IN THE SUPREME COURT OF THE

STATE OF FLORIDA

Case No.: 87,342

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

Petitioners

v.

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

Respondents

PETITIONERS' BRIEF ON JURISDICTION

DANIEL F. WALKER of

D. Fleming Walker, P.A.
221 E. Seventh Ave.
Tallahassee, Florida
32303

(904)-224-5545

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INTRODUCTION

The petitioners filed a complaint against the respondents, in their official capacities, challenging the state and Federal constitutionality of §99.103, Fla. Stat. (1993). Under the challenged statute, a party with five per cent or greater statewide voter registration (a "major" party) is statutorily entitled to a percentage of the filing fees paid by its ballot-qualified candidates for state and federal office. Ballot - qualified candidates of a "minor" party, a party with less than five per cent statewide voter registration, see no portion of their filing fees distributed to the party with which they are affiliated.

The circuit court and the the First District Court of Appeal determined that the challenged statute satisfied state and Federal constitutional standards. The petitioners now seek review by the Florida Supreme Court.

SUMMARY OF ARGUMENT

The petitioners consistently maintained claims that §99.103, Fla. Stat. (1993), insofar as the fee-distribution standards are concerned, violated the petitioners' rights of political association under the First and Fourteenth Amendments of the U.S. Constitution as well as political participation rights under Article I, Sections 1 and 5 of the Florida Constitution. The circuit court upheld the constitutional validity of the challenged statutory scheme, as did two of the three judges (one dissenting) on the First District Court of Appeal panel. The Florida Supreme Court has jurisdiction and

should exercise that power to review this case.

ARGUMENT

ISSUE 1

THE FLORIDA SUPREME COURT HAS AND SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION OVER THE CASE SUB JUDICE.

This case plainly falls within the parameters of Art. V, §3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(i).

The First District Court of Appeal, in Libertarian Party of Florida, et al v. Jim Smith and Dorothy Joyce, 21 Fla. Law Weekly D113, ___ So.2d ___ (Fla. 1st DCA January 4, 1996), "reject[ed] appellants' contention" of the statute's unconstitutionality, and affirmed the circuit court's decision, though Judge Booth dissented, "persuaded by Appellants' arguments and authorities cited that [the statute] is unconstitutional as applied to prevent minor political parties from receiving partial rebates of their candidates' filing fees."

If jurisdiction is to exist, a decision should contain language to the effect that a challenged statute is valid or enforceable. See Cantor v. Davis, 489 So.2d 18 (Fla. 1986). Furthermore, the concept of "decision" embraces not only the result, but the entire opinion. Seaboard Air Line R.R. v. Branham, 104 So.2d 356, 358 (Fla. 1958). The district court of appeals' decision in this case falls well within the parameters for the Supreme Court to exercise jurisdiction to review

this case.

The First District Court of Appeal upheld the challenged statute on the ground that the statute was supported by a state interest to "strengthen and encourage major parties as a means of preventing factionalism and a multiplicity of splinter parties." The court's decision is unprecedented and should be reviewed, because the fee-distribution statute is completely unrelated to ascertaining whether a minor party has demonstrated sufficient public interest to justify being placed on a ballot and also is unrelated to state interests in preventing "clogged electoral administrative machinery" or similar concerns. The District Court of Appeal's reliance on Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274 (1974) was questionable at best and further necessitates review of this case.

Finally, the fee-distribution statute is one of statewide application, affecting the financial strength of new and minor parties in the electoral arena, imposing a condition on the exercise of political associative rights of citizens who affiliate with minor parties, and forcing minor party candidates for state and federal office to offset more administrative costs than do similarly-situated major-party candidates for the same offices.

CONCLUSION

Appropriate state and federal constitutional issues have been raised in the circuit court and district court of appeal, and the

lower courts determined that the fee-distribution feature of §99.103, Fla. Stat. (1993) is constitutionally valid.

