MATERIALS REFERENCED IN DEFENDANT'S PRETRIAL SUBMISSION

Constitution of the United States
Article II, Section 1, Clause 2

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Constitution of the State of Georgia
Article 1, Section 1 Rights of Persons

Paragraph V . Freedom of speech and of the press guaranteed. No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty.

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Section 21-2-2 Definitions

As used in this chapter, the term:

(5) "Election" ordinarily means any general or special election and shall not include a primary or special primary unless the context in which the term is used clearly requires that a primary or special primary is included.

(7) "Elector" means any person who shall possess all of the qualifications for voting now or hereafter prescribed by the laws of this state, including applicable charter provisions, and shall have registered in accordance with this chapter.

(25) "Political party" or "party" means any political organization which at the preceding:

(A) Gubernatorial election nominated a candidate for Governor and whose candidate for Governor at such election polled at least 20 percent of the total vote cast in the state for Governor; or

(B) Presidential election nominated a candidate for President of the United States and whose candidates for presidential electors at such election polled at least 20 percent of the total vote cast in the nation for that office.

(29) "Primary" means any election held for the purpose of electing party officers or nominating candidates for public offices to be voted for at an election.

(33) "Special election" means an election that arises from some exigency or special need outside the usual routine.

(34) "Special primary" means a primary that arises from some exigency or special need outside the usual routine.

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Section 21-2-5 Candidates for federal and state office must meet constitutional and statutory qualifications for holding office being sought; challenge to qualifications of candidate; hearing

(a) Every candidate for federal and state office who is certified by the state executive committee of a political party or who files a notice of candidacy shall meet the constitutional and statutory qualifications for holding the office being sought.

(b) The Secretary of State upon his or her own motion may challenge the qualifications of any candidate at any time prior to the election of such candidate. Within two weeks after the deadline for qualifying, any elector who is eligible to vote for a candidate may challenge the qualifications of the candidate by filing a written complaint with the Secretary of State giving the reasons why the elector believes the candidate is not qualified to seek and hold the public office for which he or she is offering. Upon his or her own motion or upon a challenge being filed, the Secretary of State shall notify the candidate in writing that his or her qualifications are being challenged and the reasons therefor and shall advise the candidate that he or she is requesting a hearing on the matter before an administrative law judge of the Office of State Administrative Hearings pursuant to Article 2 of Chapter 13 of Title 50 and shall inform the candidate of the date, time, and place of the hearing when such information becomes available. The administrative law judge shall report his or her findings to the Secretary of State.

(c) The Secretary of State shall determine if the candidate is qualified to seek and hold the public office for which such candidate is offering. If the Secretary of State determines that the candidate is not qualified, the Secretary of State shall withhold the name of the candidate from the ballot or strike such candidate's name from the ballot if the ballots have been printed. If there is insufficient time to strike the candidate's name or reprint the ballots, a prominent notice shall be placed at each affected polling place advising voters of the disqualification of the candidate and all votes cast for such candidate shall be void and shall not be counted.

(d) In the event that a candidate pays his or her qualifying fee with a check that is subsequently returned for insufficient funds, the Secretary of State shall automatically find that such candidate has not met the qualifications for holding the office being sought, unless the bank, credit union, or other financial institution returning the check certifies in writing by an officer's or director's oath that the bank, credit union, or financial institution erred in returning the check.

(e) The elector filing the challenge or the candidate challenged shall have the right to appeal the decision of the Secretary of State by filing a petition in the Superior Court of Fulton County within ten days after the entry of the final decision by the Secretary of State. The filing of the petition shall not itself stay the decision of the Secretary of State; however, the reviewing court

may order a stay upon appropriate terms for good cause shown. As soon as possible after service of the petition, the Secretary of State shall transmit the original or a certified copy of the entire record of the proceedings under review to the reviewing court. The review shall be conducted by the court without a jury and shall be confined to the record. The court shall not substitute its judgment for that of the Secretary of State as to the weight of the evidence on questions of fact. The court may affirm the decision or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the findings, inferences, conclusions, or decisions of the Secretary of State are:

(1) In violation of the Constitution or laws of this state;

(2) In excess of the statutory authority of the Secretary of State;

(3) Made upon unlawful procedures;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

An aggrieved party may obtain a review of any final judgment of the superior court by the Court of Appeals or the Supreme Court, as provided by law.

HISTORY: Code 1933, § 34-304, enacted by Ga. L. 1980, p. 312, § 1; Ga. L. 1983, p. 884, § 6-1; Ga. L. 1984, p. 636, § 1; Ga. L. 1985, p. 496, § 1; Ga. L. 1986, p. 32, § 1; Ga. L. 1987, p. 1360, § 1; Ga. L. 1989, p. 900, § 1; Ga. L. 1993, p. 617, § 1; Ga. L. 1997, p. 590, § 2; Ga. L. 1998, p. 145, § 1; Ga. L. 1998, p. 295, § 1; Ga. L. 1999, p. 21, § 1; Ga. L. 1999, p. 52, § 1.

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Section 21-2-10 Presidential electors

At the November election to be held in the year 1964 and every fourth year thereafter, there shall be elected by the electors of this state persons to be known as electors of President and Vice President of the United States and referred to in this chapter as presidential electors, equal in number to the whole number of senators and representatives to which this state may be entitled in the Congress of the United States.

HISTORY: Laws 1824, Cobb's 1851 Digest, p. 235; Code 1863, § 1251; Code 1868, § 1332; Code 1873, § 1311; Code 1882, § 1311; Civil Code 1895, § 89; Civil Code 1910, § 103; Code 1933, § 34-2501; Ga. L. 1958, p. 208, §§ 1, 3; Code 1933, § 34-1601, enacted by Ga. L. 1964, Ex. Sess., p. 26, § 1; Ga. L. 1982, p. 3, § 21; Ga. L. 1993, p. 118, § 1; Ga. L. 1998, p. 295, § 1.

Section 21-2-191 Rules for presidential preference primary

As provided in this article, a presidential preference primary shall be held in 2012 and every four years thereafter for each political party or body which has cast for its candidates for President and Vice President in the last presidential election more than 20 percent of the total vote cast for President and Vice President in this state, so that the electors may express their preference for one person to be the candidate for nomination by such person's party or body for the office of President of the United States; provided, however, that no elector shall vote in the primary of more than one political party or body in the same presidential preference primary. Such primary shall be held in each year in which a presidential election is to be conducted on a date selected by the Secretary of State which shall not be later than the second Tuesday in June in such year. The Secretary of State shall select such date no later than December 1 of the year immediately preceding such primary. A state political party or body may by rule choose to elect any portion of its delegates to that party's or body's presidential nominating convention in the primary; and, if a state political party or body chooses to elect any portion of its delegates, such state political party or body shall establish the qualifying period for those candidates for delegate and delegate alternate positions which are to be elected in the primary and for any party officials to be elected in the primary and shall also establish the date on which state and county party executive committees shall certify to the Secretary of State or the superintendent, as the case may be, the names of any such candidates who are to be elected in the primary; provided, however, that such dates shall not be later than 60 days preceding the date on which the presidential preference primary is to be held.

HISTORY: Code 1933, § 34-1002A, enacted by Ga. L. 1973, p. 221, § 1; Ga. L. 1974, p. 429, § 1; Ga. L. 1975, p. 1223, § 1; Ga. L. 1986, p. 220, § 1; Ga. L. 1992, p. 1, §§ 1, 1A; Ga. L. 1994, p. 1406, § 6; Ga. L. 1997, p. 590, § 18; Ga. L. 2007, p. 544, § 2/SB 194; Ga. L. 2011, p. 630, § 1/HB 454.

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Section 21-2-193 Submission of list of candidates for presidential preference primary ballot

On a date set by the Secretary of State, but not later than 60 days preceding the date on which a presidential preference primary is to be held, the state executive committee of each party which is to conduct a presidential preference primary shall submit to the Secretary of State a list of the names of the candidates of such party to appear on the presidential preference primary ballot. Such lists shall be published on the website of the Secretary of State during the fourth week immediately preceding the date on which the presidential preference primary is to be held.

HISTORY: Code 1933, § 34-1003A, enacted by Ga. L. 1973, p. 221, § 1; Ga. L. 1980, p. 5, § 1; Ga. L. 1987, p. 1360, § 10; Ga. L. 1993, p. 118, § 1; Ga. L. 1994, p. 1406, § 7; Ga. L. 1997, p. 590, § 19; Ga. L. 2007, p. 544, § 3/SB 194; Ga. L. 2011, p. 630, § 2/HB 454.

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954 F.2d 1526, 60 USLW 2534
David DUKE, Martha Andrews, William Gorton and Victor Manget, Plaintiffs-Appellants,
v.
Max CLELAND, Secretary of State of the State of Georgia and Chair of the Presidential Candidate Selection Committee; and Presidential Candidate Selection Committee,
Defendants-Appellees,
Alec L. Poitevint, Member of the Presidential Candidate Selection Committee, Defendant-Intervenor-Appellee.
No. 92-8048.
United States Court of Appeals,
Eleventh Circuit.
Feb. 11, 1992.

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Griffin, Dickson & O'Toole, Marietta, Ga., Neil T. Bradley, Moffatt Laughlin McDonald, Mary Ellen Wyckoff, American Civ. Liberties Union, Southern Regional Office, Gerald R. Weber, American Civ. Liberties Union, Atlanta, Ga., for plaintiffs-appellants.

Dennis R. Dunn, Sr. Asst. Atty. Gen., Atlanta, Ga., for Cleland and Presidential Candidate Selection Committee.

Oscar N. Persons, Howard D. Hinson, David J. Stewart, Lonnie Theodore Brown, Scott C. Commander, R. Clay Milling, Alsont & Bird, Frank Strickland, Atlanta, Ga., for Poitevint.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH, ANDERSON and COX, Circuit Judges.

ANDERSON, Circuit Judge:

FACTS

On December 4, 1991, appellant Duke announced his candidacy for the Republican nomination for President of the United States. Under Georgia law, a presidential preference primary shall be held in 1992 "so that the electors may express their preference for one person to be the candidate for nomination by his party or body for the office of President of the United States." O.C.G.A. § 21-2-191. Political parties participating in Georgia's primary may establish their own rules regarding the selection of delegates to nominating conventions. O.C.G.A. § 21-2-195. The rules of Georgia's Republican Party bind its delegates to vote at the Republican national convention for the candidate who receives the most votes in Georgia's preference primary. [1]

Georgia law establishes a presidential candidate selection committee ("Committee") to perform the duty of selecting the candidates that will appear on the presidential preference primary ballot. O.C.G.A. § 21-2-193(a). [2] Georgia's Secretary of State prepares an initial list of presidential candidates and submits this list to the Committee. O.C.G.A. § 21-2-193(a). This list includes names of presidential candidates "who are generally advocated or recognized in news media throughout the United States as aspirants for that office and who are members of a political party or body which will conduct a presidential preference primary" in the state. Id.

Pursuant to this statutory duty, during the first week in December 1991, Max Cleland, Georgia's Secretary of State, published a list of names of potential presidential candidates for the 1992 Georgia presidential preference primary. This list included appellant's name as one of the potential candidates for the Republican nomination for President. During the second week of December 1991, Cleland submitted this list to the Committee.

On December 16, 1991, the Committee met to consider the list of candidates. Under Georgia law, "[e]ach person designated by the Secretary of State as a presidential candidate shall appear upon the ballot of the appropriate political party or body unless all committee members of the same political party or body as the candidate agree to delete such candidate's name from the ballot." Id. In this case, all the Republican Committee members--state Republican party chair Alec Poitevint, Senate Minority Leader Tom Phillips and House Minority Leader Paul Heard--agreed to remove Duke's name from the ballot. The Secretary of State subsequently published the list of presidential candidates exactly as slated by the Committee, thereby omitting Duke's name from the ballot. See id.

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Before the January 6, 1992, statutory deadline, Duke then made a request in writing to the Secretary of State that his name be placed on the ballot. See O.C.G.A. § 21-2-193(b). On January 8, 1992, the Committee reconvened to consider Duke's request. Under Georgia law, had any Republican member of the Committee requested that Duke's name be placed on the presidential preference primary ballot, the Committee would have been bound to instruct the Secretary of State to include his name on the ballot. Id. However, none of the Republican members of the Committee asked to include Duke's name on the ballot, and, accordingly, Duke's name has not been placed on the primary ballot.

PROCEDURAL HISTORY

On January 15, 1992, appellant Duke, together with appellants Martha Andrews, William Gorton, and Victor Manget, [3] commenced this action in the United States District Court for the Northern District of Georgia against Secretary of State Cleland and the Committee, challenging the constitutionality of Duke's exclusion from the presidential preference primary ballot. Appellants alleged that the Committee's actions denied appellants' First Amendment rights of free speech and association and sought a temporary restraining order, preliminary injunction and

permanent injunction in order to prohibit the printing of ballots for Georgia's presidential preference primary unless appellant Duke was listed as a Republican candidate.

