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IN THE SUPREME COURT OF FLORIDA

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The LIBERTARIAN PARTY OF FLORIDA; the LIBERTARIAN PARTY OF FLORIDA EXECUTIVE COMMITTEE; and ROBERT WILSON,

Petitioners,

v.

CASE NO. 87,342

JIM SMITH, in his official capacity as Secretary of State; DOROTHY JOYCE in her official capacity as Director of the Division of Elections,

Respondents.

______/

On Discretionary Review from the District Court of Appeal First District of Florida

ANSWER BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

ISSUE I

SECTION 99.103, FLORIDA STATUTES, IS A PROPER EXERCISE OF THE LEGISLATURE'S APPROPRIATIONS POWER THAT DOES NOT VIOLATE THE U.S. CONSTITUTION

A. Introduction 4

B. Standard of Review 5

C. Section 99.103 Under the U.S. Constitution . . . 10

ISSUE II

SECTION 99.103, FLORIDA STATUTES, IS A PROPER EXERCISE OF THE LEGISLATURE'S APPROPRIATIONS POWER THAT DOES NOT VIOLATE THE FLORIDA CONSTITUTION
. . . . 23

ISSUE III

IF SECTION 99.103, FLORIDA STATUTES, IS UNCONSTITUTIONAL, IT MUST BE STRICKEN IN ITS ENTIRETY
. . . . 26

CONCLUSION 32

CERTIFICATE OF SERVICE 33

APPENDIX 34

TABLE OF CITATIONS

CASES	PAGE(S)
Adams v. Dickinson, 115 S.Ct. 2608 (1995)	31
American Party v. White, 415 US. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974)	7
Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)	passim
Boudreau v. Winchester, 642 So.2d 1 (Fla. 4th DCA 1994), *review den.*, 651 So.2d 1192 (Fla. 1995)	20,21
Buckley v. Valeo, 424 U.S. 1, 70, 96 S.Ct. 612, 659, 46 L.Ed.2d 659 (1976)	passim
Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972)	7
Burdick v. Takushi, ___ U.S. ___, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)	7,8,21
Butterworth v. Republican Party, 604 So.2d 477 (Fla. 1992)	21,25
Cramp v. Board of Public Instruction of Orange Co., 137 So.2d 828, 830 (Fla. 1962)	passim
Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994), *cert. den. sub. nom.* Adams v. Dickinson, 115 S.Ct. 2608 (1995)	31,32,33
Dept. of Revenue v. Magazine Publishers of America, Inc., 604 So.2d 459 (Fla. 1992)	28,29
Eu v. San Francisco Cty. Democratic Cent. Comm. 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989)	7
Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992)	6,9,17

Grove City College v. Bell, 465 U.S. 555, 575,
104 S.Ct. 1211, 1222, 79 L.Ed.2d 516 (1984) 16

Heller v. Doe, 113 S.Ct. 2637, 2642 (1993) 22

Illinois State Board of Elections v. Socialist Workers Party
440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) 7

In Re Estate of Caldwell, 247 So.2d 1, 3 (Fla. 1971). 25

Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970,
29 L.Ed.2d 554 (1971) 7

Libertarian Party of Florida v. Smith, 665 So.2d 1119
1121 (Fla. 1st DCA 1996) 4

Little v. Fla. Dept. of State, 19 F.3d 4, 5
(11th Cir. 1994), *cert. denied*, 115 S.Ct. 483 (1994) passim

Lubin v. Panish, 415 U.S. 709, 717-19, 94
S.Ct. 1315, 1320-1, 39 L.Ed.2d 702 (1974) 7,11

Madole v. Barnes, 229 N.E.2d 20 (1967) 17,18

McKesson Corp. v. Division of Alcoholic Beverages
& Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) 32

McNamee v. Smith, 647 So.2d 162
(Fla. 1st DCA 1994) 19,20

Munro v. Socialist Workers Party, 479 U.S. 189, 107 S.Ct.
533, 93 L.Ed.2d 499 (1986) 7,8,22

Norman v. Reed, 502 U.S. 279, 112 S.Ct. 698, 116
L.Ed.2d 711 (1992) 7

Rust v. Sullivan, 500 U.S. 173, 111 S.Ct.
1759, 114 L.Ed.2d 233 (1991) 15,17

Schmitt v. State, 590 So.2d 404, 415
(Fla. 1991) 27,28

Smith v. Butterworth, 866 F.2d 1318, 1321 (11th Cir. 1989) 28

Social Workers Party v. Rockefeller, 314 F.Supp. 984 (S.D.N.Y. 1970) 17,18

State v. Dodd, 561 So.2d 263 (Fla. 1990) 24,25

State v. Fla. Police Benevolent Assoc., 613 So.2d 415, 418 (Fla. 1992) 6

State v. Slaughter, 574 So.2d 218, 220 (Fla. 1st DCA 1991) 25

Storer v. Brown, 415 U.S. 724, 736, 94 S.Ct. 1274, 1282 (1974) 7,19

Treiman v. Malmquist 342 So.2d 972 (Fla. 1977) 24,25

Wetherington v. Adams, 309 F.Supp. 318 (N.D. Fla. 1970) 21

Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) 7

OTHER AUTHORITIES

42 U.S.C. §1983 33

Florida Statutes

Section 99.103 passim

Section 99.096 passim

Section 99.061 5,19,20

Section 99.092 5,19,26

Section 212.21 29

Laws of Florida

Chapter 29935 29

Chapter 57-62 29

STATEMENT OF THE CASE

Respondents[1] accept Petitioners' statement.

STATEMENT OF THE FACTS

The State accepts the Party's statement.

SUMMARY OF THE ARGUMENT

Issue I: Section 99.103 Under The U.S. Constitution

Section 99.103(1), Florida Statutes, provides that a portion of filing fees, after collection, must be rebated to the executive committees of major--but not minor--political parties. As the Party strongly urges, §99.103 is not a ballot *access* statute. Rather, the statute is a post-ballot measure reasonably designed to discourage splinter parties by encouraging growth of non-factional parties. It does through very modest financial support (partial rebate of filing fees) of major parties only.