In light of the issues that have been raised, and given the implications for new and smaller political parties desiring to run candidates and to have sufficient financial strength to compete with older, established political parties, the Supreme Court should review this case upon determining that jurisdiction exists.

Daniel F. Walker
D. Fleming Walker, P.A.
221 E. Seventh Avenue
Tallahassee, Florida 32302
(904)-224-5545
Fla. Bar No. 0935328

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Charlie McCoy, by U.S. Mail (1st Class), on this 12th day of February, 1996.

Daniel F. Walker

APPENDIX

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Instrument/Document

* Conformed copy of First District Court of Appeal opinion filed January 4, 1996, The Libertarian Party of Florida, the Libertarian Party of Florida Executive Committee, and Robert Wilson v. Jim Smith, in his official capacity as Secretary of State, Dorothy Joyce, in her official capacity as Director of the Division of Elections

* Amended Reply Brief of Appellants, filed with the 1st District Court of Appeal on July 21, 1995

* Amended Answer Brief of Appellees, filed with the 1st District Court of Appeal on May 3, 1995

* Appellants Initial Brief, filed with the 1st District Court of Appeal on April 21, 1995

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

THE LIBERTARIAN PARTY OF FLORIDA, THE LIBERTARIAN PARTY OF FLORIDA EXECUTIVE COMMITTEE, and ROBERT WILSON,

Appellants,

v.

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

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 95-547

Opinion filed January 4, 1996.

An appeal from the Circuit Court for Leon County.
L. Ralph Smith, Judge.

Daniel F. Walker of D. Fleming Walker, P.A., Tallahassee, for Appellants.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellees.

PER CURIAM.

Appellants, the Libertarian Party of Florida, its executive committee, and a Libertarian candidate for the Florida House of Representatives, seek reversal of a final judgment ruling against their complaint for declaratory and injunctive relief which challenged the constitutionality of section 99.103, Florida

Statutes (1993). The challenged statute excludes political parties with less than 5 percent of total registered voters -- i.e., "minor political parties" -- from receiving partial rebates of their candidates' filing fees.[1] It is undisputed that were it not for the Libertarian Party's status as a minor party, the challenged statute would entitle its executive committee to a rebate of approximately half of its candidates' filing fees. The appellants claim that the statute violates the Equal Protection Clause because it is a discriminatory classification that unfairly burdens their fundamental First and Fourteenth Amendment right to associate politically by placing minor parties and their candidates at a competitive disadvantage vis-a-vis the two major parties.[2] We reject appellants' contention, and affirm.

The statute under attack is subject to a flexible standard of scrutiny which ranges from strict scrutiny to a rational basis analysis, depending on the circumstances. Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992). In our inquiry we must weigh the

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[1]A party with less than 5 percent of Florida's total registered voters is elsewhere defined as a "minor political party." See §97.021(15), Fla. Stat. (1993).

[2]The appellants have also invoked the rights of political association and participation in article I, sections 1 and 5 of the Florida Constitution. Because they fail to cite authority indicating that their Florida rights are more extensive than those provided under the U.S. Constitution, and we are aware of no separate analysis applicable to the challenged statute under our state constitution, we agree with the trial court's ultimate assessment of these claims: "Since it passes muster under the U.S. Constitution, §99.103 also passes muster under the Florida Constitution."

character and magnitude of the asserted injury to the plaintiffs' First and Fourteenth Amendment rights against the precise interests advanced by the state in support of the statute, taking into consideration the extent to which those interests make it necessary to burden the plaintiffs' rights. Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983); see Fulani v. Smith, 640 So. 2d 1188 (Fla. 1st DCA 1994), rev. denied, 651 So. 2d 1193 (Fla. 1995). The rigorousness of our inquiry depends upon the extent to which the challenged statute burdens First and Fourteenth Amendment rights; severe restrictions must be narrowly tailored to advance compelling interests, while "reasonable, nondiscriminatory restrictions" need only advance important regulatory interests. Burdick v. Takushi, 504 U.S. 428, 434, 112 S.Ct. 2059, 2063-64, 119 L.Ed.2d 245 (1992) (quoting Anderson, supra, 460 U.S. at 788, 103 S.Ct. at 1570).