The district court held a hearing on January 18, 1992, at which time the court granted appellee Poitevint's motion to intervene. In a written order issued January 21, 1992, the district court denied appellants' motion for preliminary injunctive relief. 783 F.Supp. 600. The district court held that a grant of preliminary injunctive relief was inappropriate because appellants failed to prove (1) that a First Amendment right exists which guarantees access to the primary ballot of a party which does not, itself, extend that right, (2) that appellees' actions have deprived appellants of their First Amendment rights of association, (3) that the Committee's exclusion of Duke from the primary ballot constituted state action, (4) that the threatened injury to the appellants outweighed the damage the proposed injunction might cause to appellees, or (5) that the injunction would not be adverse to the public interest.

On January 21, 1992, appellants filed a notice of appeal and motion for injunction pending appeal. The district court denied the motion on January 22, 1992, at which time appellants filed an emergency motion for an injunction pending appeal with this court. In an order dated January 23, 1992, this court denied appellants' emergency motion, finding that "Duke has not demonstrated a substantial likelihood that he can succeed on the merits of his claim that his constitutional rights were violated by his being prevented from appearing on the ballot as a Republican."

Appellants filed a motion for an expedited appeal on January 24, 1992, and this court granted the motion on the same day. On January 27, 1992, this court amended the original briefing order and set this case for oral argument on February 6, 1992.

DISCUSSION

A. Mootness

We begin by addressing appellees' contention that this controversy is moot because the ballots have already gone to the printer without David Duke's name on them. Appellees argue that because it is too late for Duke to be on the 1992 primary ballot, this case does not fall within the exception to the mootness doctrine in that it is " 'capable of repetition, yet evading review.' " Moore v. Ogilivie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969) (citing Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

We conclude that appellees have not demonstrated that it is, in fact, "too late" for Duke's name to appear on the ballot or for appellants to obtain some other appropriate relief. Moreover, we hold that the case is not moot because "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to

resolve the constitutional issues that arose in [1992]." Norman v. Reed, --- U.S. ----, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992).

B. Standard of Review

At the trial level, appellants sought a preliminary injunction in order to suspend the printing of the Georgia Presidential Primary ballots without David Duke's name on them. In order to prevail, a party seeking a preliminary injunction must establish: (1) a substantial likelihood that he will ultimately prevail on the merits; (2) a showing that he will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to him outweighs the harm the injunction may cause the opposing party; and (4) a showing that granting the injunction would not be adverse to the public interest. Cunningham v. Adams, 808 F.2d 815, 819 (11th Cir.1987); Johnson v. U.S. Department of Agriculture, 734 F.2d 774, 781 (11th Cir.1984); Shatel Corp. v. Mao Ta Lumber & Yacht Corp., 697 F.2d 1352, 1354-55 (11th Cir.1983). The district court denied the appellants' request for an injunction, and the ballots, therefore, were sent to the printer without the addition of David Duke's name.

This court has jurisdiction over this case under 28 U.S.C. § 1292(a)(1), the provision governing review of district court rulings on preliminary injunctions. Because this court is reviewing the district court's denial of a preliminary injunction, the appropriate standard of review is whether the district court abused its discretion. Cunningham v. Adams, 808 F.2d at 819; United States v. Jefferson County, 720 F.2d 1511, 1519 (11th Cir.1983). Acknowledging the narrow standard of review, we proceed to examine whether the district court abused its discretion in finding that appellants would not be likely to prevail on the merits. Because we conclude that appellants are unlikely to prevail on the merits, we do not address the other three prerequisites to the granting of an injunction. [4]

C. Likelihood of Success on the Merits

In order to assess appellants' likelihood of success on the merits, we need to determine the appropriate constitutional standard to apply, strict scrutiny or some lesser standard. In general, in order to evaluate the constitutionality of a state election law, it is necessary to identify whether the challenged law burdens rights protected by the First and Fourteenth Amendment. If the challenged law burdens a fundamental constitutional right, then the law can survive only if the State demonstrates that the law advances a compelling interest and is narrowly tailored to meet that interest. See Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 109 S.Ct. 1013, 1019, 103 L.Ed.2d 271 (1989); Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 (1986); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979).

In ballot access cases, however, the Supreme Court has often deviated from the strict scrutiny model of analysis. Beginning

with Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), the Court applied a strict scrutiny analysis to strike down an Ohio law which required new political parties to obtain a larger percentage of the vote than parties that had participated in the last gubernatorial election. In two later cases, Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) and American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974), however, the Court recited the strict scrutiny language and then arguably receded from the standard in its application. See also Laurence H. Tribe, American Constitutional Law 783 (1978); Gerald Gunther, Constitutional Law 849-54 (12th ed. 1991).

In Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), the Court adopted a different methodology. The Court espoused a individualized weighing of the various protected rights alleged to be burdened and the justifications the State put forward in support of the law. The Court emphasized that this weighing will not produce an "automatic" result and that "hard judgments" often must be made. Id. at 1570 (citation omitted).

Finally, in Norman v. Reed, supra, the Court's latest pronouncement in the ballot access area, the Court returned to the traditional strict scrutiny analysis in striking down two provisions of an Illinois law that made it difficult for a new political party to obtain a position on the ballot. For both provisions, the Court concluded that the law was not narrowly tailored to meet the interests of the State.

In the present case, we need not definitively decide upon the proper standard. While we are hesitant in concluding that the burdens imposed on appellants infringe rights protected by the Constitution, we are more confident in concluding that the interests appellees advance are legitimate and compelling interests, justifying the resulting burden. Therefore, even under a strict scrutiny analysis, it appears that appellants are unlikely to prevail on the merits.

Despite the uncertainty in the specific standard to be employed, we need to articulate precisely the claims appellants make, examining the constitutional rights allegedly burdened by the Committee's decision to exclude Duke from the presidential primary ballot. Appellants argue that the Committee's action violates their First and Fourteenth Amendment rights. First, Duke claims that his deletion from the presidential primary ballot infringes his right to associate with the political party of his choosing. Second, the other appellants, individual voters, claim there has been an infringement on their right to vote. [5]

1. Duke's Claim of Infringement of His Right of Association

Duke first claims that the Committee's decision excluding him from the ballot infringed his right of association. In effect, Duke argues that he has a right to associate with an "unwilling partner," the Republican Party. See Belluso v. Poythress, 485 F.Supp. 904, 912 (N.D.Ga.1980).

As the discussion below demonstrates, the Republican Party enjoys a constitutionally protected freedom which includes the right to identify the people who constitute this association that was formed for the purpose of advancing shared beliefs and to limit the association to those people only. See Democratic Party of U.S. v. Wisconsin,

50 U.S. 107, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981). The necessary corollary to this is that Duke has no right to associate with the Republican Party if the Republican Party has identified Duke as ideologically outside the party. In cases where a voter has urged a right to vote in a party primary, the Supreme Court has stated that a "nonmember's desire to vote in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." Tashjian, 107 S.Ct. at 549 n. 6. The same rationale is also applicable in the instant case. Despite Duke's desire to be slated on the ballot as a Republican, we find that appellees did not infringe his right of association because the Republican Party legitimately exercised its right "to identify the people who constitute the association, and to limit the association to those people only." Wisconsin, 101 S.Ct. at 1019.

2. The Appellants' Claim of Infringement of Their Right to Vote

Appellants also argue that the decision of the Committee has burdened their right to vote. While the Supreme Court has acknowledged that the right to vote is a fundamental right, see Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), the absolute right to vote is not implicated in this case. The specific right alleged to be infringed in this case is not the right to vote in general but the right to vote for a particular candidate as a Republican in the presidential primary. It is important to note that appellees' actions have not deprived appellants of their right to vote for Duke as either an independent candidate or the candidate of a third party in the general election. Nor is there any claim in this case that appellants have been deprived of their right to vote for Duke as a third-party candidate in the primary or as a write-in candidate in the primary or general election. Because appellees' actions have not foreclosed totally appellants' opportunity to vote for Duke in the 1992 presidential election, we believe that the burden on the right to vote is substantially less in this case than in Anderson v. Celebrezze, supra, where the state statute prevented an independent candidate from appearing on the presidential general election ballot after a certain filing deadline thereby precluding independent-minded voters from exercising their right to vote for a candidate sharing their particular viewpoint. Although the alleged infringement on the right to vote in this case is thus considerably attenuated, [6] we will assume arguendo that there has been some burden on the right to vote, and thus we proceed to evaluate the countervailing state interests.

3. State Interests

Appellees assert that Georgia has an interest in maintaining the autonomy of political parties. The Supreme Court has long recognized that the First Amendment guarantees a political party's right of association and that this right "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." Wisconsin, 450 U.S. at 122, 101 S.Ct. at 1019. In Eu, 109 S.Ct. at 1021, in holding that a California statute that prohibited a political party from endorsing a primary candidate violated the party's constitutionally protected freedom of association, the Court stated that the party's freedom of association extends to the right to identify the people who constitute the association,

and the right to select a standard bearer who best represents the party's ideologies and preferences. For the latter proposition, the Court cited Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 601 (D.C.Cir.1975) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). See also Tashjian, 479 U.S. at 235-36, 107 S.Ct. at 560 (Scalia, J., dissenting) ("The ability of the members of [a political party] to select their own candidate ... unquestionably implicates an associational freedom...."). 450 U.S. at 122, 101 S.Ct. at 1019.

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In Wisconsin, supra, the state law of Wisconsin provided for an open primary and also provided that the delegates to the national convention chosen by each political party would be bound by the results of the primary. The National Democratic Party ruled that the Wisconsin delegation would not be seated because the plan for the selection of its delegates violated the National Party rule that delegates to the national convention be chosen through procedures in which only Democrats can participate. In the ensuing litigation in state court, the Wisconsin Supreme Court held that the Democratic Party could not disqualify the Wisconsin delegation from being seated and that the delegates were bound to follow the results of Wisconsin's open primary. The Supreme Court reversed, holding that the Democratic Party could disqualify and refuse to seat the Wisconsin delegation because it was bound to vote in accordance with the results of the open primary in violation of the party rules. In so holding, the Court recognized that the party's rule played a legitimate role in safeguarding the party's constitutionally protected right of political association. Id. at 121-22, 101 S.Ct. at 1019. The Court indicated that the legitimacy of the Democratic Party rule was supported by precedent which "recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions--thus impairing the party's essential functions--and that political parties may accordingly protect themselves from 'intrusions by those with adverse political principles' " Id. at 122, 101 S.Ct. at 1019 (quoting Ray v. Blair, 343 U.S. 214, 221-22, 72 S.Ct. 654, 657-58, 96 L.Ed. 894 (1952)); see also Rosario v. Rockefeller, 410 U.S. 752, 760, 93 S.Ct. 1245, 1251, 36 L.Ed.2d 1 (1973) (sustaining state statute designed "to inhibit party '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").

In Ray v. Blair, supra, the Alabama Democratic Party refused to certify Blair as a candidate for Presidential Elector to the Electoral College in the Democratic Primary, because Blair refused to sign the loyalty pledge required of party candidates, pledging to aid and support the nominees of the national convention of the Democratic Party. The Supreme Court of Alabama granted a writ of mandamus requiring the certification. The United States Supreme Court reversed, in effect recognizing the legitimacy of the loyalty oath required by the Party. The Court recognized that "[s]uch a provision protects a party from intrusion by those with adverse political principles." Id. 450 U.S. at 221-22, 101 S.Ct. at 1019.

On the basis of the foregoing precedent, we conclude that the Republican Party in this case enjoys a constitutionally protected right of freedom of association. We conclude that the Party's

constitutionally protected right encompasses its decision to exclude Duke as a candidate on the Republican Primary ballot because Duke's political beliefs are inconsistent with those of the Republican Party. None of the previous Supreme Court cases is directly in point. For example, in Wisconsin, supra, the Court recognized the legitimacy of the party rule, the effect of which was to limit participation at the voter level in the party primary or delegate selection procedure. Thus, that case did not involve party limitations at the candidate level. Nonetheless, the case provides strong support for the proposition that party procedures to guard against intrusion by those with inconsistent ideologies are legitimate. We conclude that the burden on the right to vote in the Wisconsin case--the exclusion of all voters in the Party primary election who were not members of the Democratic Party--is comparable to the burden on the right to vote in this case--the exclusion from the Republican primary of a candidate whose beliefs the Republican Party has determined are inconsistent with those of the Party. Ray v. Blair, supra, is more directly analogous to this case in that it recognizes the legitimacy of a political party's exclusion of a candidate in the party primary in order to protect itself from those with adverse political principles. Ray v. Blair involves the same burden on the right to vote as that

involved in this case--exclusion of a candidate from a party primary. We acknowledge that Ray v. Blair is not directly on point because that Court was not presented with the precise argument articulated by appellants in this case. Appellants argue that the action of the Republican Party was illegitimate because his exclusion was based upon his political beliefs. The fallacy in appellants' argument is that the Supreme Court precedent expressly permits a political party to limit its membership on the basis of political beliefs. As the Supreme Court stated in Wisconsin, 450 U.S. at 122, 101 S.Ct. at 1019, the party's freedom of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." We conclude that the Republican Party's exclusion of Duke because of his political beliefs was an action taken pursuant to a legitimate and compelling interest; it was an appropriate exercise of the Party's freedom to associate with persons of common political beliefs.

