SUPREME COURT OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

Avella v. Batt[1]
(decided July 20, 2006)

In September 2004, five registered voters in Albany County[2] commenced suit against various political parties and the New York State Board of Elections.[3] The plaintiffs alleged that the respondents, the Working Families Party ("WFP")[4] entered into a conspiracy to illegally aid David Soares's campaign in the Democratic primary for Albany County District Attorney.[5] Further, the plaintiffs argued that the defendants violated Election Law section 2-126, which prohibited political parties from contributing to another party's candidate in a

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[1] Avella v. Batt (Avella II), 820 N.Y.S.2d 332 (App. Div. 3d Dep't 2006).

[2] Avella v. Batt (Avella I), 785 N.Y.S.2d 305, 307 (Sup. Ct. 2004). The five Albany County voters are:

> Mr. Michael A. Avella is the Treasurer of the New York Republican State Committee; Shawn Marie Levine is the Executive Director of the New York State Conservative Party; Lawrence Rosenbaum was the Chairman of the Albany County Independence Party; and Mr. Steven D. Moran and Robert Haggerty are registered members of the Albany County Democratic Party.

Id.

[3] *Id.*

[4] *Id.* The respondents are:

> Friends of David Soares, the political committee formed to promote Mr. Soares candidacy for Albany County District Attorney; the Treasurer of the Working Families Party (WFP) . . . ; the Center for Policy Reform . . . , a not-for-profit District of Columbia corporation; and the New York State Board of Elections and the Albany County Board of Elections.

Id.

[5] *Id.*

primary election.[6] In response, the respondents, with the exception of the Boards of Elections, argued that section 2-126 was unconstitutional because it inhibited First Amendment[7] rights of political expression and association.[8] The New York Supreme Court rejected the respondents' First Amendment claims and relied on *Baran* v. *Giambra*[9] in holding that section 2-126 served a compelling government interest.[10] Additionally, the court found that WFP violated section 2-126 when it spent party funds to promote Soares's campaign during the Democratic primary.[11] However, the Appellate Division, Third Department, reversed the supreme court's holding, finding section 2-126 to be unconstitutional.[12]

From July 7, 2004 through September 24, 2004, WFP spent approximately $129,000.00 on Soares's campaign, of which $122,000.00 was spent before the primary election.[13] Two weeks

[6] N.Y. ELEC. Law § 2-126 (McKinney 2006) provides:

> No contributions of money, or the equivalent thereof, made, directly or indirectly, to any party, or to any party committee or to any person representing or acting on behalf of a party or party committee, or any moneys in the treasury of any party, or party committee, shall be expended in aid of the designation or nomination of any person to be voted for at a primary election either as a candidate for nomination for public office, or for any part position.

[7] U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances."

[8] *Avella I*, 785 N.Y.S.2d at 307.

[9] Baran v. Giambra, 705 N.Y.S.2d 740 (App. Div. 4th Dep't 1999).

[10] *Id*. ("We reject the contention of respondents that *Election Law § 2-126* unconstitutionally inhibits their First Amendment rights. *Election Law § 2-126* serves a substantial government interest in removing both actual corruption and the appearance thereof from the electoral process.").

[11] *Avella I*, 785 N.Y.S.2d at 312.

[12] *Avella II*, 820 N.Y.S.2d at 340.

[13] *Id*. at 337.

before the primary election, WFP sent four separate mailings to Albany County voters.[14] The mailings specifically addressed the Democratic primary between David Soares and Paul Clyne, but failed to mention the other candidates running in the general election.[15] Additionally, WFP reported its contributions to the Board of Elections as expenditures for a primary election and the only primary in September of 2004 was the Albany County District Attorney Democratic primary.[16]

The respondents claimed that section 2-126 violated the First Amendment's free speech and association protections by limiting its communication with the public.[17] Recognizing that campaign contribution and expenditure jurisprudence in the United States Supreme Court has evolved greatly since the enactment of section 2-126,[18] the *Avella* court adopted the Supreme Court's strict scrutiny analysis.[19] The *Avella* court held that the Board of Elections failed to demonstrate that avoiding corruption and/or the appearance of corruption was a sufficient justification to tolerate the state's interference with a party's expenditures.[20] Therefore, section 2-126 was unconstitutional because it placed too great a burden on WFP's

[14] *Id.*

[15] *Id.*

[16] *Avella I*, 785 N.Y.S.2d at 311.

[17] *Id.* at 307.