The challenged statute is not a ballot access provision that ordinarily implicates substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments. See Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979); McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1221 (4th Cir. 1995). Rather, §99.103 is merely an appropriation of some portion of the filing fees that both sides concede are lawfully collected from candidates for office. The rigidity of our examination is lessened where, as here, we move further away from impacting voting

and associational rights. Consequently, we must determine whether the rule set forth in §99.103 is reasonably related to an important state interest.[3]

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[3]We are not persuaded by the appellants' contention that we must apply strict scrutiny because the statute discriminates against minor parties. The appellants cited Libertarian Party of Indiana v. Marion County, 778 F.Supp. 1458 (S.D.Ind. 1991), in support of strict scrutiny. There, the court struck down a provision in the state election law allowing major parties to obtain free copies of voter registration lists while minor parties had to obtain the lists at their own expense. Although the court considered whether a stricter standard of review should be used to judge "discriminatory" statutes, the question was not decided. The state's failure to present any important interest to support its rule meant that the statute must fall under either standard. Even if the court had opted for strict scrutiny, the case would be distinguishable given the court's finding that restricting access to voter registration lists impinged upon associational rights.

We are aware that in Burdick and Anderson the Court noted that lessened scrutiny would apply to "reasonable, *nondiscriminatory* restrictions." However, we do not agree with the appellants' suggestion that this language mandates strict scrutiny whenever a "discriminatory" provision is challenged on equal protection grounds, regardless of the degree to which a party's First and Fourteenth Amendment rights are implicated. Equal protection was not implicated in Burdick or Anderson, and it would make little sense in the context of an equal protection challenge to impose strict scrutiny whenever some aspect of a challenged election law could be described as discriminatory. This would be tantamount to imposing strict scrutiny in all such cases, since some form of discriminatory classification is the impetus for any equal protection challenge. Of course, an equal protection analysis only begins with a finding that the challenged provision contains a discriminatory classification; it then remains to be determined whether the classification or "discrimination" is supported by a sufficiently important state interest, and whether and to what extent the provision is necessary to advance that interest. We thus conclude that where equal protection is raised, the reference to "reasonable, nondiscriminatory restrictions" must mean that lessened scrutiny will be applied to statutes that do not have substantial discriminatory impact upon voting, associational and expressive rights protected by the First and Fourteenth Amendments.

The state interest asserted to support the statute is a desire to strengthen and encourage major parties as a means of preventing factionalism and a multiplicity of splinter parties. Such an interest has been deemed important. See Burdick, supra, 504 U.S., at 439, 112 S.Ct., at 2066; Wetherington v. Adams, 309 F.Supp. 318, 321 (N.D.Fla. 1970); Boudreau v. Winchester, 642 So. 2d 1, 3 (Fla. 4th DCA 1994), rev. denied, 651 So. 2d 1192 (Fla. 1995). In Storer v. Brown, 415 U.S. 724, 736, 94 S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974), the Supreme Court declared that this interest was "not only permissible, but compelling."

As to whether §99.103 is reasonably related to the state's interest, the appellants argue that once the minor party candidate qualified to be on the ballot by obtaining the petition signatures of the required number of registered voters, all concerns about factionalism and splinter parties should have been satisfied. It is probably true that the interest in preventing factionalism is best effectuated by petition requirements and other limitations on ballot access.[4] This does not mean, however, that the interest cannot also be advanced by limited rebates of major party candidates' filing fees to their respective parties' executive committees "for the purpose of meeting . . . expenses." §99.103(1), Fla. Stat. (1993). The appellants may have shown that

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[4]We have rejected the Libertarian Party's challenge to the constitutionality of the 3 percent petition requirement in section 99.096(2), Florida Statutes (1993). See Libertarian Party of Florida v. Smith, 660 So. 2d 807 (Fla. 1st DCA 1995).

the statute is not necessary or essential to the state's interest, but we are only concerned with whether the statute is reasonably related to the interest asserted. Because we believe it is so related, we reject appellants' attack and uphold the challenged provision.