CONCLUSION

We conclude that appellants are unlikely to prevail on the merits because the only claims asserted on appeal are ultimately without merit. Therefore, the district court's denial of appellants' motion for a preliminary injunction is AFFIRMED. [7]

KRAVITCH, Circuit Judge, dissenting:

This case implicates two competing First Amendment values: first, the interests of voters and would-be candidates in participating in electoral processes; second, the interests of a political party in advancing the shared political beliefs of its members. Because, in my view, the exclusion of appellant David Duke from the Georgia Republican Presidential Preference Primary ballot substantially burdens the former interests without significantly protecting the latter, I believe that Duke and the appellant voters have demonstrated a likelihood of success on the merits of their claim and have satisfied the other three prerequisites to the issuance of a

preliminary injunction. Therefore, I would hold that the district court abused its discretion in denying plaintiffs' request for injunctive relief.

I. Mootness

For the reasons stated in its opinion, I agree with the majority that this case is not moot.

II. State Action

The majority assumes without deciding that Duke's exclusion from the Georgia Republican presidential primary ballot amounted to state action; I affirmatively believe that such state action exists here. Georgia law establishes the mechanism by which primary ballot access is determined.

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Bullock v. Carter, 405 U.S. 134, 140-41, 92 S.Ct. 849, 854, 31 L.Ed.2d 92 (1972). The Candidate Selection Committee that excluded Duke from the primary ballot is a creature of state law, and two-thirds of the members of that Committee--designated specifically in the Georgia statute--are elected officials of the State. See Majority Op., n. 2. Pursuant to state law, the Georgia Secretary of State submits to the Committee an initial list of presidential candidates "who are generally advocated or recognized in news media throughout the United States as aspirants for that office ...", O.C.G.A. § 21-2-193, thereby exercising a direct and substantive role in the candidate selection process itself. Finally, the state regulates primary procedures and funds the elections. Given the direct role played by the state in determining access to the primary ballot, "the State ... collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as part of the public election machinery." Gray v. Sanders, 372 U.S. 368, 374-75, 83 S.Ct. 801, 805, 9 L.Ed.2d 821 (1963) (quoting Chapman v. King, 154 F.2d 460, 464 (5th Cir.1946)). See also Smith v. Allwright, 321 U.S. 649, 663-64, 64 S.Ct. 757, 764-65, 88 L.Ed. 987 (1944). Under the standards announced in Gray and Allwright, the Republican Party's exclusion of Duke from the Republican presidential primary ballot constitutes state action. [1]

III. Level of Constitutional Scrutiny

Because the exclusion of Duke from the Republican presidential primary was state action, we must next determine the proper level of scrutiny to apply. [2] The majority assumes arguendo that the strict scrutiny standard applies to this case. I firmly believe that this is the appropriate level of scrutiny.

As the majority observes, the Supreme Court recently has reasserted that a court assessing the constitutionality of a state's ballot access restriction must "first examine whether [the restriction] burdens rights protected by the First and Fourteenth Amendments." Eu v. San Francisco City Democratic Cent. Com., 489 U.S. 214, 222, 109 S.Ct. 1013, 1019, 103 L.Ed.2d

271 (1989) (citations omitted). If the action burdens such rights, "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." Id. at 222, 109 S.Ct. at 1019-1020 (citations omitted). See also Norman v. Reed, --- U.S. ----, ----, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1991). Notwithstanding the Supreme Court's occasional deviations from this standard, see, e.g., Anderson v. Celebrezze, 460 U.S. 780, 789-90, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983), it remains the traditional method by which alleged state deprivations of First Amendment rights are reviewed. Storer v. Brown, 415 U.S. 724, 759-762, 94 S.Ct. 1274, 1294, 39 L.Ed.2d 714 (1974) (Brennan,

J., dissenting). [3]

IV. Application of the Strict Scrutiny Standard

A. Appellants' Rights

In applying strict scrutiny to the instant case, the threshold question is whether the appellees' exclusion of Duke from the Georgia Republican presidential primary ballot burdens rights of the appellants protected by the First and Fourteenth Amendments. The majority identifies two particular rights that appellants allege were burdened by the state's action: the right of Duke to associate with the Republican Party, and the right of the voters to vote for Duke in the Republican primary. I agree with the majority that Duke does not have a right to associate with those who do not wish to associate with him. I disagree, however, with the majority's analysis of the other rights asserted by the appellants.

The majority errs on two levels. First, it mischaracterizes the rights appellants allege were infringed by the state's action, understating the scope of the right to vote and ignoring other related First Amendment rights directly implicated in the case. Second, it overlooks the significant burdens placed by the state on the exercise of these rights.

i. The Right To Vote and Associated Rights

The majority maintains that "the specific right alleged to be infringed in this case is not the right to vote but the right to vote for a particular candidate as a Republican in the presidential primary," and that such a right is at best "attenuated." Although the "absolute right to vote" is not implicated in this case, the state's action implicates a series of equally fundamental First Amendment rights, raising questions of both free speech and equal protection.

The right to vote embraces not only a voter's access to the ballot, but also his access to alternative viewpoints and positions presented on that ballot. [4] As the Supreme Court noted in Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974), "the right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot. It is to be expected that a

voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." 415 U.S. at 716, 94 S.Ct. at 1320. See also Williams v. Rhodes, 393 U.S. 23, 31, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968); Anderson v. Celebrezze, 460 U.S. at 793-94, 103 S.Ct. at 1572-73.

The First Amendment rights of a candidate and his or her supporters to associate for the advancement of their shared beliefs are also affected by the state's restriction of access to a primary ballot:

[T]he voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the right of voters.

Lubin v. Panish, 415 U.S. at 716, 94 S.Ct. at 1320. See also Bullock v. Carter, 405 U.S. at 143, 92 S.Ct. at 855-56; Bellotti v. Connolly, 460 U.S. at 1062, 103 S.Ct. at 1513 (Stevens, J., dissenting).

Further, a candidate's individual right to seek party nomination or political office is implicated by the action of the state in this case. Although the Supreme Court

has declined to recognize the right to candidacy as fundamental, see Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982), the Court emphasized that state action affecting candidate ballot access rights deserves heightened scrutiny where the restriction "unfairly or unnecessarily burdens 'the availability of political opportunity.' " Clements, 457 U.S. at 964, 102 S.Ct. at 2844 (quoting Lubin v. Panish, 415 U.S. at 716, 94 S.Ct. at 1320).

Where, as here, the state determines availability of political opportunity on the basis of ideology, such heightened scrutiny is appropriate. The state action in this case not only affects First Amendment freedoms but also the right to equal protection of those freedoms. See Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 96-98, 92 S.Ct. 2286, 2290-2291, 33 L.Ed.2d 212 (1972). "[Q]ualification requirements that implicitly exclude controverted political positions are ... the most suspect." L. Tribe, American Constitutional Law, § 13-19 at 1100 n. 13. Similarly, the exclusion of Duke from access to the primary ballot on the explicit basis of his political philosophy and that of his adherents implicates the most cherished constitutional freedoms. See Bullock v. Carter, 405 U.S. at 143-144, 92 S.Ct. at 856 (holding that primary ballot access restrictions possessing a "patently exclusionary character" must be "closely scrutinized").

ii. Burden on Appellants' Rights

Given the fundamental First Amendment rights affected by the state's action in this case, the next question is whether these rights are significantly burdened by the challenged state action. The majority holds that no such burden exists. I disagree.

The majority's analysis rests on the belief that because the appellant voters may support Duke as a third-party or write-in candidate in the primary election, or as a third-party, independent or write-in candidate in the November general election, they have alternate channels through which to exercise their First Amendment rights, and consequently are only incidentally burdened by the state's exclusion of Duke from the Republican primary ballot. This belief is erroneous in view of the restrictions placed on access to the primary system by Georgia law and controlling Supreme Court precedent.

Georgia law provides as follows:

[A]s provided in this article, a presidential preference primary shall be held ... for each political party or body which has cast for its candidates for President and Vice President in the last presidential election more than 20 percent of the total vote cast for President and Vice President in the state....

O.G.C.A. § 21-2-191. In view of the realities of our two-party system, the state restricts participation in the primary system to those individuals who qualify for the Republican and Democratic primaries.

Admittedly, Duke could run as a write-in candidate for the Republican nomination. The Supreme Court, however, has recognized that the opportunity to run as a write-in candidate "is not an adequate substitute for having one's name printed on the ballot." Anderson v. Celebrezze, 460 U.S. at 799 n.26, 103 S.Ct. at 1575 n.26; accord, Lubin v. Panish, 415 U.S. at 719 n.5, 94 S.Ct. at 1321 n.5 ("[A candidate] relegated to the write-in position would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot.").

Thus, in light of the foregoing state law restrictions on primary participation, Duke's access to the primary process is effectively foreclosed by the state's exclusion of his name from the Republican ballot. [5] It is therefore indisputable that the appellants' rights to free political association and equal political opportunity have

been burdened significantly by the state's action.

B. Compelling State Interest

Appellants have shown that the exclusion of Duke from the Republican presidential primary ballot substantially burdens rights protected by the First and Fourteenth Amendments. The next

question is whether the appellants have shown that the appellees failed to sustain their burden of demonstrating a compelling state interest that justifies the exclusion.

The majority maintains that the state has a compelling interest in protecting the institutional autonomy and First Amendment associational rights of members of the Republican Party, citing in support of this proposition a line of Supreme Court cases emphasizing the associational rights of political parties.

The majority's opinion begs the question of whether the preservation of the First Amendment rights of the Republican Party in particular is a compelling state interest. I am not convinced that it is. See Eu, 489 U.S. at 228, 109 S.Ct. at 1023 ("preserving party unity is not a compelling state interest"). Nevertheless, I will assume arguendo that the state does indeed advance a compelling state interest in support of its challenged action. [6]

C. Action Narrowly Tailored To Serve the Governmental Interest

Having found a compelling state interest in support of the state's action, the majority ends its inquiry, concluding that the exclusion of Duke from the Republican presidential preference primary ballot was constitutional. As discussed supra, however, the mere identification of a state interest is insufficient to validate state action that burdens constitutional rights. Rather, the defendant must also show that the state action was narrowly tailored to serve the alleged governmental interest. Eu, supra. [7] Answering this question requires a precise inquiry into whether allowing participation in a party primary infringes the associational interests advanced by the appellees.

The majority holds that Duke's inclusion on the Georgia Republican presidential primary ballot infringes on the Republican Party's First Amendment right to determine its membership and the right to choose its standard bearer. I do not believe that Duke's inclusion on the ballot constitutes any such infringement on the Party's rights, given that the Republican Party is free to disavow Duke, to campaign aggressively against him and to urge the Party membership to reject his candidacy at the polls. See Bellotti v. Connolly, 460 U.S. at 1063, 103 S.Ct. at 1513 (Stevens, J., dissenting) ("[i]f ... candidates have only minimal support from the enrolled party members who vote in the primary, they will simply be ignored.").

Democratic Party of United States v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981), the facts of which are presented in the majority's opinion at 1532, does not support the majority's position. By tying the votes of its delegation to the Democratic National Convention to the results

of its open primary, "Wisconsin required convention delegates to cast their votes for candidates who might have drawn their support from nonparty members." Bellotti v. Connolly, 460 U.S. at 1062-63, 103 S.Ct. at 1513 (Stevens, J., dissenting) (emphasis in original). The participation of

non-Democratic voters in the Wisconsin primary bound the Democratic Party to honor those voters' ideological preferences: "[t]he results of the party's decisionmaking processes might ... have been distorted" by this forced association. Id. The inclusion of Duke on the Republican primary ballot, conversely, does not distort the Party's decisionmaking processes because no one is required to vote for him. Because the Party is in no way bound to honor Duke's ideological preferences by virtue of his appearance on the ballot, no association between Duke and the Party occurs in the absence of support for Duke from Party members. Id. [8]

Implicit in the appellees' argument and the majority's opinion is the notion that the mere addition of Duke's name to the Republican primary ballot amounts to a forced association with Duke or a designation of a Republican Party standard bearer. This analysis, however, is inconsistent with the Supreme Court's decision in Eu. There, the Court addressed the constitutionality of a California law that forbade the official governing bodies of political parties to endorse or campaign for particular candidates in primary elections. The Court held the statute unconstitutional, stating that the state law infringed on a party's right "to select 'a standard bearer who best represents the party's ideologies and preferences.' " Eu, 489 U.S. at 224, 109 S.Ct. at 1021 (quoting Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 601 (D.C.Cir.) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976)).

The Court's decision in Eu is instructive because it identifies party campaigning as the means by which a party asserts its First Amendment associational right to select its standard bearer. The Court identified the primary election as the "crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." Eu, 489 U.S. at 224, 109 S.Ct. at 1021 (quoting Tashjian v. Republican Party, 479 U.S. 208, 216, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 (1986)). The Court thus recognized by implication that candidates deemed by the Party leadership to be inappropriate standard bearers should be permitted to participate, even if unsuccessfully, in the primary process itself. The Court's decision in Eu strongly suggests that the associational interests asserted by the Republican Party in this case can be fully preserved by allowing the Party to campaign against Duke in the primary election, and that the Party has a weak associational interest in preventing Duke's inclusion on the Republican ballot.