Nothing in the decisions announced by any court limits the State to pre-ballot measures. Moreover, numerous federal and state decisions have held that discouraging factionalism is a rational basis for ballot access statutes, which raise far more serious First Amendment concerns. If discouraging factionalism is sufficient to sustain a law affecting a candidate's ability even to get on the ballot, then it must also be sufficient to sustain a far more peripheral law as to rebate of filing fees.

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[1]Respondents will be referred to as the "State." Unless distinguished for specific purposes, Petitioners will be referred to as the "Libertarian Party" or the "Party."

Section 99.103 directs how of public money, originally collected as filing fees, is to be appropriated. Consequently, it has minimal, if any, First Amendment implications. Under the U.S. Supreme Court's decisions in Anderson and Burdick, *infra*, scrutiny of the statute is very much relaxed. In essence, the test becomes whether there is a rational basis for rebating fees to major party candidates only.

Applying a rational basis test, §99.103 can reasonably be said to strengthen major parties through modest financial support of their executive committees, and thereby discourage factionalism. Since minor party candidates can avoid a filing fee simply by executing a hardship affidavit, any First Amendment implications are minimal and are overcome. Section 99.103 is sound under the U.S. Constitution.

Issue II: Section 99.103 Under The Florida Constitution

Political parties and candidates have rights of political association and participation under both the U.S. and Florida Constitutions. The Party, however, has not shown its Florida rights are more extensive than its federal rights. Since it passes muster under the U.S. Constitution, §99.103 also passes muster under the Florida Constitution.

Issue III: Severance Is Not Available

While nominally attacking all of §99.103(1), the Party asks that only one of the statute's clauses be declared unconstitutional; so that minor parties, as well as major parties, may receive filing fee rebates. The Party has not demonstrated that deleting the challenged clause would accomplish the Legislature's purpose, and has not demonstrated that the

Legislature would have passed §99.103(1) with the challenged clause deleted. This court cannot make such a decision for the Legislature.

If the differing treatment of major and minor parties under subsection (1) of §99.103 is unconstitutional, all of §99.103 must be invalidated. Doing so leaves the Legislature with the opportunity to enact a new statute providing rebates to all parties; or, by doing nothing, providing rebates to *no* parties. Under this Court's recent decision in Kuhnlein, the Legislature is entitled to this opportunity.

ARGUMENT

ISSUE I

SECTION 99.103, FLORIDA STATUTES, IS A PROPER EXERCISE OF THE LEGISLATURE'S APPROPRIATIONS POWER THAT DOES NOT VIOLATE THE FIRST AMENDMENT

A. Introduction

The Party's argument in part A of Issue I is totally beside the point. Weighing mightily against the First District's rationale, the Party fails to argue against the holding. Instead, the Party derides the decision below, complaining that the court relied heavily on cases involving ballot access. The State notes only that the First District clearly and correctly declared:

> the challenged statute is not a ballot access provision that ordinarily implicates substantial voting, associational and expressive rights ... [r]ather, §99.103 is merely an appropriation of some portion of the filing fees that both sides concede are lawfully collected from candidates for office.

Libertarian Party of Florida v. Smith, 665 So.2d 1119, 1121 (Fla. 1st DCA 1996).

Otherwise, only one of the Party's observations merits response. The Party quotes the Fulani decision, *infra*, for the undisputed point that a state cannot use a fee to decide who can be on the ballot. (IB, p. 7) Throughout this litigation, both sides and the courts have agreed that §99.103 does not involve really involve ballot access.[2] The conditions for appearing on

[2]The Party's motion for summary judgment declared: "The election law being challenged is not a ballot-access law; that is a significant factor in this case." (R 65)

a ballot must be met before a candidate may obtain a refund. A major party candidate obtains a fee rebate by virtue of being nominated. Under §99.061(1), a minor party candidate who fails to get sufficient signatures is refunded the entire qualifying fee, which includes the filing fee.[3]

From the outset, the Party admits §99.103 is a *post*-ballot measure, but fails to grasp that it is also an appropriations law reasonably designed to discourage factionalism. Nothing in the decisions of any court limits the State to pre-ballot measures. The Party's disagreement with the First District's rationale is of no moment.

The remainder of the State's answer to the first issue will address the standard of review and the statute's propriety under the U.S. Constitution. The State's answer in Issue II will address the statute's propriety under the Florida Constitution, subsuming Petitioners' second and third issues. In Issue III, the State will address whether severance is proper if the challenged clause in §99.103(1) is held unconstitutional.

B. Standard Of Review

Section 99.103, Florida Statutes, does not impose a filing fee or affect access to the ballot. Before the trial court, the Party attached significance to the fact that the statute does

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[3]Under §99.092, a qualifying fee has three components: a filing fee, an election assessment, and a party assessment when applicable. The filing fee component represents 4.5% of the salary of the office sought. Initially, the state retains one-third of the filing fee paid by any candidate, and transfers that amount to the Election Campaign Trust Fund. §99.092(1). The remainder is distributed pursuant to §99.103.

not regulate ballot access. Before this court, the Party's argument hinges on the same fact. (IB, p. 6-8)

Section 99.103 is a statutorily-codified exercise of the Legislature's appropriations power. In essence, the statute directs that State revenue--already collected through filing fees--be appropriated to specific uses. Part of such revenue goes to the Election Campaign Trust Fund; part to the General Revenue Fund; and part to rebates.

Obviously, the Legislature has exercised its appropriations power in a manner that distinguishes between major and minor parties. Only the former can obtain rebates. Nevertheless, the matter at issue here is the allocation of revenue to specific uses, a power residing solely with the Legislature. State v. Fla. Police Benevolent Assoc., 613 So.2d 415, 418 (Fla. 1992) ("Under the Florida Constitution, *exclusive* control over public funds rest (sic) solely with the legislature. [e.s.]").