Accordingly, the judgment is AFFIRMED.

MINER and WEBSTER, JJ., CONCUR; BOOTH, J., DISSENTS WITH WRITTEN OPINION.

BOOTH, J., DISSENTING.

I am persuaded by Appellants' arguments and authorities cited that Florida Statutes section 99.103 is unconstitutional as applied to prevent minor political parties from receiving partial rebates of their candidates' filing fees. I must, therefore, respectfully dissent.

IN THE DISTRICT COURT OF APPEAL OF

THE STATE OF FLORIDA, FIRST DISTRICT

CASE NO.: 95-00547

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

Appellants

vs.

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

Appellees

_____/

An Appeal from the Circuit Court for Leon County

APPELLANTS' AMENDED REPLY BRIEF

Daniel F. Walker, of
D. FLEMING WALKER, P.A.
221 E. Seventh Ave.
Tallahassee, Florida
32303

(904)-224-5545

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PREFACE

The appellants stand on their initial brief but for an amended reply to the appellees' position regarding severance of the challenged provision of §99.103(1), Fla. Stat. (1993).

SUMMARY OF ARGUMENT

If the 5% voter-registration standard for party eligibility of a rebate of filing-fee percentages is declared unconstitutional, a valid and complete statute which fosters part activities and financial support would remain in place. Had the 5% standard not been applied in 1994, the state Republican and Democratic parties would have received the same amount of filing-fee-generated monies which they otherwise did receive.

In light of the above consideration, it strains credulity to assert that the Florida legislature would not have enacted §99.103 if the Legislature could not constitutionally limit the benefits of the filing-fee distribution scheme only to major parties.

ARGUMENT

ISSUE

IF SECTION 99.103(1)'S DISPARATE FEE-DISTRIBUTION PROVISION IS DECLARED UNCONSTITUTIONAL, THE REMAINDER OF SECTION 99.103 WILL CONSTITUTE A VALID, COHERENT, WORKABLE STATUTE IN THE ABSENCE OF THE UNCONSTITUTIONAL PROVISION.

The appellants agree with the State that the test from Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828, 830 (Fla. 1962) is the appropriate analysis to apply regarding severance of

unconstitutional language from a statute. The State properly noted that the unconstitutional provision could be separated, and that a complete act would remain if the challenged provision was declared unconstitutional.

The State, however, maintains that if the challenged provision is declared unconstitutional, then the legislative purpose of the statute could not be accomplished and, closely related to that point, that the Legislature would not have passed §99.103 without the challenged provision.

The State maintains that the purpose of §99.103's fee-distribution provision is to prevent factionalism, an argument amply addressed in the appellants' initial brief and to which the appellants reiterate: How a filing-fee is distributed has nothing to do with the purpose of a ballot-access statute, which is implemented to gauge whether a party or candidate has sufficient popular support to justify placement on the ballot. The "factionalism prevention" purpose alleged in support of §99.103(1) is a false issue.

The State is mixing and confusing "anti-factionalism" with electoral protectionism. With regard to the prevention of factionalism, other statutes properly address that concern in a manner which honors party cohesion without damaging the competitive stature of other parties and candidates. The Florida Election Code contains numerous, orthodox "anti-factionalism" statutes such as §103.08 (protecting the use of a political party's name), §101.021 (imposing the closed primary system,

thus preventing voters registered with one party from voting in the primary of a different political party), and §99.021(1)(b), which requires that a person seeking the nomination of one political party cannot have "been a candidate for nomination for any other political party for a period of 6 months preceding the general election for which he seeks to qualify." None of these statutes exhalts the competitive status of one or two political parties at the competitive expense of another party. These classic "anti-factionalism" statutes are obviously different in effect than the 5% voter-registration standard for party eligibility for receipt of candidate-generated fee monies.

