain individuals, including most notably David Duke, on presidential preference primary ballots. These opinions are informative as to whether the allegations in Plaintiffs' lawsuit constitute "state action."

In Georgia, the Eleventh Circuit considered Duke's challenges under O.C.G.A. § 21-2-193, which, *inter alia*, required that a candidate selection committee comprised of the Georgia Secretary of State, the Speaker of the state House of Representatives, the majority leader of the state Senate, the minority leaders of both the state House and Senate, and the chairpersons of the Democratic and Republican parties, decide who appeared on the presidential preference primary ballot. The Georgia statute required

that the Secretary of State submit a list of presidential candidates, and provided procedures for the committee members to delete names from that list from appearance on the ballot, and further provided procedures for an excluded individual to seek reconsideration. *See Duke v. Cleland,* 954 F.2d 1526 (11th Cir. 1992) ("*Duke I*"); *Duke v. Cleland*, 5 F.3d 1399 (11th Cir. 1993) ("*Duke II*"); and *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996) ("*Duke III*").

The Eleventh Circuit held that actions taken under this Georgia Statute, that excluded Duke from the presidential preference primary ballot, constituted "state action" under 42 U.S.C. § 1983. Notably, in *Duke II*, the Eleventh Circuit held that:

> The Committee is a creature of state law and its actions are attributable to the state. First, the state vests the initial power to include or exclude candidates in the Secretary of State. The seminal power of selection, conferred upon a high state official, is tempered only by the state's requirement that the candidates selected be generally recognized by the national media as aspirants for the presidency. Second, the statute then confers upon the Committee the absolute power to decide who may run and who may not run. The statute represents a scheme whereby the state confers largely upon itself the raw power to choose who may or may not be party primary candidates. Two-thirds of the Committee's voting members are elected officials representing their respective parties. No guidelines limit their power. The Committee may exclude nationally recognized candidates for any reason or no reason at all.

Duke II, 5 F.3d at 1403. The *Duke II* court further noted that "[w]hen as here the state empowers its officials to exclude presidential aspirants from the presidential primary ballot, the power exercised is directly attributable to the state." *Id (*citing *Smith v. Allwright*, 321 U.S. 649, 664-65, 64 S. Ct. 757, 765-66 (1944)). *See also Duke III*, 87 F.3d 1226, 1231-32 (11th Cir. 1996) (agreeing with *Duke II* court that the committee's decision to exclude Duke under the Georgia Statute constituted state action).

In *Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994) ("*Florida Duke*"), the Eleventh Circuit considered a 42 U.S.C. § 1983 challenge to a previous version of Section 103.101, in which Duke (and others) were excluded from the presidential preference ballot by a statutory committee similar to that found in the Georgia statute. This previous version of Section 103.101 contained requirements for a candidate selection committee, and provided a process for reconsideration.[2] The Eleventh Circuit compared (the now previous version of) Section103.101 with its Georgia counterpart, and determined that:

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[2] The previous version of Section 103.101, Florida Statutes (1994), provided, in pertinent part:

> (2) There shall be a Presidential Candidate Section Committee composed of the Secretary of State, who shall be a nonvoting chair; the Speaker of the House of Representatives; the President of the Senate; the minority leader of each house of the Legislature; and the chair of each political party required to have a presidential preference primary under this section.
>
> (a) By December 31 of the year preceding the Florida 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. The Secretary of State shall submit such list of names of presidential candidates to the selection committee on the first Tuesday after the first Monday in January each year a presidential preference primary election is held. Each person designated as a presidential candidate shall have his or her name or appear, or have his or her delegates' names appear, on the presidential preference primary ballot unless all committee members of the same political party as the candidate agree to delete such candidate's name from the ballot. The selection committee shall meet in Tallahassee on the first Tuesday after the first Monday in January each year a presidential preference primary is held. The selection committee shall publicly announce and submit to the Department of State no later than 5 p.m. on the following day the names of presidential candidates who shall have their names appear, or who are entitled to have their delegates' names appear, on the presidential preference primary ballot. The Department of State shall immediately notify each presidential candidate designated by the committee. Such notification shall be in writing, by registered mail, with return receipt requested.