Because it involves only the allocation of revenue, §99.103 must be reviewed under the least strict standard available when election-related laws are challenged. Ultimately, this test will be the "modified strict scrutiny" test announced in Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) and refined in later cases. *See* Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992) (noting that the Anderson test, rather than strict scrutiny, applies to a ballot-access case).

Over the past two decades, the United States Supreme Court has decided roughly a dozen cases involving equal protection challenges to ballot access and filing fee statutes.[4] In 1983, that Court dismissed traditional strict scrutiny in favor of a more flexible balancing approach. The Court set forth this approach in Anderson:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after

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[4] Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (invalidating Ohio ballot access requirements); Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (upholding Georgia ballot access requirements); Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (invalidating Texas filing fee requirements); Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (upholding certain California ballot access requirements and remanding others); American Party v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974) (upholding Texas ballot access requirements); Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974) (invalidating California filing fee requirements); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (invalidating Illinois signature requirements); Anderson v. Celebrezze, supra (invalidating Ohio signature requirements); Munro v. Socialist Workers Party, 479 U.S. 189, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) (upholding Washington ballot access requirements); Tashjian v. Republican Party of Conn., 479 U.S. 209, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (invalidating Connecticut ballot access requirements); Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (invalidating California ban on primary endorsements); Norman v. Reed, 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992) (invalidating certain Illinois signature requirements and upholding others); Burdick v. Takushi, __ U.S. __, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (upholding Hawaii ballot access requirements).

> weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789, 103 S.Ct. at 1570 (citations omitted). *See* Burdick, 112 S.Ct. at 2063 (the appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in Anderson); Tashjian, 479 U.S. at 213, 107 S.Ct. at 548 (courts must identify legitimacy of interests advanced by state and consider the extent to which they necessitate burdening voter rights; *citing* Anderson). *See* Munro, 479 U.S. at 196-99, 107 S.Ct. at 538-40 (upholding Washington statute requiring minor party candidates to receive at least 1% of vote in primary to be placed on ballot in general election).

Later, the Court continued to apply the Anderson test, but reconciled that test with traditional strict scrutiny requirements:

> [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.
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> * * *
>
> [A] more flexible standard applies. A court considering a challenge to a state election law must [apply the Anderson test]. Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.

Burdick, 112 S.Ct. at 2063 (citations omitted). As a result, the Supreme Court's approach to either a First Amendment or Equal Protection challenge to a ballot access limitation depends upon its view of the seriousness of the alleged constitutional infringement.

Applying the pronouncements of Anderson and Burdick, this court must subject §99.103 to scrutiny that is no more rigorous than the "rational basis" test typically applied to economic regulation. *See* Fulani, 973 F.2d at 1543 ("The approach used by the Anderson Court can be described as a balancing test that ranges from strict scrutiny to a *rational-basis* analysis, depending on the circumstances." [e.s.]).

The challenged statute does not regulate the content or manner of speech, or the ability to seek redress from governmental action. As the Party concedes, it does not regulate ballot access. The statute has no effect on a candidate's choice of parties. The obligation to pay and the amount of filing fees are established by other statutes not at issue.

The statute has no real bearing on the Petitioners' rights of political association. Petitioner Wilson chose to associate with the Libertarian Party despite the fact that he was not eligible for a rebate. Moreover, Wilson could have avoided a filing fee by submitting an affidavit pursuant to 99.096(5), Florida Statutes. That statute allows minor party candidates *only* to avoid the filing fee when the fee would be an undue burden on personal or other available resources.

Significantly and candidly, the Party acknowledged below that the "State of Florida is not required to craft a statutory scheme by which *any* political party is entitled to a portion of its candidates' filing fees." [e.s.] (R 69). Of itself, the rebate or retention of filing fees does not implicate the U.S. or Florida Constitutions.

In short, the Party's complaint concerns only the Legislature's differing exercise of its appropriations power. The Legislature has chosen to use already-collected revenue for rebates to major political parties, but not minor ones. The issue is simply whether §99.103 creates an unreasonable classification. That issue does not invoke strict scrutiny. To the contrary, the statute's First Amendment implications are so minimal that a rational basis test applies.

C. Section 99.103 Under The U.S. Constitution

Sporadically throughout Issue I, the Party contends it is "harmed" by not receiving a rebate; that it is financially penalized; etc. (IB, p. 8-9) Also, the Party quotes the Celebrezze decision for the proposition that a statute can be unconstitutional if it threatens diversity of political candidates or ideas. (IB, p. 10) Nevertheless, the Party has not adduced facts that would support such speculative claims. The parties to this case have not so stipulated. Since $1200 of Wilson's $1550 in contributions was contributed by the Libertarian Party of Santa Rosa County (R 96), the unavoidable inference is that the Party did not consider the fee a burden justifying a hardship affidavit under §99.096(5). Since Wilson reported only $100 of his own money as a contribution (R 96), he obviously used money from other sources to pay his fee and was not himself unduly burdened.

In light of these facts and inferences, there is nothing in the record that would allow this court to conclude the statute placed Wilson and the Libertarian Party's at a competitive disadvantage. This court must not accede to such speculation. *See* Buckley v. Valeo, 424

U.S. 1, 70, 96 S.Ct. 612, 659, 46 L.Ed.2d 659 (1976) (agreeing that alleged infringement of First Amendment rights through compelled disclosure of contributors was "highly speculative"); *Id.*, 424 U.S. at 93, n. 126, 96 S.Ct. at 640, n. 126 (claim that public funding of presidential campaigns would lead to government control of political parties' internal affairs "wholly speculative"); and *Id.*, 424 U.S. at 99 & n. 134, 96 S.Ct. at 673 & n. 134 (rejecting claim that one aspect of election funding law disadvantaged non-major parties, in part because "whatever merit the point may have...is questionable on the basis of the record before the Court.").