There is one valid rationale or purpose for the fee-distribution scheme: fostering political parties' activities, per Wetherington v. Adams, 309 F.Supp. 318 (N.D. Fla. 1970). That is the primary purpose of the statute.

Should the challenged 5% voter-registration standard for party fee-rebate eligibility be stricken from §99.103(1), the amount of funds to be received by state "major" parties would be exactly the same as with the 5% voter-registration standard. The constitutionally valid purpose of §99.103(1), fostering political parties' activities and support, would be left undamaged by striking the 5% voter-registration standard for party eligibility for filing-fee rebates.

Given the lack of damage to the primary purpose to the statute, it is an exercise in pure speculation to assert that the Legislature

would not enact §99.103(1) if minor parties were eligible for fee rebates from their respective candidates, particularly since minor-party eligibility would not affect the existence or degree of financial benefit enjoyed by the major parties from their respective candidates' fees. The far more reasonable expectation is that the legislature would retain §99.103 if minor parties were to be treated equally with major parties with regard to fee-rebate eligibility.

A closer look at Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828 (Fla. 1962) also is in order.

At issue was whether a loyalty oath should stand in light of a portion of the oath having been determined unconstitutional. The stricken language was determined unconstitutionally vague, pertaining to persons who had lent or might lend "aid, support, advice, counsel, or influence to the Communist Party." That was a sub-purpose of the oath, just as extending fee-rebate funds to political parties, but only "major" parties, is a sub-purpose of the fee-distribution statute.

The Florida Supreme Court was not compelled to strike the entire oath just because some of the oath language was declared unconstitutional. The Court looked to the primary purpose of the oath, the prevention of "election or employment of public officials and employees who are knowingly disloyal" to the Federal and state governments "and who subscribe to the doctrine of accomplishing a change in government by the employment of force and violence." The Court did not confuse an invalid sub-purpose

with a valid primary purpose of the statute.

The Court held there was "little doubt" the Legislature "would have enacted into law the remainder of the statute." Cramp at 831. Deleting the unconstitutional language "would leave intact a valid, coherent, workable statute." Cramp at 831. The stricken language "did not permeate or saturate the remainder of the act and make it impossible" to enforce the remainder. Cramp at 831.

The same can be said of the case at hand.

The primary purpose of §99.103(1), fostering parties' activities and support, would be left intact if the 5% voter-registration standard for party eligibility for fee rebates was declared unconstitutional. The major parties would not be financially affected in any way. A coherent, workable statute would remain. It certainly would not be impossible to enforce the statute if the 5% voter registration standard was stricken.

CONCLUSION

In light of the Cramp test, its application, and the irrelevance of the "factionalism prevention" allegations, severace of the challenged provision of §99.103(1) is appropriate, and the remainder of the statute should stand.

Respectfully submitted,

Daniel F. Walker
Fla. Bar No. 0935328
221 E. Seventh Ave.
Tallahassee, FL 32303
(904)-224-5545

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Charlie McCoy, by U.S. Mail (1st class), on this 21st day of July, 1995.

Daniel F. Walker

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

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

Appellants,

v. CASE NO. 95-00547

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

Appellees.
_____/

On Appeal from the Second Judicial Circuit
In and For Leon County, Florida

AMENDED
ANSWER BRIEF OF APPELLEES

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 333646
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL--PL 01
TALLAHASSEE, FL 32399-1050
(904) 488-9935

COUNSEL FOR APPELLEES

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OTHER AUTHORITIES

Florida Statutes

Laws of Florida

STATEMENT OF THE CASE

Appellees accept Appellants' statement.[1]

STATEMENT OF THE FACTS

The State accepts the Party's statement, with this addition:

As part of their joint stipulation, the parties filed copies of documents that had been submitted to the Secretary of State by Appellant Wilson. Some of those documents are from Wilson's campaign treasurer report. (R 95-7) The summary shows that for the period ending July 29, 1994, Wilson's campaign account had $1550.00 in contributions and $1278.42 in expenditures. (R 95) Of the $1550.00 in contributions, $1200.00 was contributed by the Libertarian Party of Santa Rosa County. (R 96) The $1278.42 represents Wilson's filing fee. (R 97)

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 agrees, §99.103 is not a ballot access statute.