[18] *Avella II*, 820 N.Y.S.2d at 337 ("It must be noted that section 2-126 is derived from legislation enacted at the turn of the 20th century as part of a package of reform . . . . Since the time that the statute was enacted, the case law of the United States Supreme Court regarding First Amendment implications of legislation regulating expenditures in connection with elections has evolved significantly.").

[19] *Id.* at 340.

[20] *See id.* at 339-40.

First Amendment rights.

The *Avella* court validated its holding by relying on three United States Supreme Court cases. The *Avella* court utilized the Supreme Court's two-step analysis found in *Eu v. San Francisco*.[21] First, the *Avella* court looked at whether the law infringed upon the First Amendment, and then if an abridgment existed, the court assessed whether the state had a compelling state interest to justify the interference. The court adopted Supreme Court language, explaining that: "A state's broad power to regulate elections, however, 'does not extinguish the [s]tate's responsibility to observe the limits established by the First Amendment rights of the [s]tate's citizens.' "[22] In rendering its decision, *Avella* noted that the expensive nature of communication in today's society demands that greater protection be placed on political expenditure limitations, or the most effective means of communication will be restrained unnecessarily.[23] For these reasons, the *Avella* court found that limiting political expenditures involve " 'core' First Amendment activities"[24] which must be given the "fullest and most urgent application . . . during a campaign for political office."[25]

Next, the court rejected the petitioner's state interest argument that section 2-126 advances New York's interest in preventing corruption because the need was only a " 'sufficient justification for

[21] 489 U.S. 214 (1989).

[22] *Avella II*, 820 N.Y.S.2d at 338 (quoting *Eu*, 489 U.S. at 222).

[23] *Id.* (" '[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money.' " (quoting *Buckley*, 424 U.S. at 19)).

[24] *Id.* at 337.

[25] *Id.* at 338 (quotation omitted).

[a] statute's contribution limitations, but it [does] not provide sufficient justification for . . . expenditure limitations.' "[26] The *Avella* court also rejected the petitioner's claim that the statute prevents "interference of one party in another party's affairs,"[27] finding that such interference was " 'highly paternalistic,' "[28] and " 'particularly egregious.' "[29] Last, the *Avella* court held that even if the petitioners could demonstrate a compelling state interest, it would still strike down the expenditure limitation because the blanket prohibition is not "narrowly tailored toward the goal of removing corruption from the electoral process."[30] Moreover, such limitations unjustifiably restrict the quality of expression and quantity of issues discussed.[31] Thus, the court found section 2-126 of New York's election law to be unconstitutional.[32]

The *Avella* court relied on the Supreme Court ruling in *Buckley v. Valeo*,[33] when it held that section 2-126 heavily burdened First Amendment rights. In 1976, *Buckley* held that limiting campaign expenditures interferes with First Amendment freedoms because the limitations place constitutionally violative restrictions on the right to political expression and association.[34] Notably, however, the Court did not find that restricting individual contribution amounts

[26] *Id.* at 339 (quoting Randall v. Sorrell, 126 S. Ct. 2479, 2488 (2006)).
[27] *Avella II*, 820 N.Y.S.2d at 339.
[28] *Id.* at 340 (quoting *Eu*, 489 U.S. at 223-224).
[29] *Id.*
[30] *Id.* at 340.
[31] *Id.*
[32] *Avella II*, 820 N.Y.S.2d at 340.
[33] 424 U.S. 1 (1976).
[34] *Buckley*, 424 U.S. at 59.

is as intrusive on First Amendment rights as expenditure ceilings are.[35]

In *Buckley*, an assortment of political parties and federal offices brought suit to challenge the constitutionality of the Federal Election Campaign Act of 1971.[36] The Act forbids "individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate for an election campaign" and limited independent expenditures by both individuals and groups to $1,000.00 a year for any " 'clearly identified candidate.' "[37]

The *Buckley* Court evaluated the constitutionality of the Act's provisions independently, but began its analysis with the general principal that the First Amendment deserves the "broadest protection . . . ."[38] Without such protection there is no way " 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[39] The Court then balanced its First Amendment concerns with the government's interest of "equalizing the relative ability of all voters to affect electoral outcomes . . . ."[40] Even when there is substantial interference with First Amendment protections, if it is demonstrated that there is a legitimate state interest, the provision can be upheld.[41] Yet, in *Buckley*, the Court found that restrictions on the amount of money an