To the contrary, Wilson's decision to use much of his early campaign resources to pay a filing fee indicates that the fee must not be so debilitating as the Party would have this court believe. Also, it would seem that any Libertarian Party candidate--if the Party's resources are limited--could properly avoid the fee under the "undue burden" provision of §99.096.

The ability to avoid the fee weighs heavily in favor of the constitutionality of §99.103. See Lubin v. Panish, 415 U.S. 709, 717-19, 94 S.Ct. 1315, 1320-1, 39 L.Ed.2d 702 (1974) (absence of alternative to qualifying fee rendered California election system exclusionary as to candidates unable to pay); Little v. Fla. Dept. of State, 19 F.3d 4, 5 (11th Cir. 1994) (upholding Florida election law for judicial candidates, and noting that the law provided an alternative to filing fee).

In Little, a statute providing for judicial qualifying fees was challenged. The plaintiffs contended that the fee violated equal protection because the "allocation" (*id.* at 5) of that fee

was different for judicial and non-judicial candidates; and that the "chosen appropriation" (*id.*) violated the First Amendment. Relying solely on Buckley, the Little court recognized the challengers simply disagreed with the Legislature's use of judicial qualifying fees. The court said:

> The situation here is virtually identical to Buckley. Money in the form of filing fees is deposited into general revenue for use therein and in the campaign trust fund. Once the existence and amount of the fee is found to pass constitutional muster, as set forth above, this appropriation is the only matter that remains for objection. The above makes clear that such objection will not be heard. [e.s.]

Id. 19 F.3d at 5. Here, the Party does not challenge the existence or amount of the filing fee. They challenge only the Legislature's allocation of the fees collected.

The Buckley decision is critical to the State's argument. In that decision, the Court addressed the constitutionality of a campaign finance act limiting political contributions and providing an election campaign checkoff on federal tax returns. The Court concluded that despite the contribution limitation's tendency to discourage the First Amendment guarantees of freedom of expression and association, the government's interest in preventing either corruption or the appearance of corruption was sufficiently important to sustain the limitation. Buckley, 424 U.S. at 28-9, 96 S.Ct. at 639.

The Court also rejected the argument that equal protection required Congress to permit taxpayers to designate particular candidates or parties as recipients of their money:

> The appropriation ... is like any other appropriation from the general revenue except that its amount is determined by reference to the aggregate of the one- and two-dollar authorization on taxpayers'

> income tax returns. This detail does not constitute the appropriation any less an appropriation by Congress. The fallacy of Petitioners' argument is therefore apparent; every appropriation made by Congress uses public money in a manner to which some taxpayers object.
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> * * * *
>
> Congress need not provide a mechanism for allowing taxpayers to designate the means in which their particular tax dollars are spent.

Id.; 424 U.S. at 91-92 & n. 125, 96 S.Ct. at 668-9 & n. 125.

Other provisions regarding federal subsidies and limitations on campaign contributions and expenditures were also upheld. Significantly, the court found that public campaign financing did not "prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice." 424 U.S. at 94, 96 S.Ct. at 670-1.

A close look at the public campaign financing law (subtitle H of the 1974 Internal Revenue Code) at issue in Buckley goes far to sustain the statute challenged here. Subtitle H provided that tax checkoff revenue could be given to candidates and parties for financing party nominating conventions, and campaigns for primary and general elections. The monetary amounts available were specified, as were other conditions for voluntary participation in public financing. *Id.*, 424 U.S. at 85-90, 96 S.Ct. at 666-68.

Subtitle H also established criteria for receipt of public money according to party size. Parties were classified as "major", "minor" or "new." Major parties were those whose most recent candidate for President received at least 25% of the vote. Minor parties were those

whose candidates received less than 25%, but at least 5% of the vote.[5] All other parties were considered to be new. *Id.,* 424 U.S. at 87-8, 96 S.Ct. at 667. Only major and minor parties received public money for presidential nominating convention expenses. New parties received nothing. *Id.*

For the presidential campaigns themselves, the major party candidates received $20 million before the general election. Minor party candidates received, also before the election, a lesser amount based on votes received in the last election in relation to the votes received by the major parties. New party candidates could not receive any money until after the general election. Then, their share was computed under the same method as for minor parties-- *if* they received at least 5% of the vote in the general election. *Id.,* 424 U.S. at 88-9, 96 S.Ct. at 667-8.

In short, new party candidates were denied any pre-election public funding. If they did not get at least 5% of the popular vote, they did not get any public money. Here, the Florida Legislature has denied pre-election public funding (i.e., rebates of revenue generated through filing fees) to political parties that do not have at least 5% of the registered voters. If Congress can deny public money, generated through tax checkoffs by citizens affiliated

[5]Interestingly, the federal 5% threshold--the least proportion of the vote for a party to be considered "minor"--coincides with Florida's longer-established threshold for a party to be considered "major." Based on size alone, a minor party under federal law would be a major party under Florida law.

with any or no party; the Florida Legislature can deny partial filing fee rebates to parties which include less than 5% of the registered voters.

The Party does not attack the 5% amount as unreasonable. It does not attack the Florida Legislature's decision to base rebate eligibility on a party's pre-election size rather than votes actually cast for that party in an earlier election. It concedes that the Legislature could retain all filing fees, thereby denying rebates to all parties.

All that is opposed by the Party is the fact that major and minor parties are treated differently--the latter cannot receive public money. The Party's railings against §99.103 are essentially no different from the arguments that were unsuccessful in Buckley. The Party too must fail.

As discussed above, §99.103 has nothing to do with Libertarian Party members' ability to associate politically. It has nothing to do with Wilson's choice to affiliate with the Libertarian Party; his ability to get on the ballot; or, obviously, his voluntary decision not to submit an "undue burden" affidavit. The Party is trying to bootstrap an appropriations issue into a fundamental right.