> The net result of both statutes is that the bipartisan state-created Committees are inextricably intertwined with the process of placing candidates names on the ballot, and the state-created procedures, not the autonomous political parties, make the *final* determination as to who will appear on the ballot in each primary election.

Florida Duke, 13 F.3d at 393 (emphasis in original). Thus, the *Florida Duke* court held that the appellants satisfied the "state action" prong of 42 U.S.C. § 1983. The *Florida Duke* court further held that the reconsideration provision of Section 103.101(2)(c) was unconstitutional, under a strict scrutiny test. *See id.* at 395.

The Florida Legislature subsequently amended Section 103.101 to remove the candidate selection committee and reconsideration procedure. For example, in 2013, the Florida Legislature amended Section 103.101 to, *inter alia,* remove the provisions related to the candidate selection committee. *See* Ch. 2013-57, § 20, Laws of Fla. Under the current provisions of Section 103.101(2), "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."

In *Duke II*, in reviewing the Georgia Statute, the Eleventh Circuit noted:

> (b) Any presidential candidate whose name does not appear on the list submitted to the Secretary of State may request that the selection committee place his or her name on the ballot. Such request shall be made in writing to the Secretary of State no later than the second Tuesday after the first Monday in January.
>
> (c) If a presidential candidate makes a request that the selection committee reconsider placing a candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to reconsider placing the candidate's name on the ballot. The Department of State shall immediately notify such candidate of the selection committee's decision.

> The parties themselves do not select their primary candidates or retain ultimate responsibility for choosing those it seeks for representations. Indeed, the Committee's determinations are essentially unreviewable by the party membership. The Committee's power is such that it alone may declare who is fit to run, and who, by extension, is fit to govern. As the product of state legislative choice, the Committee's power constitutes "state action" within the meaning of the Fourteenth Amendment.

Duke II, 5 F.3d at 1403-04. Similarly, in *Florida Duke*, the Eleventh Circuit, in considering the "reconsideration" provision of Section 103.101, stated:

> Section 103.101(2)(c) does not leave the *individual* political parties the discretion to review a candidate's reconsideration. Rather, because the Florida legislature has given the Committee power to "declare [during the reconsideration process] who is fit to run, and who, by extension, is fit to govern," *Duke II* at 1404, we are bound by the new precedent in this Circuit and hold that the procedures outlined in § 103.101(2)(c) constitute state action.

Florida Duke, 13 F.3d at 393-94.

The current Section 103.101 contains language much different than the provisions analyzed by the *Duke II* and *Florida Duke* courts, in which state action was found. Section 103.101 provides for the political parties, such as FDP, to select their primary candidates, rather than a committee whose membership and determinations were regulated by statute. Section 103.101 no longer contains those provisions that so "impregnate" an entity with a governmental character as to become subject to the constitutional limitations placed upon state action. *See Evans v. Newton*, 382 U.S. 296, 299, 86 S. Ct. 486, 488 (1966). Instead, the FDP, a political party with "a constitutionally protected freedom which includes the right to identify the people who constitute the association that was formed for the purpose advancing shared beliefs and to limit the association to those people only[,]" *see Duke I*, 954 F. 2d at 1530 (citing *Democratic Party*

of the U.S. v. Wisconsin, 450 U.S. 107, 101 S. Ct. 1010 (1981), now has the discretion and sole responsibility to select its primary candidates. The FDP's procedure for doing so does not constitute "state action" and, thus, the Plaintiffs purported challenge under 42 U.S.C. § 1983 does not state a cause of action and should be dismissed as a matter of law.

Further, the Plaintiffs' failure to provide the Defendant FDP with fair notice of what its claim is, and the conclusory nature of its allegations in Count I, fall short of the pleading standard enunciated in *Twombly*¸ *Swierkiewicz* and *Iqbal*. For this additional reason, FDP respectfully requests that this Court dismiss Count I of the Plaintiffs' Complaint.

B. Count II should be dismissed.

Plaintiffs contend that the FDP "is subject to 42 U.S.C. § 200d et seq., also known as Title VI of the Civil Rights Act of 1964 . . . in that their Presidential Preference Primary is conducted by and through the State of Florida, and their delegate selection process is an integral component of the electoral process." Compl. at ¶ 22. Plaintiffs allege that FDP's refusal to include Plaintiff De La Fuente Guerra on the presidential preference primary ballot "has resulted in de facto discrimination against the Plaintiffs based on national origin." Compl. at ¶ 23. Plaintiffs also contend that the refusal to include Plaintiff De La Fuente Guerra "violates the rights of Plaintiffs as set forth above . . ." Compl. at ¶ 24.