This conclusion finds support not only in principles of constitutional law, but also in the very nature of the primary system. In Eu, the Court emphasized that "[a] primary is not hostile to intraparty feuds; rather, it is an ideal forum in which to resolve them." 489 U.S. at 227, 109 S.Ct. at 1022. See also Storer v. Brown, 415 U.S. at 735, 94 S.Ct. at 1281. This court's predecessor has recognized that factionalism between contenders for political primacy should be resolved through the electoral process without undue hindrance by the state. Riddell v. National Democratic Party, 508 F.2d 770, 776, 778 (5th Cir.1975). [9] The primary system serves as a

procedural vehicle to ensure such resolution. Were we to view a political party's associational rights as permitting the party's exclusion of candidates from a primary ballot, the very purpose of a primary would disappear. See Bellotti v. Connolly, 460 U.S. at 1061, 103 S.Ct. at 1512 (Stevens, J., dissenting), quoting Appellant Bellotti's Juris. Statement, pp. 14-15. [10]

The appellees contend that this case does not involve an intra-party feud because Duke is not a Republican. Duke, however, has stated that he is a Republican. Accepting the appellees' argument would permit the Party leadership to monopolize power within the Party simply by declaring that any dissident faction does not belong to the Party, regardless of the faction's statements to the contrary. Our system leaves the responsibility of determining the course and nature of the Party to the electorate. Riddell, 508 F.2d at 776, 778. [11]

Accordingly, I do not believe that the appellees have shown that the state action in this case is narrowly tailored to serve the Republican Party's associational interests because those interests can be fully preserved by allowing the Republican Party to campaign against Duke's candidacy prior to the election. [12] The Republican Party of Georgia and the state seek to exclude Duke from the primary ballot because they believe that the Party will suffer embarrassment and adverse publicity by virtue of his candidacy for the Republican nomination. No political body, however, has a constitutional right to freedom from embarrassment or adverse publicity.

V. Conclusion

For the foregoing reasons, I conclude that the appellants demonstrated a likelihood of success on the merits. I also believe that they established (1) irreparable injury in the absence of injunctive relief; (2) that the threatened injury to plaintiffs outweighed the harm caused by the injunction to the opposing party; and (3) that the grant of the injunction would not be adverse to the public interest. Cunningham v. Adams, 808 F.2d 815, 819 (11th Cir.1987). I therefore respectfully dissent from the majority's affirmance of the district court's denial of injunctive relief.

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1 The party's rules bind the delegates for at least two presidential nomination ballots at the national convention, unless the candidate receives less than 35% of the ballots cast at the convention.

2 The Committee is composed of Georgia's Secretary of State, the Speaker of the House of Representatives, the majority leader of the Senate, the minority leaders of both the House and the Senate, and the chairpersons of both the Democratic and Republican parties. Id. The Secretary of State serves on the Committee as a nonvoting chairperson. Id.

3 Appellants Andrews, Gorton, and Manget are all registered and qualified to vote in the State of Georgia, have previously voted in Republican primary elections in Georgia and wish to have the opportunity to vote for appellant Duke in Georgia's 1992 presidential preference primary if they so choose.

4 Before addressing appellants' constitutional claims, we address the issue of whether the action of the Committee in excluding Duke from the ballot constitutes state action. Appellees argue that there is no state action in this case because the decision to exclude Duke from the ballot was a private, political choice made by Republican party officials. Appellees urge that the Georgia statute does not create the right permitting political parties to choose their candidates. Appellants counter that the Committee acted pursuant to a specific statutory scheme and that, therefore,

the action of the Republican party members was attributable to the state. We need not resolve the state action question at this juncture, however, because we assume, arguendo, the presence of state action and proceed to address the appellants' likelihood of success on the merits of their constitutional claims.

5 We emphasize, however, the claims that have not been made by appellants. Duke and the other appellants have not claimed that the Committee used improper procedures to reject him, that the Committee excluded him for any reason other than his political beliefs, or that the Committee's decision was, in any other way, arbitrary. In addition, appellants do not assert that the Republican members of the Committee lack the authority to speak for the Republican Party or that some other person or governing body has superior authority to speak for the Republican Party. Moreover, appellants failed to adduce any evidence to support a finding of a lack of authority by the Republican Committee members or to demonstrate a failure to follow the procedures set out by the Republican Party or the Georgia statutes. Finally, appellants have asserted no challenge to the statute itself. Rather, appellants' sole challenge is that the Republican members of the Committee excluded Duke from the Republican primary ballot because of his political beliefs.

6 Indeed a strong argument could be made that there is no right to vote for any particular candidate in a party primary, because the party has the right to select its candidates. See infra.

7 We make two brief comments in response to the dissent. First, in Section IV.A.ii., the dissent argues that the Georgia statute would not permit Duke to run in the primary as a third party candidate. We remain convinced, however, that appellants did not present that argument either in the district court or on appeal. Duke did not seek access to the primary ballot as a third party candidate, nor did appellants argue that the right to vote was burdened by any restriction upon a third party candidate's access to the primary ballot. We express no opinion either on the fact of any such restriction or the constitutionality thereof.

Second, in balancing the constitutional rights at issue in this case, the dissent argues that appellees' position "would permit the Party leadership to monopolize power within the Party simply by declaring that any dissident faction does not belong to the Party." Infra, dissent at 1539. We express no opinion as to whether or not a state could place reasonable restrictions upon the process by which a political party determines the candidates who may run in the party primary. The state may well have legitimate interests in providing a reasonable measure of access to a political party's primary ballot. We need not address that issue, because the issue has not been presented in this case. The state has not asserted such an interest, nor have appellants presented this argument. In any event, the matter of some reasonable regulation by the state is very different from the assertion by appellants of an absolute right of access to the primary ballot of a particular political party, notwithstanding the determination by the party (by means of party procedures the validity of which are not challenged) that Duke's political beliefs are inconsistent with those of the party.

1 Delgado v. Smith, 861 F.2d 1489 (11th Cir.1988), cert. denied, 492 U.S. 918, 109 S.Ct. 3242, 106 L.Ed.2d 589 (1989), does not compel a contrary result. In that case, this court concluded that the state's involvement in the circulation of a voter-initiated petition to amend the Florida Constitution was not state action because "the state [did] not initiate the petition, [did] not draft the language of the petition, [did] not address the merits of the proposal and [did] not participate in any way in the circulation of the petition or in the collection of signatures." Id. at 1497. In this case, the state not only directly supervises and funds the primary election process, it also determines the composition of the selection committee and conducts the initial screening of candidates to be included on the ballot, thereby playing a considerable substantive role in the designation of both candidate selectors and candidates. This action is qualitatively different from the ministerial action at issue in Delgado.

2 At footnote 5 of its opinion, the majority states that "appellants have asserted no challenge to the statute itself." Although the appellants have not alleged that the candidate selection process authorized by O.G.C.A. § 21-2-193 is unconstitutional on its face, implicit in the appellants' claims is the charge that the Georgia candidate selection law is unconstitutional as applied to Duke's candidacy because state action under that statute deprived him and his supporters of their constitutional rights to equal political opportunity, political association and equal protection of the laws. Thus, the appellants' failure to challenge the facial validity of the Georgia candidate selection law has no relevance to our inquiry today, nor does that failure bar further inquiry on this issue.

3 I also believe that the appellants are entitled to the relief they seek even if we were to apply the more lenient balancing test used in Anderson. See note 12, infra.

4 That this case involves a primary election rather than a general election does not affect analysis of the rights asserted by appellants. The Supreme Court has acknowledged the existence of First Amendment speech and associational rights in the context of primary elections as well as general elections. See Bullock v. Carter, 405 U.S. at 142-143, 92 S.Ct. at 855-56; Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307-08, 38 L.Ed.2d 260 (1973). See also Bellotti v. Connolly, 460 U.S. 1057, 1062, 103 S.Ct. 1510, 1513, 75 L.Ed.2d 938 (1983) (Stevens, J., joined by Rehnquist and O'Connor, JJ., dissenting from dismissal of appeal for lack of jurisdiction).

5 The fact that Duke may run as an independent or third-party candidate in the general election does not mitigate the burdens placed on his right to run in a primary election. See note 3, supra. The appellants' rights to participation in a presidential primary are distinct from and independent of their rights to participate in the general election, and the failure of the state to place burdens on the latter rights has no relevance to the state's action burdening the former.

6 It is, however, important to recognize what interests the appellees do not assert in justification of their actions. The state does not suggest that Duke's exclusion from the ballot was designed in any way to avoid voter confusion, American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974), or to otherwise protect the integrity of the electoral process. Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1972). I agree that these justifications are in some contexts sufficiently compelling to justify ballot access restrictions. Here, however, appellees rest their exclusion of Duke from the primary ballot solely on the Republican Party's right to associate with and disassociate from whomever it chooses, and contended at oral argument that the party could exclude a candidate without giving any reason whatsoever.

7 By failing to conduct a "narrow tailoring" analysis as part of its strict scrutiny of the state's action, the majority fails to recognize that "the state incorporation of the party's decision ... subjects the party to standards that are ordinarily inapplicable to private organizations." Tribe, American Constitutional Law, § 13-25 at 1127-28. The state's involvement in a political party's decisionmaking processes mandates strict scrutiny of those processes, even where the state professes an interest in preserving the associational rights of the party members.

8 To the extent the Party argues that a Duke victory in the Georgia primary would reflect the ideological preferences of non-Republicans and therefore violate the Party's rights of association, the Party's selective exclusion of Duke from the ballot is not narrowly tailored to serve the Party's interests, in light of the fact that the ideological preferences of non-Republicans would be reflected in any candidate's victory. The State may enact some reasonable Party registration requirements to serve its associational interests; it may not deprive a particular candidate and his supporters of their constitutional rights under the pretext of preventing cross-over voting.

9 The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

10 The appellees' contention at oral argument that the Republican Party could without explanation exclude all candidates from the Republican primary but President Bush underscores the irreconcilability of appellees' position and the primary system.

11 It also should be noted that the Georgia primary system itself appears devoted to the ideal of inclusiveness. Under Georgia law, an individual registered to vote in the presidential primary need only declare his or her party preference upon entering the polling place. The contention that a party has a significant associational right in the primary process is belied by the inclusive nature of this process in general. Indeed, such inclusivity is the hallmark of our two-party system. See Democratic Party, 450 U.S. at 131, 101 S.Ct. at 1024 (Rehnquist, J., dissenting) (American political parties not "organized around the achievement of defined ideological goals"); Rosario, 410 U.S. at 769, 93 S.Ct. at 1255 (Powell, J., dissenting) (major parties "characterized by a fluidity and overlap of philosophy and membership").

12 As noted supra, although we must use "strict scrutiny" analysis to measure the constitutionality of the state action in this case, appellants have demonstrated a likelihood of success on the merits even under the more lenient balancing test discussed in Anderson, 460 U.S. at 789-90, 103 S.Ct. at 1570. Appellees have not demonstrated that their First Amendment rights of association are significantly infringed by Duke's appearance on the Republican ballot. Given the infringement on plaintiffs' rights to equal political opportunity and political association resulting from the state's action, the balance weighs in favor of allowing Duke access to the Republican primary ballot.

....

485 F. Supp. 904

Nick BELLUSO, Francis J. Richards, Jr., and William A. Forsyth, Sr.
v.
David POYTHRESS, Thomas B. Murphy, John R. Riley, Paul D. Coverdell, Herbert Jones, Jr., Marge Thurman, and Matthew H. Patton.

Civ. A. No. 80-283 A.

United States District Court, N. D. Georgia, Atlanta Division.

February 25, 1980.

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[485 F. Supp. 906]

Lloyd E. N. Hall, Hall, White & Daum, Atlanta, Ga., for plaintiffs.

Micheal J. Bowers, Senior Asst. Atty. Gen., Atlanta, Ga., for defendants.

ORDER

RICHARD C. FREEMAN, District Judge.

Plaintiffs came before this court on February 20, 1980 seeking a declaratory judgment, damages, and preliminary and permanent injunctive relief. Plaintiffs allege that their rights under the first and fourteenth amendments to the United States Constitution have been violated by the failure of the defendant members of the Georgia Presidential Preference Primary Selection Committee to include the name of plaintiff Nick Belluso on the Republican ballot for the March 11, 1980 Georgia Presidential Preference Primary. 42 U.S.C. § 1983, 28 U.S.C. § 1343.

On February 22, this court held an evidentiary hearing on plaintiffs' claims. At that time, the court understood the purpose of the hearing to be to determine the propriety of preliminary injunctive relief, the function of a preliminary injunction being "merely to preserve the status quo until the merits of a case can be adjudicated." Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir.

1975). The court failed to make clear, however, the nature of the proceedings, or formally to propose consolidation of the preliminary injunction hearing with a trial on the merits, Rule 65(a)(2), Fed.R.Civ.P. Nevertheless, after hearing the evidence, we believe our ruling today will be dispositive of plaintiffs' claims. In the interest of justice, therefore, we ask that the parties inform the court within two days of receipt of this order if they wish to offer further evidence or argument.