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[1] Appellees will be referred to as the "State." Unless distinguished for sprcific purposes, Appellants will be referred to as the "Libertarian Party" or the "Party."

Rather, the challenged statute is an appropriation of public money originally collected as filing fees. Consequently, partial rebate of those fees has minimal, if any, First Amendment implications. The U.S. Supreme Court's decisions in Anderson and Burdick compel use of a strict scrutiny test that is very much relaxed. 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 executive committees of the major political parties. Any minimal First Amendment implications are overcome, particularly when candidates associated with minor parties can readily avoid a filing fee altogether.

Numerous federal and state decisions have held that discouraging factionalism is a rational basis for ballot access statutes; which, by their nature, have more serious First Amendment implications. 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. 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 effectively 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 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. Striking all of the statute also 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. Under the Florida Supreme 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 U.S. CONSTITUTION

A. Introduction

In Issue I, the Party requests that §99.103 be declared unconstitutional as violative of their rights of political association and participation[2] under the U.S. and Florida Constitutions. The Party raises five sub-issues, A through E. Collectively, the sub-issues make three distinct arguments: (1) the proper standard of review; (2) whether §99.103 violates the Party's rights of political association and participation under the U.S. Constitution; and (3) whether the statute violates the same rights under the Florida Constitution.

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 Florida Constitution. In Issue III, the State will address the proper remedy; that is, whether severance is proper if the challenged clause in §99.103(1) is held unconstitutional.

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[2] The first issue statement (IB, p.4) speaks to the "burdens" placed on the Party's rights of "political association and participation."

B. Standard Of Review

Section 99.103, Florida Statutes, is not a filing fee or ballot access statute. Other statutes (not at issue) specify who must pay filing fees and the amount of those fees. Before the trial court, the Party agreed that the statute does not regulate ballot access, and attached significance to that fact.[3] Before this court, the Party declares that the statute is not one of ballot access (IB, p.2), and strongly disputes any reading of the trial court's decision to that effect. (IB, p.7-8) The State agrees that ballot access is not involved, thereby justifying a much less strict standard of review. However, the trial court never concluded §99.103 involved ballot access, but simply analogized to ballot access cases. The State does not know why the Party has worked so hard to refute a non-issue.

Nevertheless, §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.

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

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[4] 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.[5] In 1983, that Court dismissed traditional strict

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[4] In its motion for summary judgment, the Party urged the trial court to employ a "refined" Anderson test. (R 63)

[5] Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24

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 weighing all these factors is the reviewing court in a

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(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).

> position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789 (citations omitted). See Burdick, *supra at n. 6*, __ U.S. at __, 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 (courts must identify legitimacy of interests advanced by state and consider the extent to which they necessitate burdening voter rights [citing Anderson at 548]); Munro, 479 U.S. at 200-01 (Marshall, J., dissenting).

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.
>
> . . . .
>
> [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 Party's rights of political association. Plaintiff 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. At best, 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.

B. Section 99.103 Under The U.S. Constitution

Sporadically throughout Issue I, the Party contends §99.103 violates their right of political association under the U.S. Constitution. It claims the major parties receive a financial benefit denied to the minor parties. (IB, p.4-5) The Party also contends that a "competitive burden falls upon minor parties," which cannot receive filing fee rebates; and that the "effectiveness of competing minor parties is not similarly enhanced" by receiving rebates. (IB, p. 10) 4)

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, etc. 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. Id., 424 U.S. at 91, 96 S.Ct. at 668-9. The Court was not persuaded:

> 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 appellants' argument is therefore apparent; every

> appropriation made by Congress uses public money in a manner to which some taxpayers object.
>
> * * * *
>
> 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 669 & 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.[6] 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

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[6] 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.