Assuming that Plaintiffs contentions are brought under 42 U.S.C. § 2000d, they have failed to properly plead for entitlement to relief. Title VI of the Civil Rights Act, 42

U.S.C. § 2000d, "prohibits discrimination on account of race, color, or national origin in all programs and activities receiving financial assistance." *Sirpal v. University of Miami*, 684 F. Supp. 2d 1349 (S.D. Fla. 2010) (quoting *Humphrey v. United Parcel Serv.*, 200 Fed. Appx. 950, 952 (11th Cir. 2006)). "Title VI, which is analyzed under an equal protection framework . . . bars only intentional discrimination . . . . Thus, to state a claim under Title VI, a plaintiff must allege facts establishing discriminatory intent." *Id.*

Plaintiffs' Complaint alleges that each Plaintiff is Hispanic. However, the Complaint fails to specify what federally funded program or activity discriminated against them. *See, e.g., Assoko v. City of New York,* 539 F. Supp. 2d 728, 740-41 (S.D. N.Y. 2008) (holding that plaintiffs' failure to specify what federally funded program or activity discriminated against them, subjected their complaint to dismissal). Further, outside of alleging that Plaintiffs are Hispanic, nothing in the Complaint alleges intentional discrimination or discriminatory intent. *See, e.g., Sirpal*, 684 F. Supp. 2d at 1357 ("Discriminatory intent may be established by evidence of such factors as substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision.") (quoting *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993)). Rather, Plaintiffs allege, in conclusory fashion, that FDP's ballot selection process "has resulted in de facto discrimination against the Plaintiffs based on national origin." Compl. at ¶ 23.

Given these pleading deficiencies, Defendant FDP respectfully requests that this Court dismiss Plaintiffs' Complaint.

C. The Plaintiffs' Requested Relief is now Moot.

The date of Florida's presidential preference primary is March 15, 2016. See Fla. Stat. § 103.101(1) (2015). Plaintiffs' Complaint requests that Defendant Florida Secretary of State place Plaintiff De la Fuente Guerra's name on the Florida Presidential Preference Primary Ballot. However, by operation of state law, the supervisors of elections have already mailed overseas military and absentee ballots. The deadline for the mailing of overseas military ballots was January 30, 2016. *See* Fla. Stat. § 101.62(4)(a) (2015).[3] Currently, supervisors of elections are mailing absentee ballots to qualified voters who have requested absentee ballots. *See* Fla. Stat. § 101.62(4)(b) (2015).[4] It is of obvious public interest to have fair and orderly elections. The Plaintiffs' request—brought months after the FDP submitted its list of candidates to the Department of State for inclusion on the presidential preference primary ballot—would cause disruption to this orderly process. As ballots have already been mailed, and as the presidential

[3] Section 101.62(4)(a), Florida Statutes (2015), provides as follows:

> No later than 45 days before each presidential preference primary election, primary election, and general election, the supervisor of elections shall send an absentee ballot as provided in subparagraph (c)2. to each absent uniformed services voter and to each overseas voter who has requested an absentee ballot.

[4] Section 101.62(4)(b), Florida Statutes, provides as follows:

> The supervisor of elections shall mail an absentee ballot to each absent qualified voter, other than those listed in paragraph (a), who has requested such a ballot, between the 35th and 28th days before the presidential preference primary election . . . .

preference primary process in Florida has already commenced, the Plaintiffs' request for relief is now moot. For this additional reason, this Court should dismiss Plaintiffs' Complaint.

WHEREFORE, Defendant FDP requests that this Court dismiss Plaintiffs' Complaint in its entirety for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail this 10th February 2016 to Michael A. Steinberg, Esquire, Michael Steinberg & Associates, 4925 Independence Parkway, Suite 195 Tampa, FL 33634, Frosty28@aol.com and David Fugett, Florida Department of State, R.A. Gray Building, Suite 100, 500 South Bronough Street, Tallahassee, FL 32399-0250, David.fugett@dos.myflorida.com.

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