[35] *Id.* at 28-29.
[36] *Id.* at 7-8.
[37] *Id.* at 13, 13 n.13 (quoting 18 U.S.C. § 608(e) (1970)).
[38] *Id.* at 14.
[39] *Buckley*, 424 U.S. at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
[40] *Id.* at 17.
[41] *Id.* at 25.

individual can spend on a campaign "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[42]

From this general conversation of First Amendment rights and the government's purpose of the Act, the Court turned its analysis to distinguishing the constitutional implications of regulating political contributions and expenditures.[43] The Court found that limiting contribution amounts has a constitutionally sufficient justification.[44] The limits only placed a "marginal restriction upon the contributor's ability to engage in free communication."[45] Moreover, there was no direct impact on "robust and effective discussion of candidates and campaign issues"[46] because the intended effect of the limitation was to ensure that candidates receive contributions from a greater number of supporters; thus forcing large campaign supporters to apply such funds to direct political expression.[47] Based on this rationale, the Court found that such restrictions were not intolerable intrusions on First Amendment rights and could survive constitutional scrutiny.[48]

However, unlike contribution limits, the Court treated

[42] *Id.* at 19.

[43] *See id*. at 23.

[44] *Buckley*, 424 U.S. at 25-26, 29. The Appellees argued that the government has three main interests in limiting contributions. *Id.* at 25. First, to reduce corruption and the appearance thereof. *Id.* Next, to "mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of the elections." *Id.* at 25-26. Last, to allow more candidates, especially those without infinite monetary resources, access to the political arena by controlling the costs of elections. *Id*. at 26.

[45] *Id*. at 20-21.

[46] *Id*. at 29.

[47] *Id.* at 22.

[48] *Id*. at 29.

expenditure limitations with a higher level of scrutiny, holding that expenditure limitations directly restrain political expression and freedom of association.[49] The Court found that all three provisions relating to expenditure limitations—independent expenditures,[50] expenditures by candidates from personal accounts[51] and overall campaign expenditures for federal campaigns,[52] burden First Amendment protections. Generally, the effect of limiting how much can be spent on a " 'clearly identified candidate' precludes most associations from effectively amplifying the voice of their adherents"[53] and fails to serve the purported governmental interest of preventing corruption.[54] The Court arrived at this conclusion by acknowledging that communication in today's society has drastically changed, such that expenditure restrictions unavoidably burden First Amendment freedoms.[55] Moreover, the Court emphasized that in order to communicate effectively with the public, money cannot be

[49] *Buckley*, 424 U.S. at 39.

[50] *Id*. at 45. Preventing government corruption is not a sufficient justification because the Act does not attempt to eliminate those dangers; the Act only prohibits certain large contributions. If a party avoids spending money in a manner that explicitly supports or opposes the election or defeat of a candidate then there is no limitation, this loop-hole allows for the very corruption that the law was attempting to prevent. *Id*.

[51] *Id*. at 51-54. The Act's attempted limit on expenditures by candidates from his/her own personal funds to prevent corruption did not justify infringement of First Amendment rights because: first, restricting a candidates personal wealth may not necessarily ensure equality among candidates; and second, the First Amendment does not allow "restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id*.

[52] *Id*. at 54-57. The fear of the cost of federal election campaigns is not a sufficient reason to justify the restrictions on campaign spending. *Id*. at 57. "In the free society ordained by our Constitution it is not the government but the people – individually as citizens and candidates and collectively as associations and political committees – who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.*

[53] *Id.* at 22.

[54] *Buckley*, 424 U.S. at 47-48.

[55] *Id*. at 19.

restricted because the "quantity and diversity of political speech" would be substantially affected.[56] Therefore, limiting expenditures would prohibit parties from communicating effectively and efficiently with the electorate (i.e., radio, television, or mass media). Instead, limitations would unjustifiably exclude "indispensable instruments of effective political speech."[57] Thus, "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[58] Therefore, the government could not overcome constitutional scrutiny.[59]

In *Eu v. San Francisco*,[60] the Supreme Court held that banning official governing bodies of political parties from endorsing candidates in primary elections infringed upon First Amendment rights.[61] It recognized that a State could regulate political parties' internal workings when the State demonstrates that its interference is

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[56] *Id.*

[57] *Id*. ("The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event.").

[58] *Id*. at 14 (quoting *Roth*, 354 U.S. at 484).

[59] *Buckley*, 424 U.S. at 48-49.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the 'widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

Id. (quoting New York Times Co v. Sullivan, 376 U.S. 254, 266 (1964))

[60] 489 U.S. 214 (1989).