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 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 arguments 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 limited public funds for rebates to major parties. The Rust challengers could have declined the subsidy. Under §99.096(5), Florida Statutes, a minor party candidate can properly claim the filing fee would place an undue burden on the resources "otherwise available to him"; and receive, in effect, a 100% rebate.

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 parties. It also discourages factionalism

and a multiplicity 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), this 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, this court 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), 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.

In reaching its decision, 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"). The court then went straight to the heart of its (and this) case. It recognized that the statutory scheme is "essentially no different from the payment of filing fees ... and an appropriation." Id. at D1248. The court followed with this observation:

> To the extent such funding is just like any other appropriation, Buckley applies.

Id. Concluding the opinion, the Fourth District cited to two federal cases--Burdick and Wetherington[7]--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

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

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 executive committees of major political parties. Any minimal 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.

Numerous federal and state decisions have held that discouraging factionalism is a rational basis for ballot access statutes. While the effectiveness of rebates is open to question; such a question goes only to the statute's wisdom, not its legality. 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, and that such right is abridged by §99.103. Moreover, 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 maintains the state's interests are insufficient to sustain §99.103 under federal constitutional law; and, for the "same reasons," are insufficient to sustain the statute under Florida constitutional law. (IB, p. 18) If the "same reasons" would compel relief under either the U.S. or Florida Constitutions, the logical inference is that the respective rights involved are substantively the same.

Except for the conclusory and unsupported observation that the Florida right of candidacy is "more expansive" (IB, p.18) merely by its existence, the Party offers no separate authority that the Florida Constitution

is violated by §99.103. To the contrary, the Party expressly relies on it arguments as to the U.S. Constitution.

As to a violation of its Florida right of political association, the Party relies largely 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.

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 initial brief is self-contradictory. 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 to declare §99.103 is "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, p.3) 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)

Effectively, 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 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. The Party must demonstrate:

> (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) ("The Cramp test is a well established component of Florida law. It has been applied repeatedly in countless Florida cases... ."), cert. den., 112 S.Ct. 1572 (1992).

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 this purpose.

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. 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.

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

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

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; the most recent of which was 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.

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 defeat the purpose of §99.103. 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 that deleting the challenged clause from §99.103(1) would accomplish the Legislature's purpose, and 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 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

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[9] Subsection (2) of §99.103 cannot operate independently, and must be invalidated if subsection (1) is unconstitutional.

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. pending sub. nom., Adams v. Dickinson, case no. 94-1443; the Florida Supreme 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 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 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

In the conclusion to its initial brief, the Party asks that §99.103 be declared "contrary to...42 U.S.C. §1983." (IB, p.20) No additional argument is presented. By neither arguing a civil rights claim nor incorporating an earlier such argument, the Party has waived any civil rights claim alleged in the complaint.

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 §1983 claim--when the nature of the case would require that all petitions be treated as requests for declaratory judgment), *cert. pending sub. nom.* Adams v. Dickinson, case no. 94-1443.

Section 99.103, Florida Statutes, does not violate the Party's rights of political association and participation; and is constitutional. If the limitation of

rebates to major parties is unconstitutional, that limitation is not severable. All of the statute must be stricken.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Charlie McCoy

CHARLIE MCCOY
Assistant Attorney General
Florida Bar No. 333646
OFFICE OF THE ATTORNEY GENERAL
The Capitol--PL01
Tallahassee, FL 32399-1050
(904) 488-9935

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 10th day of MAY, 1995.

Charlie McCoy

CHARLIE MCCOY

APPENDIX

Chapter 29935, Laws of Fla. (1955), §1

<charlie>lbtn/ab

CHAPTER 29935

SENATE BILL NO. 1132

AN ACT amending and revising Sections 103.121 and 103.111, Florida Statutes, and providing additions to Sections 99.103 and 104.272, Florida Statutes; relating to state and county executive committees; secretary of states remission of filing fees and party assessments of candidates to state executive committees; mishandling of funds by officers of state executive committees.