STATEMENT OF THE FACTS

Plaintiff Nick Belluso is a recent convert to the Georgia Republican Party, but a perennial, though unsuccessful, candidate for both state and national public office. Mr. Belluso has run, inter alia, for Alderman of the City of Atlanta, State Senator, United States Representative, and Governor of the State of Georgia. In the past, Mr. Belluso campaigned as either an independent or Democratic candidate. Plaintiffs Francis J. Richards, Jr. and William A. Forsyth, Sr. are registered voters residing in DeKalb County, Georgia, who wish to vote for Mr. Belluso in the Georgia Presidential Preference Primary as the Republican Party's candidate for President of the United States. Defendants Poythress, Murphy, Riley, Coverdell, Jones, Thurman, and Patton comprise the Georgia Presidential Preference Primary Selection Committee (Selection Committee) and are charged under state law with the responsibility of choosing the names of the candidates that will appear

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on the parties' primary ballots. See Ga.Code § 34-1003a.

The state of Georgia provides by law that a presidential preference primary shall be held every four years, and sets out the procedures to be followed by the participating political parties. Section 34-1003a governs the selection of candidates to appear on the party ballots, and provides, in pertinent part:

The name of any candidate for a political party or body nomination for the office of President of the United States shall be printed upon the ballot used in such primary:

(a) Upon the direction of a presidential candidate selection committee composed of a nonvoting chairman who shall be the Secretary of State, the Speaker of the House of Representatives, the Majority Leader of the Senate, the Minority Leaders of both the House and Senate, and the chairmen of the political parties and bodies who conduct a presidential preference primary pursuant to section 34-1002. The Secretary of State, during the second week in January of the year in which a presidential preference primary is held, shall prepare and publish a list of names of potential presidential candidates who are generally advocated or recognized in news media throughout the United States as aspirants for that office and who are members of a political party or body which will conduct a presidential preference primary in this State. The Secretary of State shall submit such list of names of potential presidential candidates to the selection committee during the third week in January of the year a presidential preference primary is held. . . . Each person designated by the Secretary of State as a presidential candidate shall appear upon the ballot of the appropriate political party or body unless all committee members of the same political party as the candidate agree to delete such candidate's name from the ballot. . . .

(b) Any presidential candidate whose name is not selected by the Secretary of State or whose name is deleted by the selection committee may request, in writing, to the chairman of the selection committee, prior to February 10 of each year a presidential preference primary is held, that his name be placed on the ballot. Not earlier than February 10, nor later than February 15, the Secretary of State shall convene the committee to consider such requests. If any member of the selection committee of the same political party or body as the candidate requests that such candidate's name be placed on the ballot, the committee shall direct the Secretary of State to place the candidate's name on the ballot. Within five days after such meeting, the Secretary of State shall notify the potential presidential candidate whether or not his name will appear on the ballot.

The results of the preference primary are binding on each party's delegates to the national nominating conventions only insofar as the party may determine by party rule. Ga.Code § 34-1002a. The political parties may apportion their delegates as they choose. 1979 Georgia Laws, pp. 1316, 1317.

On January 2, 1980, plaintiff Belluso sent a letter to Secretary of State David Poythress requesting that his name be included on the Republican ballot. The letter was supplemented by copies of Belluso's filings with the Federal Election Committee, a copy of the check for $1500 that he had sent as a filing fee to be included on the Republican ballot in the South Carolina presidential primary, copies of eleven stories about Belluso's candidacy appearing in major newspapers, and lists of broadcasted radio and television interviews. Defendants' Exhibit # 1.

Pursuant to Ga.Code § 34-1003a, in the third week of January, Secretary of State Poythress submitted a list of potential Republican presidential candidates to the Selection Committee. The list included John Anderson, Howard Baker, George Bush, John Connally, Philip Crane, Robert Dole, and Ronald Reagan. Mr. Belluso's name was absent. As permitted by Ga.Code

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§ 34-1003a(b), plaintiff then wrote to Matthew W. Patton, chairman of the State Republican Party and a member of the Selection Committee, requesting that his name be added to the list. Although all committee members of the same party must agree to delete a name, the request of only one member is required to add a name. Belluso's request for inclusion was denied. Mr. Belluso never contacted any other committee members about his desired candidacy. No names on the list of candidates submitted by the Secretary were ultimately deleted by the Selection Committee, but three names were added. The Democratic committee members added Richard B. Kay to the Democratic ballot, and Harold Stassen and Benjamin Fernandez were added to the Republican ballot.

At the February 22 hearing, the court heard testimony that the original list of candidates is compiled by the Secretary and his staff without the advice or consultation of the Selection Committee. The statute requires that the Secretary submit the names of presidential candidates "who are generally advocated or recognized in news media throughout the United States as aspirants for that office . . .." Ga.Code § 34-1003a. In applying this admittedly broad statutory standard to lesser-known candidates, the Secretary testified he considered recommendations of

his staff, materials submitted by the candidates, and impressions formed by personal experience. Although the national scope of the news coverage of the candidate was a factor, there was no weighting of the number or length of articles published about each candidate. The Secretary maintained no clipping service, and used no specific method to analyze the celebrity of presidential hopefuls. He did not evaluate the candidates' financial assets or ability to raise money, the candidates' chances of winning, the electorate's view of the candidates, or the seriousness of the candidates' platforms. The Secretary testified he considered manifestations in the media coverage of a candidate's own serious intent to pursue the presidency and serve in that office if elected.

Applying this test of seriousness to the materials submitted by plaintiff Belluso, the Secretary rejected the plaintiff's application. Secretary Poythress testified that the news articles the plaintiff chose to offer in support of his candidacy revealed a frivolous desire for office and an insincere intent to serve if elected. The Secretary's evaluations were based on the news coverage of Mr. Belluso as a "kookie" candidate. Much of the press's treatment of Mr. Belluso, which included articles in such major newspapers as the Washington Post, the Detroit Free Press, The Houston Post, and The Atlanta Constitution, focused on the plaintiff's organization of a Presidential Kookie Candidate Convention in December 1979, and plaintiff's labelling of himself as a "kookie" candidate. Among the proposals cited by the Secretary as evidence of plaintiff's insincerity was Mr. Belluso's promise that, if elected, he would sit in a rocking chair on the porch of the White House and do nothing but rock during his term of office. As manifestation of the frivolous nature of plaintiff's candidacy, the Secretary pointed to Mr. Belluso's reported hiring of "Keystone Cops" armed with water pistols and laughing gas as his substitute for Secret Service protection.

Some of the Republican members of the Selection Committee also testified. Georgia State Senator Paul Coverdell stated that "general recognition" and "seriousness" was the standard the Selection Committee applied in drawing up the final list of candidates, and that he had never heard of Nick Belluso or his candidacy until the commencement of this lawsuit. Mr. Coverdell is co-chairman of George Bush's Georgia campaign. Herbert Jones, Minority Leader of the Georgia Assembly and a member of the Reagan campaign, stated that the Secretary submitted Mr. Belluso's letter of application to the committee, but to his knowledge it was never discussed. Mr. Jones was unaware that plaintiff Belluso had an interest in, or was a member of, the Republican party.

Mr. Belluso testified as to the seriousness of his candidacy and his intent to serve if

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elected. He stated that his promise to sit in a rocking chair on the porch of the White House was merely a symbolic way of expressing his belief that government should interfere less in the lives of Americans. Plaintiff presented evidence of his admittance as a Republican candidate in the South Carolina and Alabama primaries.[1] He referred the court's attention to statements in the submitted news articles that his use of gimmickry and a "kookie campaign" was only to attract media attention to his serious side. One headline, for example, states "`Kooks' Serious About Presidency.'" Defendants' Exhibit # 1. As an indication of his support in Georgia, Mr. Belluso

testified that he had received two percent of the vote in the 1978 gubernatorial race, which he entered as a Democrat.[2] Mr. Belluso also asserted that he has a serious ten-point platform that includes such proposals as the institution of a flat-rate income tax, a change to a four-year federal budget, a return to the gold standard, and the opening up of federal lands in the western United States to homesteaders. When asked why he never contacted any other Republican members of the Selection Committee besides Chairman Patton about his candidacy, Belluso said he felt that other members would consider him a threat to their own favorite candidates.

Plaintiff also offered into evidence the packets of materials sent to the Secretary of State by other minor presidential candidates requesting a place on the major parties' ballots. Richard B. Kay sent a letter and an affidavit announcing himself to be a Democratic candidate and attesting to the nationwide media attention he had received. The letter was accompanied by copies of some of the news stories written about his candidacy, and an unfiled complaint threatening Secretary Poythress with the institution of a lawsuit if Kay's name was excluded from the Democratic ballot. Plaintiffs' Exhibit # 1. Cliff Finch, former Governor of the State of Mississippi, sent only a telegram declaring his candidacy and requesting a place on the Democratic list. Plaintiffs' Exhibit # 2. Benjamin Fernandez sent a letter and copies of news stories about his candidacy that had appeared in such papers as The New York Times, The Miami Herald, and The Seattle Times. Plaintiffs' Exhibit # 3. The Secretary included Governor Finch's name on the original list, and Mr. Kay and Mr. Fernandez were added by the Selection Committee. Secretary Poythress testified that if he had received Kay's or Fernandez's applications in time, he would have included Fernandez on the original Republican list, and "very likely" would have included Kay on the Democratic list.

Mr. Belluso and the two registered voters who have joined him in this action challenge the Georgia statute underlying the candidate selection process as unconstitutional on its face, and unconstitutional as applied to plaintiff Belluso. Plaintiffs assert they will suffer irreparable harm if Mr. Belluso's name is excluded from the Republican ballot in the March 11th Presidential Preference Primary.

INJUNCTIVE RELIEF

Plaintiffs seek to enjoin the printing or dissemination of the Republican ballot without Mr. Belluso's name on it. This court may grant plaintiffs the relief they request only if they satisfy four prerequisites:

(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and

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(4) that granting the preliminary injunction will not disserve the public interest.

Morgan v. Fletcher, 518 F.2d at 239 (citations omitted). Because we find that plaintiffs have failed to satisfy the four-pronged test, we must deny plaintiffs' request for injunctive relief.

1. Likelihood of Success on the Merits

As a threshold matter, the plaintiffs must demonstrate that Belluso's exclusion from the Republican primary ballot constitutes state action, so that they may challenge the exclusion under federal constitutional principles. The defendants argue there is no state action because ultimate control over access to the primary ballots lies with party representatives acting in a purely political, as opposed to governmental, capacity. The plaintiffs respond that as involuntary members of a statutorily created and funded commission, the Republican party representatives act as state officials. The plaintiffs also suggest that even internal party decisionmaking may constitute state action, see Gray v. Sanders, 372 U.S. 368, 374-75, 83 S.Ct. 801, 805, 9 L.Ed.2d 821 (1963), and further claim that at least the initial determination of the Secretary of State in drawing up the list involves a governmental act conferring or withholding a tangible benefit. We need not, however, resolve the state action debate here; we will assume the presence of state action and resolve the controversy upon an evaluation of the substantive constitutional considerations presented.

Under usual principles of equal protection analysis, a statute is subject only to minimum, or low level, scrutiny unless it draws a suspect classification or infringes a fundamental interest. See, e. g., City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976). This case involves no suspect classification. Consequently, we may suppose that unless Belluso's right to inclusion on the Republican Presidential Preference Primary ballot (or the remaining plaintiffs' right to have him so included) is constitutionally "fundamental," our only inquiry is one of minimum scrutiny: whether the Georgia provision excluding Belluso rationally advances a legitimate state purpose. We would have little difficulty exonerating Ga.Code § 34-1003a under this standard. On the other hand, if the ballot access right involved is fundamental, its abridgement would be subject to strict scrutiny and would be upheld only if justified by a "compelling state interest" and where no "less restrictive alternative" could attain that interest. See, e. g., Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 991, 59 L.Ed.2d 230 (1979).

The difficulty here lies in deciding what degree of scrutiny should apply to the Georgia law. Our investigation is complicated by the fact that the cases do not entirely accept the two-tiered equal protection analysis discussed above, under which state action is judged either very strictly or very uncritically. Rather, they identify ballot access rights as being close to, but not quite, fundamental. The cases therefore employ a middle standard of scrutiny which we will conclude is one of "reasonable necessity." Moreover, we will determine that the ballot access right implicated in this case, because it concerns only a primary election, is even less fundamental than that defined in the existing Supreme Court decisions. We will apply a relatively lenient test approaching that of ordinary minimum scrutiny. Under this standard we will conclude that Ga.Code § 34-1003a is neither unduly burdensome nor irrational. We will therefore reject the plaintiffs' claims to its validity under the fourteenth amendment.

The first in the series of ballot access cases both defined the nature of the constitutionally implicated interests and illustrated clearly impermissible burdens on those interests. In Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), the Court struck down particularly harsh restrictions to ballot access for presidential elections. Ohio required any political party that

had failed to receive ten percent of the vote in the previous gubernatorial election to file a petition signed by a number of registered voters equal to at least fifteen

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percent of the votes cast in that election. The parties had to file their petitions nine months before the election in which they sought to participate; to comply with extensive and costly organizational demands; and to hold primary elections and nominating conventions. With these restrictions — and by prohibiting write-in votes — Ohio virtually excluded minority parties and thus denied them equal protection of the law. The Court identified two interests behind a fourteenth amendment right-to-access rule: "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." 393 U.S. at 30, 89 S.Ct. at 10.