By analogy, another recent U.S. Supreme Court case supports the Florida Legislature's decision to allocate public money through an election-related statute. In Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), the Supreme Court rejected a First Amendment challenge to regulations implementing a federal program to provide funds for family planning services. The federal law forbade use of the funds in programs where

abortion was a method of family planning. The regulations prohibited recipient programs from discussing abortion options with their clients. The Court stated:

> Within far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program.

Id. at 1773. The court found there was no intrusion on the recipients' First Amendment rights. Any limitation on employees' speech was a consequence of their decision to accept employment. Id. at 1775.

Pertinently, the Court also rejected the argument that the First Amendment rights of program recipients were violated because they were also compelled to contribute their own matching funds as a condition of receiving the federal funds. The recipients contended their privately funded speech was penalized by the restrictions. As to this, the Court stated:

> We find this argument flawed for several reasons. First, Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy. See Grove City College v. Bell, 465 U.S. 555, 575, 104 S.Ct. 1211, 1222, 79 L.Ed.2d 516 (1984) (petitioner's First Amendment rights not violated because it "may terminate its participation in the [federal] program and thus avoid the requirements of [the federal program]"). By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds--subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project--or declining the subsidy and financing their unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice.

Id. at 1775, n. 5.

Although abortion information restrictions and filing fee rebates are not factually comparable, the principles of Rust are very persuasive. Congress placed a condition on acceptance of public funds for family planning services. The Florida Legislature conditioned the use of public money for rebates, by limiting them to major parties. The Rust challengers could have declined the subsidy. Under §99.096(5), Florida Statutes, a minor party candidate can claim the filing fee would place an undue burden on the resources "otherwise available to him"; and receive, in effect, a 100% rebate.

In contrast to this strong authority, Petitioners rely on Socialist Workers Party v. Rockefeller, 314 F.Supp. 984 (S.D.N.Y. 1970), *judgment aff'd. without opinion*, 400 U.S. 806, 96 S.Ct. 65 (1970); and Madole v. Barnes, 229 N.E.2d 20 (1967). Neither cases is persuasive.

Among numerous challenges to New York's election laws, Socialist Workers included an attack on the statute providing lists of registered voters free to parties which had received at least 50,00 votes in the preceding gubernatorial election, but not to parties which had not. In a terse discussion, the court held the statute violated equal protection. 314 F.Supp. at 995-6.

The differences between this case and Socialist Workers are obvious and compelling. First, the New York law had no provision for free lists when payment would constitute a hardship. *See* Fulani, 973 F.2d at 1543-7 (Florida statute allowing major party candidates to avoid cost of signature verification unconstitutional when minor parties candidates could

not do so). Here, a minor party can avoid a qualifying fee altogether by submitting a hardship affidavit under §99.096(5). Second, the U.S. Supreme Court affirmed the judgment only, and did so by a 6-3 margin; leaving the lower court's decision with little precedential value. Finally, Socialist Workers did not involve an appropriation of already-collected revenue, and is not good law in light of Buckley and other cases discussed herein.

Petitioners' reliance on Madole fares no better. There, a county rule allowed courthouses to be used by political parties which had received at least 50,000 votes in the previous election for governor, but not by other parties. The rule was invalidated as violative of equal protection, and as a "roundabout ... restraint on the constitutional right to free expression." 229 N.E.2d at 23.

The inability to use a public meeting place, when your opponents can, is a greater disadvantage than an inability to receive a partial filing fee rebate. If adequate-sized, private meeting places are expensive to rent, even the financial burden can be substantial. If such places are not readily available, the inability to use public buildings can seriously impair a party or candidate's ability to express views, organize, etc.

Of course, none of these concerns are present here--the challenged statute simply does not implicate the First Amendment to nearly the extent as did the rule in Madole. Also, the rule apparently had no provision for use of courthouses by non-qualifying parties when no other facilities were available, or when the cost of such facilities was a hardship.

All that remains is to show a rational basis for §99.103. As that statute declares, its purpose is to assist the state executive committees of the major parties meet their "expenses." §99.103(1). By rebating fees to those committees, the Legislature financially encourages or strengthens major, non-factional parties. It thereby discourages proliferation of splinter parties; which must know, before an election, that they will not be eligible for rebates.

Such considerations were sufficient to justify certain ballot access provisions in California. *See* Storer v. Brown, 415 U.S. 724, 736, 94 S.Ct. 1274, 1282 (1974) ("California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government."). If discouraging factionalism is sufficient to sustain a law affecting a candidate's ability even to get onto the ballot, then it must also be sufficient to sustain a far more peripheral law as to rebate of filing fees. Similarly, if the State can favor major parties in a manner restricting ballot access by splinter groups, the State certainly can favor major parties when allocating modest amounts of public funds to which no political party is constitutionally entitled.

Recent Florida court decisions also weigh in favor of the challenged statute. In McNamee v. Smith, 647 So.2d 162 (Fla. 1st DCA 1994), the court issued a terse opinion upholding the "constitutionality of the filing fee, election assessment and party assessment scheme found in sections 99.061(1), 99.092 and 99.103, Florida Statutes." *Id.* at 163. Specifically, McNamee contended that the statutory provisions requiring part of filing fees to be given to the state political party violated "freedom of speech and association." *Id.*

Citing Little and Buckley, the First District rejected all of McNamee's contentions. The court carefully and appropriately noted that its review was "limited to the legality [not]...the wisdom of the challenged scheme." *Id.*

The Fourth District's longer opinion in Boudreau v. Winchester, 642 So.2d 1 (Fla. 4th DCA 1994), *review den.*, 651 So.2d 1192 (Fla. 1995), addressed the propriety of a fee, not its later use. Boudreau attacked the statutory qualifying fee and the party assessment required by §99.061(1), Florida Statutes (1993). He claimed those fees were unconstitutional to the extent portions were remitted to the Republican Party and the state election commission trust fund; thereby forcing him to support candidates of an opposing party in violation of his First Amendment rights. *Id.* at 2. He also claimed the party assessment infringed upon his freedom of association, because it called for more participation in the state party than he chose. *Id.*

The Fourth District rejected Boudreau's arguments. Recognizing that fees may not be charged for the privilege of exercising First Amendment rights except to the extent used for regulating the activity, the court found that the state's interest in fostering political activity; guarding against factionalism; and avoiding chaotic elections justified the fees. *Id.* The court attached significance to the fact that Florida's statutory scheme allowed a candidate to run as an independent or choose an alternate means of reaching the ballot, thereby avoiding the filing fee and party assessment altogether.