[61] *Id*. at 227-29.

necessary to ensure orderly and fair elections.[62] Similar to the statute in *Avella*, in *Eu*, the California statute in question prohibited official governing bodies of political parties from endorsing candidates in primary elections.[63] The statute also regulated the internal affairs of the political parties by having statutorily defined provisions for committee size, selection, composition, and removal of members.[64]

The Court evaluated the constitutionality of California's code in a two-step process. First, the Court assessed whether the law infringed upon "rights protected by the First and Fourteenth Amendments."[65] Next, if there was an infringement, in order to "survive constitutional scrutiny," the state must demonstrate that the law serves a compelling state interest.[66]

California asserted that the code was a "miniscule"[67] burden on First Amendment rights, however the Court found otherwise.[68] The Court found that First Amendment rights must be protected fervently, especially during elections,[69] for this is the time that " 'debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.' "[70] Accordingly, California's ban prevented parties from communicating with the voters about the candidate and whether

[62] *Id.* at 232.
[63] *Id.* at 216-17 (referring to CAL. ELEC. CODE § 11702 which has since been repealed).
[64] *Id.* at 218.
[65] *Eu*, 489 U.S. at 222.
[66] *Id.*
[67] *Id.* (quotations omitted).
[68] *Id.*
[69] *Id.* at 223.
[70] *Eu*, 489 U.S. at 223 (quoting *Buckley*, 424 U.S. at 14).

that candidate is aligned with the party's principles.[71] Also, the Court found that the ban on endorsements violated the right to association because it prevented a party from selecting "a 'standard bearer who best represents the party's ideologies and preferences.' "[72]

In an attempt to survive constitutional scrutiny, the State of California argued that the statute satisfied a compelling state interest because: 1) the ban allowed for a more stable government;[73] 2) the ban facilitated internal party stability;[74] and 3) the ban protected the electorate "from confusion and undue influence."[75] In rejecting all three arguments, the Court explained that California's elections process was not "any more stable now than it was in 1963, when the legislature enacted the ban."[76] Moreover, it was not California's role to interject its judgment for a political party[77] and confusion and undue influence were not compelling state interests.[78] Thus, the Court concluded that any restriction on a party's ability to spread its message is inherently suspect in the election context.[79]

Unlike the previous two Supreme Court cases, in *Clingman v.*

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[71] *Id.*

[72] *Id.* at 224 (quoting Ripon Soc'y, Inc. v. Nat'l Republican Party, 525 F.2d 567, 601 (D.C. Cir. 1975)).

[73] *Id.* at 225.

[74] *Id.* at 227-28.

[75] *Eu*, 489 U.S. at 228.

[76] *Id.* at 225.

[77] *Id.* at 228-29 ("While a State may regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption, there is no evidence that California's ban on party primary endorsements serves that purpose.").

[78] *Id.*

[79] *Id.* " 'State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.' " *Id.* (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 221 (1986)).

Beaver,[80] the Supreme Court held that Oklahoma's semi-closed primary system did not burden the right to association under the First Amendment.[81] In *Clingman*, Oklahoma's election law did not allow unregistered members of political parties to participate in primary elections, unless the primary was opened to Independents.[82] The Libertarian Party of Oklahoma ("LPO") notified the Board of Elections that it sought to open the upcoming primary election to all registered voters, regardless of party affiliation.[83] The Secretary of the Board of Elections allowed Independents to participate.[84] As a result, several political associations brought suit alleging that the law violated the First Amendment right to association.[85]

The Court disagreed with the petitioners' allegations. Unlike *Buckley* and *Eu*, in *Clingman*, the First Amendment infringement was minimal, thus a strict scrutiny analysis was not warranted.[86] The Court reaffirmed that " 'States may, and inevitably must, enact reasonable regulations of parties, election and ballots to reduce election and campaign-related disorder.' "[87] The election law did not affect or restrict the LPO's internal workings, nor did requiring voters to register as Independent burden their associational rights, thus it

[80] 544 U.S. 581 (2005).
[81] *Id.* at 593.
[82] *Id.* at 584.
[83] *Id.* at 585.
[84] *Id.*
[85] *See Clingman*, 544 U.S. at 585.
[86] *Id.* at 593.
[87] *Id.* (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1986)).

was found to be constitutional.[88]