Subsequent cases have added precision to the Williams rule by identifying permissible or impermissible ballot restriction schemes. The next major decision, Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 127, 27 L.Ed.2d 114 (1971), upheld with little elucidation of relevant constitutional principles, Georgia's five percent petition requirement.[3] See Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); American Party v. White, 415 U.S. 724, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). Unlike Jenness, these cases sometimes characterize the right to ballot access as fundamental and employ the language, if not always the analysis, of strict scrutiny. See Illinois State Board of Elections v. Socialist Workers Party, 99 S.Ct. at 992-93 (Blackmun, J., concurring); L. Tribe, American Constitutional Law 783 (1978).

The justification for restricting access to the ballot is two-fold. The state has a legitimate interest in avoiding "laundry list" ballots that confuse voters and in protecting the integrity of the democratic process from frivolous candidacies. Cases employing strict scrutiny language have termed this state interest "compelling." See, e. g., Illinois State Board of Elections v. Socialist Workers Party, 99 S.Ct. at 991. A thoughtful exposition — and reconciliation — of the conflicting concerns is set forth in Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). There, the Court invalidated California's requirement that candidates for congressional, state, and county offices pay a nonrefundable filing fee of one or two percent of the annual salary, depending upon the position sought. 415 U.S. at 710, 94 S.Ct. at 1317. The Court held that the state could impose only those limitations "reasonably necessary" to screen out non-serious candidates. Because California left no alternative to the payment of a filing fee, it overburdened access to the ballot:

Thus, California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.

415 U.S. at 718, 94 S.Ct. at 1321.

We adopt the Lubin v. Panish rule as a general statement of relevant equal protection analysis. According to that decision, the right to appear on a general election ballot is constitutionally favored but less than fundamental. The right may be burdened, but only by means reasonably necessary to limit the field to serious candidates. "Seriousness" comprehends two factors, the first of which is a candidate's actual popularity and, by implication, his reasonable chances of success. The state may condition access upon the showing of a

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"significant, measurable quantum of community support." American Party v. White, 415 U.S. at 782, 94 S.Ct. at 1307. In addition, the state may judge seriousness in terms of a candidate's subjective "desire and motivation." Lubin v. Panish, 415 U.S. at 714, 94 S.Ct. at 1319. We next inquire how the rights asserted by the plaintiffs differ from those just defined.

The critical factual distinction between our case and the cases decided by the Supreme Court is that plaintiff Belluso seeks inclusion in a preferential primary that has dubious effect as opposed to a general election that has finality. This distinction has several consequences. The first is that Belluso's exclusion from this particular ballot in no way bars him from running for President. Denied the chance to claim the Republican nomination,[4] Belluso may nevertheless seek the Presidency in the general election independently or as the candidate of a smaller political party. This constitutionally protected right, see McCarthy v. Askew, 420 F.Supp. 775, 779 (S.D.Fla.), aff'd, 540 F.2d 1254 (5th Cir. 1976), is given effect in Georgia under Ga.Code § 34-1001. Similarly, the right of Belluso's supporters to vote for him in the general election stands unaffected.

The second reason for the lowered importance of the right to inclusion on a primary ballot is the traditionally recognized autonomy of the political party's internal decisionmaking. It is true that certain aspects of the primary process have been subject to careful equal protection scrutiny. See, e. g., Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973) (invalidating an Illinois party affiliation requirement); Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (applying the one person-one vote rule to primary elections); Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 1301 (1932) (striking down regulations of Texas State Democratic Executive Committee barring blacks from voting in party primaries). But these exceptions involve voting itself and leave undiminished the long-standing respect for the autonomy of political parties. See Ripon Society v. National Republican Party, 173 U.S.App. D.C. 350, 525 F.2d 567, 584-86 (D.C.Cir. 1975) (en banc), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). Parties have long been free to strategize and act — at least before the voting begins — in the closed and clouded atmosphere of the smoke-filled room. Parties exercise rights of free speech and association when they assert this prerogative. Id. The plaintiffs' claims are weakened to the extent that the plaintiffs seek constitutional interference with internal party decisionmaking.

Third, we think that first amendment guaranties of free association, which explicitly underly the right-of-access decisions, are less substantial in the present context. Belluso asserts no

group's interest in advancing his candidacy. His claimed need to "associate" with an unwilling partner, the Republican party in Georgia, is not a first amendment right. Indeed, to the degree that rights of association are implicated, we think these rights militate in favor of leaving a party free to limit access to its own primary ballot.

Finally, there is much truth in the defendants' characterization of the Georgia Presidential Preference Primary as a "beauty contest." The balloting merely effects a recommendation to the parties, which are free to accept or ignore the results. The plaintiffs' constitutional interest in Belluso's inclusion is decreased because the importance of the primary lies within the discretion of the party.

Because Belluso seeks inclusion on a primary ballot, then, his right to access is even less "fundamental" than if he wished to participate in a general election. The standard of reasonableness by which the Georgia

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law will be judged is correspondingly lower and approaches the rationality standard of minimum scrutiny. Under this test we find Ga.Code § 34-1003a valid.

The facial reasonableness of the Georgia law is established first because it is not standardless, or arbitrary, and second because it does not of necessity operate to exclude from the primary ballot candidates with a constitutional right to inclusion. The plaintiffs make much of the section's vagueness; its supposed delegation to a single official, the Georgia Secretary of State, of the authority to interpret its meaning; and its allegedly standardless grant of power to exclude even a candidate designated by the Secretary of State to a unanimous trio of party officials. Contrary to these contentions, however, the law does furnish usable guidelines. While Georgia has eschewed the more objective approach taken by states that have imposed filing fees and petition requirements, it has sought a principled means of evaluating a candidate's seriousness, on the theory that his or her recognition in the media demonstrates a minimum degree of public support. Georgia's test may not be the most desirable — it is certainly not the most specific — but it is neither irrational nor even unrealistic. The Secretary of State testified that he implies in section 34-1003a an additional and complementary consideration of a candidate's sincerity. Thus construed, the law contemplates precisely the objective/subjective seriousness inquiry set out in Lubin v. Panish, 415 U.S. at 717-19, 94 S.Ct. at 1320-21. Moreover, the Republican party defendants testified that they applied the same test of seriousness as did the Secretary of State, and we think this application is implicitly required by the statute.

Nor does section 34-1003a contain the infirmity that doomed restrictions to ballot access in cases such as Lubin v. Panish or Williams v. Rhodes. The laws there necessarily kept off the ballot some classes of candidates with constitutional rights to inclusion. Those with sufficient seriousness were excluded by the California law if they could not afford the filing fee and by the Ohio law if they could not produce an oppressively high number of petition signatures or meet other requirements. By contrast, the Georgia law does not inevitably bar any candidate whom the Constitution requires be allowed on the primary ballot.

Because of the absence of inevitable exclusion and because the provision is not wholly arbitrary, we reject the plaintiffs' challenge to the facial validity of Ga.Code § 34-1003a under the forgiving test of equal protection scrutiny we deem applicable. The plaintiffs also claim the law has been unconstitutionally applied. This attack fails because it is unsupported by the evidence presented at the preliminary injunction hearing.

The plaintiffs' challenge to Georgia's application of section 34-1003a to Belluso takes two forms. First, they claim that the law has been employed to exclude him from the Republican primary ballot when the seriousness of his candidacy grants him a constitutional right to inclusion. Even under the general election cases, however, Belluso's showing on this account is unpersuasive. The evidence casts grave doubt upon his subjective seriousness, and he has marshalled no facts demonstrating a "significant, measurable quantum of community support," American Party v. White, 415 U.S. at 782, 94 S.Ct. at 1307. Because Belluso has made an unsuccessful proffer of his seriousness, he may not assert a right to a place on the Republican ballot.

Second, Belluso contends that section 34-1003a has been applied inconsistently since other candidates permitted on the Republican ballot have less popular support than he. Assuming that such circumstances would violate Belluso's equal protection rights, they have not been proven here. The other contenders submitted materials indicating press coverage of viable and earnest candidacies. By contrast, Belluso's failure to show his own candidacy to be serious dooms his claim of inconsistent application of the law. In sum, we reject the plaintiffs' attack upon Ga.Code § 34-1003a, both on its face and as applied.

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2. Irreparable Injury to Plaintiffs

The state Presidential Preference Primary is scheduled to be held March 11, 1980. Plaintiffs claim that permitting the Republican primary ballot to be printed and distributed without Mr. Belluso's name on it will cause them irreparable injury by prohibiting plaintiffs from voting for Mr. Belluso as a Republican candidate, and by barring Mr. Belluso from being considered as a Republican candidate for President. The court does not find that the alleged present threat of harm to plaintiffs constitutes irreparable injury.

The Secretary of State testified that although the printing of the ballots is "substantially completed," new ballots could be printed on a minimum of seven days notice. Any alleged harm to plaintiffs, therefore, will not become "irreparable" until approximately March 3rd or 4th. Even assuming plaintiffs were to prevail on the merits of their claim, they have not shown they are in sufficient jeopardy to justify the extraordinary remedy of injunctive relief.

3. Harm to Defendants

In determining the propriety of preliminary injunctive relief, the court must assess the disruptive effect the granting of such relief would have on defendants, and balance that harm against the threatened injury to plaintiffs. Within fifteen days of the date of this order, Georgia

will hold the state's Presidential Preference Primary. Secretary of State Poythress testified that the printing of the ballots is "substantially completed." Reprinting the ballots now would cause the state to expend a considerable sum of the taxpayers' money. Without presenting any supporting evidence, defendants' counsel represented to the court that reprinting the ballots would cost the state between $100,000 and $150,000. Balancing the threatened harm to defendants if an injunction issues from this court, against the threatened harm to the plaintiffs, we believe that the tangible risk to defendants is the more substantial.

4. The Public Interest

Injunctive relief may only be granted if the court determines that such relief will not disserve the public interest. The public has a strong interest in the careful use of its money for worthwhile purposes. Reprinting the primary ballots at this time would cause the expenditure, perhaps needlessly, of substantial public funds. Moreover, for this court to enjoin the printing and distribution of primary ballots pending the addition of plaintiff's name to the ballots would cause considerable disruption in the electoral process. The public also has a strong interest in conducting and participating in an orderly Presidential Preference Primary. The damage to this interest that would be caused by granting plaintiffs the relief they request, when compared to the dubious merits of plaintiffs' claims, requires that injunctive relief be denied.

Accordingly, the court DENIES the plaintiffs' prayer for preliminary injunctive relief. The plaintiffs shall have two days in which to report to the court their intention, if any, to submit further evidence or argument in support of their prayers for permanent injunctive relief, declaratory relief, and money damages. If no report is received within the prescribed two-day period, our conclusion set forth herein that the plaintiffs' constitutional rights have not been abridged shall stand as a final adjudication of all claims in the action and the Clerk of the Court shall enter final judgment in the defendants' favor.

IT IS SO ORDERED.

Notes:

1 According to plaintiffs testimony, Alabama requires potential primary candidates to submit a $100 filing fee and a petition signed by 600 registered voters. South Carolina requires only a $1500 fee.

2 The court ruled inadmissible as multiple hearsay the results of a poll taken in Atlanta purportedly showing that of 213 registered voters reached by telephone, 29 had heard of Nick Belluso, but only 5 had heard of the Republican candidate Benjamin Fernandez or the Democratic candidate Richard B. Kay.

3 Georgia also imposed a filing fee, which was not contested before the Court. Georgia has since reduced the number of signatures required from 5 to 2½ percent. See Ga.Code § 34-1010(b).

4 It is also true that the law merely regulates designation of Georgia delegates to the Republican national convention, so that Belluso may still be nominated if he obtains sufficient support in other states. In examining the

validity of the statute, however, we ought to consider that every state could enact similar legislation and that Belluso could, therefore, be precluded from any chance of nomination. Hence, we equate exclusion from the Republican primary ballot in Georgia with denial of the chance to run for the presidency as a Republican.

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Nick BELLUSO, Francis J. Richards, Jr., and William A. Forsyth, Sr.
v.
David POYTHRESS, Thomas B. Murphy, John R. Riley, Paul D. Coverdell, Herbert Jones, Jr., Marge Thurman, and Matthew H. Patton.

Civ. A. No. 80-283 A.

United States District Court, N. D. Georgia, Atlanta Division.

February 25, 1980.

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Lloyd E. N. Hall, Hall, White & Daum, Atlanta, Ga., for plaintiffs.

Micheal J. Bowers, Senior Asst. Atty. Gen., Atlanta, Ga., for defendants.

ORDER

RICHARD C. FREEMAN, District Judge.