The Boudreau court distinguished Butterworth v. Republican Party, 604 So.2d 477 (Fla. 1992) (1.5% assessment against contributions received by political parties unconstitutional as "unduly burdensome"). It then observed:

> The instant statutory scheme is essentially no different from the payment of filing fees to the state, and an appropriation of a like sum to the trust fund. To the extent such funding is just like any other appropriation, *Buckley* applies.

Id., 642 So.2d at 2.

Concluding the opinion, the Fourth District cited to two federal cases--Burdick and Wetherington[6]--for the proposition that the state's interest in "fostering political parties' activity" can be a basis for upholding filing fees; and that the state has an interest in "guarding against splintered parties and factionalism." *Id.*

Buckley, Little, and Boudreau compel recognition that this case involves no more than an appropriation of public money through an election-related statute. Consequently, partial rebate of filing fees has minimal, if any, First Amendment implications. Anderson and Burdick compel use of a strict scrutiny test that is very much "refined" or "modified." In essence, the test becomes whether §99.103 has a rational basis for rebating fees to major party candidates only.

Applying a rational basis test, §99.103 can reasonably be said to strengthen major parties and thereby discourage factionalism through modest financial support of the

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[6]Wetherington v. Adams, 309 F.Supp. 318 (N. D. Fla. 1970).

executive committees of major political parties. Any First Amendment implications are overcome, particularly since a minor party candidate can properly avoid the filing fee when that fee would unduly burden a party's resources otherwise available to the candidate.

Here, the Legislature has sought to discourage factionalism by a post-ballot, appropriation measure which minimally impinges the First Amendment. Numerous federal and state decisions have held that discouraging factionalism is a rational basis for ballot access statutes.

The rational basis test is not a license for courts to judge the wisdom, fairness or logic of legislative choices and it does not authorize the judiciary to sit as a superlegislature. Heller v. Doe, 113 S.Ct. 2637, 2642 (1993). Furthermore, the legislature need not "at any time" articulate its purpose or rationale, and the State has no obligation to produce evidence to sustain the rationality of a statutory classification. *Id.* at 2642, 2643. *See* Munro, 479 U.S. at 195, 107 S.Ct. at 537 ("To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.").

The Party never contends the 5% threshold in §99.103 represents an irrational or ineffective choice. To the contrary, the Party laments that the statute causes "competitive

crib death of small parties." (IB, p. 10) While such hyperbole is of no persuasiveness, it does illustrate the rationality of the statute's distinction between major and minor parties. Section 99.103 is sound under the U.S. Constitution.

ISSUE II

SECTION 99.103, FLORIDA STATUTES, IS A PROPER EXERCISE OF THE LEGISLATURE'S APPROPRIATIONS POWER THAT DOES NOT VIOLATE THE FLORIDA CONSTITUTION

In Issues II and III, the Party contends it has separate rights of political association and participation under the Florida Constitution. It also contends such rights are abridged by §99.103, as the statute places an improper condition on those rights. (IB, p.16-19) The State will answer the Party's second and third issues together.

That the Party has rights of political association and participation under the Florida Constitution is not questioned. The relevant inquiry is whether those rights are more expansive, so that a showing *not* sufficient to establish a violation of the U.S. Constitution would nevertheless establish a violation of the Florida Constitution. Absent such showing, resolution of the Party's First Amendment claim would necessitate the same result as to the Party's Florida constitutional claims.

The Party tacitly concedes that its Florida and federal rights are coextensive. Below, it urged that Wilson's "right of candidacy [under the Florida Constitution]...has been infringed...for the same reasons that the statute also impermissibly burdens the 1st and 14th Amendment rights of himself and the other plaintiffs." (R 75) Here, the Party concludes is

argument by urging the limitation of rebates to major parties offends the "core values of the First Amendment of the U.S. Constitution and to Article I, Sections 1 and 5 of the Florida Constitution. (IB, p. 17)

Except for the conclusory observation that Art. I, §1 of the Florida Constitution reserves all political power to the people, the Party offers no authority that the Florida Constitution is violated by §99.103. The party does not advance any papers or commentary from the 1968 or 1978 constitutional revision committees, nor does it suggest any other historical source supporting broader rights under the Florida Constitution. The Party does not advance decisions from other jurisdictions construing similar constitutional provisions.

Instead, the Party relies on Treiman v. Malmquist 342 So.2d 972 (Fla. 1977); and State v. Dodd, 561 So.2d 263 (Fla. 1990). Treiman invalidated a law requiring a judicial candidate to have been registered to vote in Florida in the last preceding general election. While Treiman relied upon federal and state court decisions, it did not even intimate that the Florida Constitution extends broader protection against unreasonable restraints on the elective process than does the U.S. Constitution.

Dodd declared unconstitutional a statute prohibiting the acceptance of campaign contributions during legislative sessions, recognized that free speech and associational rights were protected under both the federal and Florida Constitutions. *Id.* at 264. At no time, however, did Dodd consider whether such rights were broader under the Florida Constitution. To the contrary, Dodd cited only one Florida case for the unquestioned proposition that laws

implicating the rights of speech and association must be narrowly tailored to serve a compelling state interest. *Id.* Otherwise, Dodd relied heavily on several U.S. Supreme Court decisions. Like Treiman, Dodd is not persuasive.