Nevertheless, despite all appearances, the *Clingman* Court ruling was not a departure from the Court's previous decisions. Instead, the ruling exemplifies a reasonable election regulation that does not warrant strict scrutiny analysis. The Court found that if it required all state election regulations to satisfy strict scrutiny, it would "hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes."[89] Moreover, the Constitution does not require the Court's involvement where the regulation does not substantially burden First Amendment rights; it "leaves that choice to the democratic process, not to the courts."[90]

While the Third Department Appellate Division in *Avella* adopted the Supreme Court's more recent positions, the New York Supreme Court of Queens County, in 1929, held differently when evaluating the predecessor to section 2-126. *Theofel v. Butler*[91] came at a time when the government first started to regulate political parties.[92] Prior to such legislation, political parties were considered voluntary self-governing associations.[93] In *Theofel*, the election statute at issue was designed to " 'permit the voters to construct the organization from the bottom upwards, instead of permitting leaders

[88] *Id.*
[89] *Id.*
[90] *Clingman*, 544 U.S. at 598.
[91] 236 N.Y.S. 81 (Sup. Ct. 1929).
[92] *Id.* at 84.
[93] *Id.*

to construct it from the top downward.' "[94] The plaintiff challenged the Queens County Democratic Committee Chair's decision to name additional members to the executive committee and to prevent the defendant from having the "exclusive naming and designating of all candidates for the primary election."[95] The court found that the chairman's decision violated the statute because primary nominations were intended to be left in the hands of the party members.[96] Thus, the court held that because "all citizens have equal rights in primaries . . . party funds must not be expended for primary purposes."[97]

The *Avella* court, however, did not follow the antiquated decision of *Theofel*[98] because its holding is no longer routinely applied in New York courts. For example, prior to *Avella* the Appellate Division, Fourth Department, in *Baran v. Giambra*,[99] addressed the constitutionality of section 2-126 without mentioning *Theofel*. The appellate division found section 2-126 to be constitutional because it satisfied the compelling government interest analysis.[100] In *Baran*, the plaintiff alleged that Erie County Republican Committee ("ECRC") violated section 2-126 when it

[94] *Id.*

[95] *Id.* at 85. This decision was affirmed by the Appellate Division, Second Department. 235 N.Y.S. 896 (App. Div. 2d Dep't 1929).

[96] *Theofel*, 236 N.Y.S. at 86.

[97] *Id.*

[98] *Avella II*, 820 N.Y.S.2d at 337 ("Since the time that the statute was enacted , the case law of the United States Supreme Court regarding the *First Amendment* implications of legislation regulating expenditures in connection with elections has evolved significantly."). While the concerns of giving voters equal rights during primary elections was a compelling reason for the courts to uphold expenditure restrictions at the turn of the century, today's means of communication have created different implications on First Amendment rights. *Id.* at 338-39.

[99] 705 N.Y.S.2d 740 (App. Div. 4th Dep't 1999).

[100] *Id.* at 741.

expended funds in support of the defendant, Joel Giambra—a candidate for County Executive.[101] However, when the ECRC expended its funds, Giambra had not filed a petition to seek ECRC's nomination.[102] Thus, the appellate division found that Giambra did not violate section 2-126 because Giambra was not a person " 'to be voted for at a primary election.' "[103] Accordingly, the court briefly dismissed the constitutional claim because it served New York's interest in preventing corruption.[104] Moreover, the fourth department found that there was no infringement of First Amendment rights because the law did not prevent endorsements of candidates.[105]

Interestingly, the *Baran* court cited to United States Supreme Court cases like *Eu* and *Buckley*, but there was little to no explanation of how or why section 2-126 was constitutional. The *Baran* court simply found section 2-126 to satisfy the compelling state interest of preventing "corruption and the appearance thereof."[106]

Currently, New York follows Supreme Court precedent in deciding the constitutionality of campaign finance and expenditure limits. The *Avella* court followed the Supreme Court's reasoning with extensive explanation. The court's analysis mimicked the United States Supreme Court's two-part test, set forth in *Eu*: first, the *Avella* court addressed why section 2-126 unduly burdened the First Amendment; and second, the court discussed why section 2-126 was

[101] *Id*.
[102] *Id.*
[103] *Id.* (citing N.Y. ELEC. LAW § 2-126).
[104] *Baran*, 705 N.Y.S.2d at 741.
[105] *Id*.
[106] *Id*.

not narrowly tailored and did not satisfy a compelling state interest. Therefore, *Avella* provides a concrete roadmap, identical to federal jurisprudence, for testing the constitutionality of election laws.

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