Plaintiffs came before this court on February 20, 1980 seeking a declaratory judgment, damages, and preliminary and permanent injunctive relief. Plaintiffs allege that their rights under the first and fourteenth amendments to the United States Constitution have been violated by the failure of the defendant members of the Georgia Presidential Preference Primary Selection Committee to include the name of plaintiff Nick Belluso on the Republican ballot for the March 11, 1980 Georgia Presidential Preference Primary. 42 U.S.C. § 1983, 28 U.S.C. § 1343.

On February 22, this court held an evidentiary hearing on plaintiffs' claims. At that time, the court understood the purpose of the hearing to be to determine the propriety of preliminary injunctive relief, the function of a preliminary injunction being "merely to preserve the status quo until the merits of a case can be adjudicated." Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975). The court failed to make clear, however, the nature of the proceedings, or formally to propose consolidation of the preliminary injunction hearing with a trial on the merits, Rule 65(a)(2), Fed.R.Civ.P. Nevertheless, after hearing the evidence, we believe our ruling today will

be dispositive of plaintiffs' claims. In the interest of justice, therefore, we ask that the parties inform the court within two days of receipt of this order if they wish to offer further evidence or argument.

STATEMENT OF THE FACTS

Plaintiff Nick Belluso is a recent convert to the Georgia Republican Party, but a perennial, though unsuccessful, candidate for both state and national public office. Mr. Belluso has run, inter alia, for Alderman of the City of Atlanta, State Senator, United States Representative, and Governor of the State of Georgia. In the past, Mr. Belluso campaigned as either an independent or Democratic candidate. Plaintiffs Francis J. Richards, Jr. and William A. Forsyth, Sr. are registered voters residing in DeKalb County, Georgia, who wish to vote for Mr. Belluso in the Georgia Presidential Preference Primary as the Republican Party's candidate for President of the United States. Defendants Poythress, Murphy, Riley, Coverdell, Jones, Thurman, and Patton comprise the Georgia Presidential Preference Primary Selection Committee (Selection Committee) and are charged under state law with the responsibility of choosing the names of the candidates that will appear

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on the parties' primary ballots. See Ga.Code § 34-1003a.

The state of Georgia provides by law that a presidential preference primary shall be held every four years, and sets out the procedures to be followed by the participating political parties. Section 34-1003a governs the selection of candidates to appear on the party ballots, and provides, in pertinent part:

The name of any candidate for a political party or body nomination for the office of President of the United States shall be printed upon the ballot used in such primary:

(a) Upon the direction of a presidential candidate selection committee composed of a nonvoting chairman who shall be the Secretary of State, the Speaker of the House of Representatives, the Majority Leader of the Senate, the Minority Leaders of both the House and Senate, and the chairmen of the political parties and bodies who conduct a presidential preference primary pursuant to section 34-1002. The Secretary of State, during the second week in January of the year in which a presidential preference primary is held, shall prepare and publish a list of names of potential presidential candidates who are generally advocated or recognized in news media throughout the United States as aspirants for that office and who are members of a political party or body which will conduct a presidential preference primary in this State. The Secretary of State shall submit such list of names of potential presidential candidates to the selection committee during the third week in January of the year a presidential preference primary is held. . . . Each person designated by the Secretary of State as a presidential candidate shall appear upon the ballot of the appropriate political party or body unless all committee members of the same political party as the candidate agree to delete such candidate's name from the ballot. . . .

(b) Any presidential candidate whose name is not selected by the Secretary of State or whose name is deleted by the selection committee may request, in writing, to the chairman of the selection committee, prior to February 10 of each year a presidential preference primary is held,

that his name be placed on the ballot. Not earlier than February 10, nor later than February 15, the Secretary of State shall convene the committee to consider such requests. If any member of the selection committee of the same political party or body as the candidate requests that such candidate's name be placed on the ballot, the committee shall direct the Secretary of State to place the candidate's name on the ballot. Within five days after such meeting, the Secretary of State shall notify the potential presidential candidate whether or not his name will appear on the ballot.

The results of the preference primary are binding on each party's delegates to the national nominating conventions only insofar as the party may determine by party rule. Ga.Code § 34-1002a. The political parties may apportion their delegates as they choose. 1979 Georgia Laws, pp. 1316, 1317.

On January 2, 1980, plaintiff Belluso sent a letter to Secretary of State David Poythress requesting that his name be included on the Republican ballot. The letter was supplemented by copies of Belluso's filings with the Federal Election Committee, a copy of the check for $1500 that he had sent as a filing fee to be included on the Republican ballot in the South Carolina presidential primary, copies of eleven stories about Belluso's candidacy appearing in major newspapers, and lists of broadcasted radio and television interviews. Defendants' Exhibit # 1.

Pursuant to Ga.Code § 34-1003a, in the third week of January, Secretary of State Poythress submitted a list of potential Republican presidential candidates to the Selection Committee. The list included John Anderson, Howard Baker, George Bush, John Connally, Philip Crane, Robert Dole, and Ronald Reagan. Mr. Belluso's name was absent. As permitted by Ga.Code

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§ 34-1003a(b), plaintiff then wrote to Matthew W. Patton, chairman of the State Republican Party and a member of the Selection Committee, requesting that his name be added to the list. Although all committee members of the same party must agree to delete a name, the request of only one member is required to add a name. Belluso's request for inclusion was denied. Mr. Belluso never contacted any other committee members about his desired candidacy. No names on the list of candidates submitted by the Secretary were ultimately deleted by the Selection Committee, but three names were added. The Democratic committee members added Richard B. Kay to the Democratic ballot, and Harold Stassen and Benjamin Fernandez were added to the Republican ballot.

At the February 22 hearing, the court heard testimony that the original list of candidates is compiled by the Secretary and his staff without the advice or consultation of the Selection Committee. The statute requires that the Secretary submit the names of presidential candidates "who are generally advocated or recognized in news media throughout the United States as aspirants for that office . . .." Ga.Code § 34-1003a. In applying this admittedly broad statutory standard to lesser-known candidates, the Secretary testified he considered recommendations of his staff, materials submitted by the candidates, and impressions formed by personal experience. Although the national scope of the news coverage of the candidate was a factor, there was no weighting of the number or length of articles published about each candidate. The Secretary

maintained no clipping service, and used no specific method to analyze the celebrity of presidential hopefuls. He did not evaluate the candidates' financial assets or ability to raise money, the candidates' chances of winning, the electorate's view of the candidates, or the seriousness of the candidates' platforms. The Secretary testified he considered manifestations in the media coverage of a candidate's own serious intent to pursue the presidency and serve in that office if elected.

Applying this test of seriousness to the materials submitted by plaintiff Belluso, the Secretary rejected the plaintiff's application. Secretary Poythress testified that the news articles the plaintiff chose to offer in support of his candidacy revealed a frivolous desire for office and an insincere intent to serve if elected. The Secretary's evaluations were based on the news coverage of Mr. Belluso as a "kookie" candidate. Much of the press's treatment of Mr. Belluso, which included articles in such major newspapers as the Washington Post, the Detroit Free Press, The Houston Post, and The Atlanta Constitution, focused on the plaintiff's organization of a Presidential Kookie Candidate Convention in December 1979, and plaintiff's labelling of himself as a "kookie" candidate. Among the proposals cited by the Secretary as evidence of plaintiff's insincerity was Mr. Belluso's promise that, if elected, he would sit in a rocking chair on the porch of the White House and do nothing but rock during his term of office. As manifestation of the frivolous nature of plaintiff's candidacy, the Secretary pointed to Mr. Belluso's reported hiring of "Keystone Cops" armed with water pistols and laughing gas as his substitute for Secret Service protection.

Some of the Republican members of the Selection Committee also testified. Georgia State Senator Paul Coverdell stated that "general recognition" and "seriousness" was the standard the Selection Committee applied in drawing up the final list of candidates, and that he had never heard of Nick Belluso or his candidacy until the commencement of this lawsuit. Mr. Coverdell is co-chairman of George Bush's Georgia campaign. Herbert Jones, Minority Leader of the Georgia Assembly and a member of the Reagan campaign, stated that the Secretary submitted Mr. Belluso's letter of application to the committee, but to his knowledge it was never discussed. Mr. Jones was unaware that plaintiff Belluso had an interest in, or was a member of, the Republican party.

Mr. Belluso testified as to the seriousness of his candidacy and his intent to serve if

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elected. He stated that his promise to sit in a rocking chair on the porch of the White House was merely a symbolic way of expressing his belief that government should interfere less in the lives of Americans. Plaintiff presented evidence of his admittance as a Republican candidate in the South Carolina and Alabama primaries.[1] He referred the court's attention to statements in the submitted news articles that his use of gimmickry and a "kookie campaign" was only to attract media attention to his serious side. One headline, for example, states "`Kooks' Serious About Presidency.'" Defendants' Exhibit # 1. As an indication of his support in Georgia, Mr. Belluso testified that he had received two percent of the vote in the 1978 gubernatorial race, which he entered as a Democrat.[2] Mr. Belluso also asserted that he has a serious ten-point platform that includes such proposals as the institution of a flat-rate income tax, a change to a four-year federal

budget, a return to the gold standard, and the opening up of federal lands in the western United States to homesteaders. When asked why he never contacted any other Republican members of the Selection Committee besides Chairman Patton about his candidacy, Belluso said he felt that other members would consider him a threat to their own favorite candidates.

Plaintiff also offered into evidence the packets of materials sent to the Secretary of State by other minor presidential candidates requesting a place on the major parties' ballots. Richard B. Kay sent a letter and an affidavit announcing himself to be a Democratic candidate and attesting to the nationwide media attention he had received. The letter was accompanied by copies of some of the news stories written about his candidacy, and an unfiled complaint threatening Secretary Poythress with the institution of a lawsuit if Kay's name was excluded from the Democratic ballot. Plaintiffs' Exhibit # 1. Cliff Finch, former Governor of the State of Mississippi, sent only a telegram declaring his candidacy and requesting a place on the Democratic list. Plaintiffs' Exhibit # 2. Benjamin Fernandez sent a letter and copies of news stories about his candidacy that had appeared in such papers as The New York Times, The Miami Herald, and The Seattle Times. Plaintiffs' Exhibit # 3. The Secretary included Governor Finch's name on the original list, and Mr. Kay and Mr. Fernandez were added by the Selection Committee. Secretary Poythress testified that if he had received Kay's or Fernandez's applications in time, he would have included Fernandez on the original Republican list, and "very likely" would have included Kay on the Democratic list.

Mr. Belluso and the two registered voters who have joined him in this action challenge the Georgia statute underlying the candidate selection process as unconstitutional on its face, and unconstitutional as applied to plaintiff Belluso. Plaintiffs assert they will suffer irreparable harm if Mr. Belluso's name is excluded from the Republican ballot in the March 11th Presidential Preference Primary.

INJUNCTIVE RELIEF

Plaintiffs seek to enjoin the printing or dissemination of the Republican ballot without Mr. Belluso's name on it. This court may grant plaintiffs the relief they request only if they satisfy four prerequisites:

(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and

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(4) that granting the preliminary injunction will not disserve the public interest.

Morgan v. Fletcher, 518 F.2d at 239 (citations omitted). Because we find that plaintiffs have failed to satisfy the four-pronged test, we must deny plaintiffs' request for injunctive relief.

1. Likelihood of Success on the Merits

As a threshold matter, the plaintiffs must demonstrate that Belluso's exclusion from the Republican primary ballot constitutes state action, so that they may challenge the exclusion under federal constitutional principles. The defendants argue there is no state action because ultimate control over access to the primary ballots lies with party representatives acting in a purely political, as opposed to governmental, capacity. The plaintiffs respond that as involuntary members of a statutorily created and funded commission, the Republican party representatives act as state officials. The plaintiffs also suggest that even internal party decisionmaking may constitute state action, see Gray v. Sanders, 372 U.S. 368, 374-75, 83 S.Ct. 801, 805, 9 L.Ed.2d 821 (1963), and further claim that at least the initial determination of the Secretary of State in drawing up the list involves a governmental act conferring or withholding a tangible benefit. We need not, however, resolve the state action debate here; we will assume the presence of state action and resolve the controversy upon an evaluation of the substantive constitutional considerations presented.

Under usual principles of equal protection analysis, a statute is subject only to minimum, or low level, scrutiny unless it draws a suspect classification or infringes a fundamental interest. See, e. g., City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976). This case involves no suspect classification. Consequently, we may suppose that unless Belluso's right to inclusion on the Republican Presidential Preference Primary ballot (or the remaining plaintiffs' right to have him so included) is constitutionally "fundamental," our only inquiry is one of minimum scrutiny: whether the Georgia provision excluding Belluso rationally advances a legitimate state purpose. We would have little difficulty exonerating Ga.Code § 34-1003a under this standard. On the other hand, if the ballot access right involved is fundamental, its abridgement would be subject to strict scrutiny and would be upheld only if justified by a "compelling state interest" and where no "less restrictive alternative" could attain that interest. See, e. g., Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 991, 59 L.Ed.2d 230 (1979).