The Party's reliance on the Republican Party decision is similarly misplaced. That decision invalidated a state law placing a 1.5% assessment on some contributions to state and county political party executive committees. It did so solely on First Amendment grounds. Neither the majority, concurring, or dissenting opinions discuss or even cite to the Florida Constitution. Whatever the persuasiveness of Republican Party as to the First Amendment attacks on §99.103, the decision has no bearing on the Party's claims under the Florida Constitution. Moreover, the Party cites only to Justice Barkett's concurrence--not the majority opinion--for the irrelevant point that the government cannot attach "strings" to the exercise of constitutional rights. By failing to advance any authority that §99.103 violates the Florida Constitution, the Party has failed to meet its burden; that is, to overcome the presumption the statute is constitutional. *See* State v. Slaughter, 574 So.2d 218, 220 (Fla. 1st DCA 1991) (even when trial court declares statute unconstitutional, the presumption on appeal favors the validity of the statute), *citing* In Re Estate of Caldwell, 247 So.2d 1, 3 (Fla.1971).

To be clear, the State agrees that political parties and candidates have rights of political association and participation under both the U.S. and Florida Constitutions. The Party, however, has not shown the Florida rights are more extensive than the federal. Since

it passes muster under the U.S. Constitution, §99.103 also passes muster under the Florida Constitution.

ISSUE III

IF SECTION 99.103, FLORIDA STATUTES, IS UNCONSTITUTIONAL, IT MUST BE STRICKEN IN ITS ENTIRETY

The Party's position is ambiguous. On one hand, the Party's arguments challenge §99.103 in its entirety and on its face. On the other hand, the Party asks this Court[7] to enjoin the Secretary of State from "retaining a greater percentage of filing fees paid by minor party candidates ... than is retained from filing fees paid by major party candidates." (IB, p. 18) In the complaint, the Party requested that the State remit the same percentage of filing fees to the Libertarian Party as that remitted to major parties. (R 7-8)

Apparently, the Party asks this Court to declare unconstitutional and sever the language in §99.103(1) which limits rebates to major parties. This Court cannot grant such relief. The Party seeks return of about 53% of Wilson's filing fee. The only way to accomplish this would be to delete the following language from §99.103, Florida Statutes:

> **99.103 Department of State to remit part of filing fees and party assessments of candidates to state executive committee. --**
>
> (1) If more than three-fourths of the full authorized membership of the state executive committee of any party was elected at the last previous election for such members **~~and if such party is declared by~~**

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[7]Before the First District, the Party asked the this court to declare §99.103 "unconstitutional to the extent minor parties are prohibited from receiving [rebate of] the same percentage of their candidates' filing fees as the major parties." (IB before 1st DCA at p.3)

> **~~the Department of State to have recorded on the registration books of the counties, as of the first Tuesday after the first Monday in January prior to the first primary in general election years, 5 percent of the total registration of such counties when added together~~**, such committee shall receive, for the purpose of meeting its expenses, all filing fees collected by the Department of State from its candidates less the amount transferred to the Election Campaign Financing Trust Fund pursuant to 99.092 and an amount equal to 15 percent of the filing fees after such transfer, which amount the Department of State shall deposit in the General Revenue Fund of the state.

To justify severance, Florida law requires a four-part showing:

> (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and bad features are not so inseparable in substance that it can be said the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Cramp v. Board of Public Instruction of Orange Co., 137 So.2d 828, 830 (Fla. 1962) (severing unconstitutional provisions from Florida's statutory anti-communist loyalty oath). The Cramp test is still good law. *See* Schmitt v. State, 590 So.2d 404, 415 (Fla. 1991), *cert. den.,* 112 S.Ct. 1572 (1992) ("The Cramp test is a well established component of Florida law. It has been applied repeatedly in countless Florida cases... .").

Schmitt is helpful. There, the court first declared unconstitutional that part of a statute prohibiting the possession of any depiction known to include sexual conduct by a child. *Id.* at 411-14. The court then turned to the proper remedy; that is, whether severance was appropriate. It found the "illegal language" could clearly be separated from the larger statute;

that the legislative purpose was served by severance; that the statute's compelling purpose was evidence the legislature would have approved the remainder; and that a complete act remained upon severance. Therefore, severance was "entirely permissible." *Id.* at 415. *See* Smith v. Butterworth, 866 F.2d 1318, 1321 (11th Cir. 1989) (refusing to strike all of statute relating to secrecy of grand jury proceedings, when only a part of that statute violated the First Amendment), *affirmed with opinion*, 494 U.S. 622, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990).

In contrast, the Libertarian Party cannot meet all four parts of the Cramp test. Severance is not proper. The State will address each part of the Cramp test separately.

1. The Unconstitutional Provisions Can Be Separated

As done at the outset of the State's argument, the clause limiting rebates to major parties can be separated, literally, from subsection (1) of 99.103.

2. The Legislative Purpose Can Not Be Accomplished

Section 99.103(1) is clear. *Only* the major parties are to receive rebates. Severance of the challenged clause would defeat the statute's purposes of discouraging factionalism and fostering political party growth.

In Dept. of Revenue v. Magazine Publishers of America, Inc., 604 So.2d 459 (Fla. 1992), the publishers successfully challenged, on First Amendment grounds, a statute imposing a sales tax on secular magazines but not newspapers. The court then addressed the proper remedy--striking the sales tax or striking the exemption.

Obviously, the publishers desired not to pay the sales tax, but otherwise were indifferent to whether newspapers were exempt. The court, however, turned to related parts of the larger sales tax statute. Those parts declared "specific legislative intent to tax each and every sale"; and "specific legislative intent to exempt...only such sales...to the extent that such exemptions are in accordance with the [U.S. and Florida constitutions]." *Id.* 463, *quoting* 212.21(2) and (3), Fla. Stat. (1987).