The difficulty here lies in deciding what degree of scrutiny should apply to the Georgia law. Our investigation is complicated by the fact that the cases do not entirely accept the two-tiered equal protection analysis discussed above, under which state action is judged either very strictly or very uncritically. Rather, they identify ballot access rights as being close to, but not quite, fundamental. The cases therefore employ a middle standard of scrutiny which we will conclude is one of "reasonable necessity." Moreover, we will determine that the ballot access right implicated in this case, because it concerns only a primary election, is even less fundamental than that defined in the existing Supreme Court decisions. We will apply a relatively lenient test approaching that of ordinary minimum scrutiny. Under this standard we will conclude that Ga.Code § 34-1003a is neither unduly burdensome nor irrational. We will therefore reject the plaintiffs' claims to its validity under the fourteenth amendment.

The first in the series of ballot access cases both defined the nature of the constitutionally implicated interests and illustrated clearly impermissible burdens on those interests. In Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), the Court struck down particularly harsh restrictions to ballot access for presidential elections. Ohio required any political party that had failed to receive ten percent of the vote in the previous gubernatorial election to file a petition signed by a number of registered voters equal to at least fifteen

percent of the votes cast in that election. The parties had to file their petitions nine months before the election in which they sought to participate; to comply with extensive and costly organizational demands; and to hold primary elections and nominating conventions. With these restrictions — and by prohibiting write-in votes — Ohio virtually excluded minority parties and thus denied them equal protection of the law. The Court identified two interests behind a fourteenth amendment right-to-access rule: "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." 393 U.S. at 30, 89 S.Ct. at 10.

Subsequent cases have added precision to the Williams rule by identifying permissible or impermissible ballot restriction schemes. The next major decision, Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 127, 27 L.Ed.2d 114 (1971), upheld with little elucidation of relevant constitutional principles, Georgia's five percent petition requirement.[3] See Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); American Party v. White, 415 U.S. 724, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974). Unlike Jenness, these cases sometimes characterize the right to ballot access as fundamental and employ the language, if not always the analysis, of strict scrutiny. See Illinois State Board of Elections v. Socialist Workers Party, 99 S.Ct. at 992-93 (Blackmun, J., concurring); L. Tribe, American Constitutional Law 783 (1978).

The justification for restricting access to the ballot is two-fold. The state has a legitimate interest in avoiding "laundry list" ballots that confuse voters and in protecting the integrity of the democratic process from frivolous candidacies. Cases employing strict scrutiny language have termed this state interest "compelling." See, e. g., Illinois State Board of Elections v. Socialist Workers Party, 99 S.Ct. at 991. A thoughtful exposition — and reconciliation — of the conflicting concerns is set forth in Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). There, the Court invalidated California's requirement that candidates for congressional, state, and county offices pay a nonrefundable filing fee of one or two percent of the annual salary, depending upon the position sought. 415 U.S. at 710, 94 S.Ct. at 1317. The Court held that the state could impose only those limitations "reasonably necessary" to screen out non-serious candidates. Because California left no alternative to the payment of a filing fee, it overburdened access to the ballot:

Thus, California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.

415 U.S. at 718, 94 S.Ct. at 1321.

We adopt the Lubin v. Panish rule as a general statement of relevant equal protection analysis. According to that decision, the right to appear on a general election ballot is constitutionally favored but less than fundamental. The right may be burdened, but only by means reasonably necessary to limit the field to serious candidates. "Seriousness" comprehends two factors, the first of which is a candidate's actual popularity and, by implication, his reasonable chances of success. The state may condition access upon the showing of a

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"significant, measurable quantum of community support." American Party v. White, 415 U.S. at 782, 94 S.Ct. at 1307. In addition, the state may judge seriousness in terms of a candidate's subjective "desire and motivation." Lubin v. Panish, 415 U.S. at 714, 94 S.Ct. at 1319. We next inquire how the rights asserted by the plaintiffs differ from those just defined.

The critical factual distinction between our case and the cases decided by the Supreme Court is that plaintiff Belluso seeks inclusion in a preferential primary that has dubious effect as opposed to a general election that has finality. This distinction has several consequences. The first is that Belluso's exclusion from this particular ballot in no way bars him from running for President. Denied the chance to claim the Republican nomination,[4] Belluso may nevertheless seek the Presidency in the general election independently or as the candidate of a smaller political party. This constitutionally protected right, see McCarthy v. Askew, 420 F.Supp. 775, 779 (S.D.Fla.), aff'd, 540 F.2d 1254 (5th Cir. 1976), is given effect in Georgia under Ga.Code § 34-1001. Similarly, the right of Belluso's supporters to vote for him in the general election stands unaffected.

The second reason for the lowered importance of the right to inclusion on a primary ballot is the traditionally recognized autonomy of the political party's internal decisionmaking. It is true that certain aspects of the primary process have been subject to careful equal protection scrutiny. See, e. g., Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973) (invalidating an Illinois party affiliation requirement); Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (applying the one person-one vote rule to primary elections); Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 1301 (1932) (striking down regulations of Texas State Democratic Executive Committee barring blacks from voting in party primaries). But these exceptions involve voting itself and leave undiminished the long-standing respect for the autonomy of political parties. See Ripon Society v. National Republican Party, 173 U.S.App. D.C. 350, 525 F.2d 567, 584-86 (D.C.Cir. 1975) (en banc), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). Parties have long been free to strategize and act — at least before the voting begins — in the closed and clouded atmosphere of the smoke-filled room. Parties exercise rights of free speech and association when they assert this prerogative. Id. The plaintiffs' claims are weakened to the extent that the plaintiffs seek constitutional interference with internal party decisionmaking.

Third, we think that first amendment guaranties of free association, which explicitly underly the right-of-access decisions, are less substantial in the present context. Belluso asserts no group's interest in advancing his candidacy. His claimed need to "associate" with an unwilling partner, the Republican party in Georgia, is not a first amendment right. Indeed, to the degree

that rights of association are implicated, we think these rights militate in favor of leaving a party free to limit access to its own primary ballot.

Finally, there is much truth in the defendants' characterization of the Georgia Presidential Preference Primary as a "beauty contest." The balloting merely effects a recommendation to the parties, which are free to accept or ignore the results. The plaintiffs' constitutional interest in Belluso's inclusion is decreased because the importance of the primary lies within the discretion of the party.

Because Belluso seeks inclusion on a primary ballot, then, his right to access is even less "fundamental" than if he wished to participate in a general election. The standard of reasonableness by which the Georgia

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law will be judged is correspondingly lower and approaches the rationality standard of minimum scrutiny. Under this test we find Ga.Code § 34-1003a valid.

The facial reasonableness of the Georgia law is established first because it is not standardless, or arbitrary, and second because it does not of necessity operate to exclude from the primary ballot candidates with a constitutional right to inclusion. The plaintiffs make much of the section's vagueness; its supposed delegation to a single official, the Georgia Secretary of State, of the authority to interpret its meaning; and its allegedly standardless grant of power to exclude even a candidate designated by the Secretary of State to a unanimous trio of party officials. Contrary to these contentions, however, the law does furnish usable guidelines. While Georgia has eschewed the more objective approach taken by states that have imposed filing fees and petition requirements, it has sought a principled means of evaluating a candidate's seriousness, on the theory that his or her recognition in the media demonstrates a minimum degree of public support. Georgia's test may not be the most desirable — it is certainly not the most specific — but it is neither irrational nor even unrealistic. The Secretary of State testified that he implies in section 34-1003a an additional and complementary consideration of a candidate's sincerity. Thus construed, the law contemplates precisely the objective/subjective seriousness inquiry set out in Lubin v. Panish, 415 U.S. at 717-19, 94 S.Ct. at 1320-21. Moreover, the Republican party defendants testified that they applied the same test of seriousness as did the Secretary of State, and we think this application is implicitly required by the statute.

Nor does section 34-1003a contain the infirmity that doomed restrictions to ballot access in cases such as Lubin v. Panish or Williams v. Rhodes. The laws there necessarily kept off the ballot some classes of candidates with constitutional rights to inclusion. Those with sufficient seriousness were excluded by the California law if they could not afford the filing fee and by the Ohio law if they could not produce an oppressively high number of petition signatures or meet other requirements. By contrast, the Georgia law does not inevitably bar any candidate whom the Constitution requires be allowed on the primary ballot.

Because of the absence of inevitable exclusion and because the provision is not wholly arbitrary, we reject the plaintiffs' challenge to the facial validity of Ga.Code § 34-1003a under the forgiving test of equal protection scrutiny we deem applicable. The plaintiffs also claim the law has been unconstitutionally applied. This attack fails because it is unsupported by the evidence presented at the preliminary injunction hearing.

The plaintiffs' challenge to Georgia's application of section 34-1003a to Belluso takes two forms. First, they claim that the law has been employed to exclude him from the Republican primary ballot when the seriousness of his candidacy grants him a constitutional right to inclusion. Even under the general election cases, however, Belluso's showing on this account is unpersuasive. The evidence casts grave doubt upon his subjective seriousness, and he has marshalled no facts demonstrating a "significant, measurable quantum of community support," American Party v. White, 415 U.S. at 782, 94 S.Ct. at 1307. Because Belluso has made an unsuccessful proffer of his seriousness, he may not assert a right to a place on the Republican ballot.

Second, Belluso contends that section 34-1003a has been applied inconsistently since other candidates permitted on the Republican ballot have less popular support than he. Assuming that such circumstances would violate Belluso's equal protection rights, they have not been proven here. The other contenders submitted materials indicating press coverage of viable and earnest candidacies. By contrast, Belluso's failure to show his own candidacy to be serious dooms his claim of inconsistent application of the law. In sum, we reject the plaintiffs' attack upon Ga.Code § 34-1003a, both on its face and as applied.

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2. Irreparable Injury to Plaintiffs

The state Presidential Preference Primary is scheduled to be held March 11, 1980. Plaintiffs claim that permitting the Republican primary ballot to be printed and distributed without Mr. Belluso's name on it will cause them irreparable injury by prohibiting plaintiffs from voting for Mr. Belluso as a Republican candidate, and by barring Mr. Belluso from being considered as a Republican candidate for President. The court does not find that the alleged present threat of harm to plaintiffs constitutes irreparable injury.

The Secretary of State testified that although the printing of the ballots is "substantially completed," new ballots could be printed on a minimum of seven days notice. Any alleged harm to plaintiffs, therefore, will not become "irreparable" until approximately March 3rd or 4th. Even assuming plaintiffs were to prevail on the merits of their claim, they have not shown they are in sufficient jeopardy to justify the extraordinary remedy of injunctive relief.

3. Harm to Defendants

In determining the propriety of preliminary injunctive relief, the court must assess the disruptive effect the granting of such relief would have on defendants, and balance that harm against the threatened injury to plaintiffs. Within fifteen days of the date of this order, Georgia

will hold the state's Presidential Preference Primary. Secretary of State Poythress testified that the printing of the ballots is "substantially completed." Reprinting the ballots now would cause the state to expend a considerable sum of the taxpayers' money. Without presenting any supporting evidence, defendants' counsel represented to the court that reprinting the ballots would cost the state between $100,000 and $150,000. Balancing the threatened harm to defendants if an injunction issues from this court, against the threatened harm to the plaintiffs, we believe that the tangible risk to defendants is the more substantial.

4. The Public Interest

Injunctive relief may only be granted if the court determines that such relief will not disserve the public interest. The public has a strong interest in the careful use of its money for worthwhile purposes. Reprinting the primary ballots at this time would cause the expenditure, perhaps needlessly, of substantial public funds. Moreover, for this court to enjoin the printing and distribution of primary ballots pending the addition of plaintiff's name to the ballots would cause considerable disruption in the electoral process. The public also has a strong interest in conducting and participating in an orderly Presidential Preference Primary. The damage to this interest that would be caused by granting plaintiffs the relief they request, when compared to the dubious merits of plaintiffs' claims, requires that injunctive relief be denied.

Accordingly, the court DENIES the plaintiffs' prayer for preliminary injunctive relief. The plaintiffs shall have two days in which to report to the court their intention, if any, to submit further evidence or argument in support of their prayers for permanent injunctive relief, declaratory relief, and money damages. If no report is received within the prescribed two-day period, our conclusion set forth herein that the plaintiffs' constitutional rights have not been abridged shall stand as a final adjudication of all claims in the action and the Clerk of the Court shall enter final judgment in the defendants' favor.

IT IS SO ORDERED.

Notes:

1 According to plaintiffs testimony, Alabama requires potential primary candidates to submit a $100 filing fee and a petition signed by 600 registered voters. South Carolina requires only a $1500 fee.

2 The court ruled inadmissible as multiple hearsay the results of a poll taken in Atlanta purportedly showing that of 213 registered voters reached by telephone, 29 had heard of Nick Belluso, but only 5 had heard of the Republican candidate Benjamin Fernandez or the Democratic candidate Richard B. Kay.

3 Georgia also imposed a filing fee, which was not contested before the Court. Georgia has since reduced the number of signatures required from 5 to 2½ percent. See Ga.Code § 34-1010(b).

4 It is also true that the law merely regulates designation of Georgia delegates to the Republican national convention, so that Belluso may still be nominated if he obtains sufficient support in other states. In examining the

validity of the statute, however, we ought to consider that every state could enact similar legislation and that Belluso could, therefore, be precluded from any chance of nomination. Hence, we equate exclusion from the Republican primary ballot in Georgia with denial of the chance to run for the presidency as a Republican.