Relying on the quoted statutory language, the court concluded that the tax must prevail over the exemption. Therefore, the exemption was stricken, subjecting both magazines and newspapers to the tax. *Id.* at 464.

A highly analogous situation arises here. Section 99.103 was enacted in 1955. *See* 1, ch. 29935, Laws of Fla. (1955).[8] At that time, the Legislature placed a party size requirement as a condition for the rebate of filing fees. Rebates were limited to parties which had "one-eighth (1/8th) of the total registration of such counties." *Id.*

In 1957, the size requirement was lowered to 5%. *See* ch. 57-62, Laws of Fla. Altogether, §99.103 has been amended nine times; most recently in 1991. (*See* the history note following §99.103.) Despite ample opportunity, the Legislature has not departed from a size requirement for obtaining rebates, and has left this requirement at 5% for nearly 40 years.

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[8]A copy of ch. 29935 is attached as Appendix A.

A size requirement is a practical way to limit rebates to parties with more than token membership. By so doing, the statute lends modest financial support to executive committees of such parties, thereby discouraging very small splinter groups. Deleting the long-established size requirement would entirely defeat this purpose.

The legislative history of §99.103 strengthens the inference urged by the State. The Legislature would not have passed the statute with the challenged clause deleted. To do so would frustrate the goal of discouraging factionalism.

Subsections 99.103 (1) and (2) evince clear Legislative intent to discourage factionalism by financially supporting the major parties only. This intent must control over the Party's desire for a rebate, just as imposition of the tax controlled over the exemption at issue in Magazine Publishers. The Party cannot meet this part of the Cramp test.

3. The Legislature Would Not Have Passed The Good Features Without the Bad

The Legislature did not intend that all political parties, regardless of their size, obtain rebates; since doing so would be contrary to the clear wording of §99.103, and defeat its purpose. Therefore, it cannot be said that the Legislature would have passed the statute without the 5% size requirement.

4. A Complete Act Remains

The State agrees that, literally, a complete statutory act would remain if the challenged clause alone were stricken.

In sum, the Party cannot meet the two most critical parts of Cramp. It cannot demonstrate the statutory language remaining after deletion of the challenged clause from §99.103(1) would accomplish the Legislature's purpose, or that the Legislature would have passed §99.103(1) with the challenged clause deleted. This Court cannot make such a decision for the Legislature. If the differing treatment of major and minor parties under subsection (1) is unconstitutional, *all* of that subsection must be invalidated.[9]

Well established principles of severance preclude striking just the challenged clause in §99.103(1). There is a second, equally compelling reason for not doing so. By invalidating the entire statute, this court leaves the Legislature with the opportunity of enacting a new statute providing rebates to all parties; or, by doing nothing, providing rebates to *no* parties.

The Legislature is entitled to this opportunity. In the recent decision of Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994), *cert. denied sub. nom.* Adams v. Dickinson, 115 S.Ct. 2608 (1995); this Court clarified its original opinion in response to a motion by the Florida Legislature. *Id.* at 726-7. It recognized that typically the Legislature has the authority to "fashion a retroactive remedy" when a tax is invalidated under the

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[9]Subsection 99.103(1) directs return of 85% of a candidate's filing fee, after that fee has been reduced by the one-third allocated to the Election Campaign Financing Trust Fund. Subsection (2) directs that 95% of the 85% then be transferred to state executive committees "complying with subsection (1)." Since minor parties cannot, by definition, comply with subsection one, both subsections contemplate rebates to major parties only. Thus, subsection (2) cannot operate independently, and must be stricken if subsection (1) is declared unconstitutional.

Commerce Clause. *Id.* at 726, relying on McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990).

The Kuhnlein court added:

> In so saying we strongly emphasize that the courts should show great deference to the legislative prerogative. If there is any reasonable way that prerogative may be honored without substantial injustice...then a court reviewing a tax case of this type should give the Legislature the opportunity to fashion a retroactive remedy within a reasonable period of time.

Id. at 727.

While this case does not involve a tax statute, the deference to the Legislature displayed in Kuhnlein is very compelling by analogy. Here, the Legislature must be given the opportunity, if §99.103(1) is unconstitutional, to decide whether all or no political parties get rebates in the future. While this court could order a refund of the disputed part of Wilson's filing fee, this court cannot require that all parties be eligible for future rebates simply by deleting language from §99.103(1).

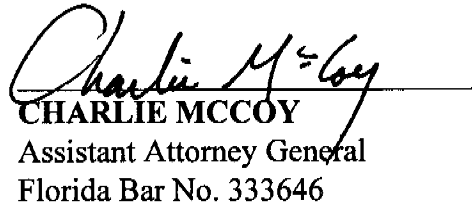
CONCLUSION

Section 99.103, Florida Statutes, does not violate the Party's rights of political association and participation. The First District's opinion must be affirmed, thereby upholding the statute. Alternatively, if the limitation of rebates to major parties is

unconstitutional, that limitation is not severable. All of §99.103, rather than the just the challenged clause in subsection(1), would have to be stricken.[10]

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **DANIEL F. WALKER**, Esq., 221 East Seventh Avenue, Tallahassee, Florida 32303; this 31st day of MAY, 1996.

CHARLIE MCCOY
Assistant Attorney General

[10]In its conclusion, the Party asks that §99.103 be declared "contrary to...42 U.S.C. s. 1983." (IB, p.18) No additional argument is presented.

This lawsuit and Party's arguments are in the nature of declaratory relief, and have sought return of the denied rebate as more of an afterthought. The Party has completely adequate remedies at state law. There is no justification for resorting to §1983. *See* Kuhnlein, 646 So.2d at 725-6 (refusing to address the plaintiffs' "other issues"--including a §1983 claim--when the nature of the case would require that all petitions be treated as requests for declaratory judgment).