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Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 99, Florida Statutes, is amended to add thereto a new section to be designated 99.103 to read:

99.103 "Secretary of state to remit filing fees and party assessments of candidates to state executive committees."

(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 shall be declared by the secretary of state to have recorded on the registration books of the counties, as of the first day of February in even numbered years, one-eighth (1/8th) of the total registrations of such counties when added together, such committee shall receive, for the purpose of meeting its expenses, all filing fees collected by the secretary of state from its candidates.

(2) Not later than thirty (30) days prior to the first primary in even numbered years the secretary of state shall remit all filing fees or party assessments that may have been collected by them to the respective state executive committee of the parties complying with subsection (1). Party assessments collected by the secretary of state shall be remitted to the appropriate state executive committee, irrespective of other requirements of this section, provided such committee is duly organized under the provisions of §103.111.

Section 2. Paragraph (h) of subsection (1) of Section 103.121, Florida Statutes, is amended and a new subsection (4) is added to section 103.121 Florida Statutes, to read:

103.121 Powers and duties of executive committees.

(1) The state and county executive committees shall have the following powers and duties:

(h) to make assessment it requires of candidates for the purposes of meeting their expenses or maintaining their party organization, not later than twenty (20) calendar days before the last filing date for state offices of each year in which a general election is held. No executive committee shall levy assessments to exceed two (2) per cent of the annual salary of the office sought by any candidate.

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Within five (5) days the state executive committee shall deliver a certified copy of the assessments to the secretary of state. The county executive committee, shall deliver their certified copy to the clerk of the board of county commissioners. The certified copies shall be filed by the secretary of state, and by the board of county commissioners. The county executive committee shall have exclusive power to levy and receive payment of assessments upon candidates to be voted for in a single county except state senators and members of the house of representatives and the state executive committees shall have exclusive power to levy all other assessments authorized. Upon payment by a candidate of his filing fee and committee assessment, he shall be entitled to a receipt from the officer with whom he qualified. If any executive committee shall fail to meet and levy party assessments before the expiration of the last day for levying assessments in a year in which a general election is held, then such assessments shall be two (2) per cent.

(4) The chairman and treasurer of the state executive committee of any party shall be accountable for the funds of such committee and jointly liable for their proper expenditure for authorized purposes only. The treasurer of such state executive committee shall furnish adequate bond, but not less than ten thousand dollars ($10,000.00). The funds of such committee shall be publicly audited at the end of each calendar year and a copy of such audit furnished the attorney general for his examination prior to April 1st of the ensuing year. Copies of such audit when filed with the attorney general shall become public documents.

Section 3. Chapter 104, Florida Statutes, is amended to add thereto a new section to be designated section 104.272 to read:

104.272 Mishandling of funds by officers of state executive committees.

Any chairman or treasurer of a state executive committee of any political party who shall improperly expend, misappropriate or make false or improper accounting for the funds of such committee shall upon conviction be guilty of a felony.

Section 4. Section 103.111, Florida Statutes, is amended to read:

103.111 State and county executive committees.

(1) The state executive committee of each political party shall consist of two members, a man and a woman for each county, who shall be elected for four years in the second primary elections held in the year 1958 and every four years thereafter. The members of the executive committee shall, within thirty days after their election, meet and organize by electing from their members a chairman and a vice-chairman, one of whom is a man and the other a woman, and a vice-chairman for each congressional district, and other such officers as each committee deems necessary. The outgoing chairman of the state executive committee shall, not less than ten days before the first meeting, notify each newly elected member of the time and place of the meetings.

(2) The county executive committee of each political party shall consist of two members, a man and a woman, from each precinct within the county, who shall be elected for four years at the second primary held in the year 1958, and every four years thereafter; provided that in precincts having an official registration of more than one thousand (1,000) qualified electors an additional two (2) members, a man and a woman, shall be authorized and their membership provided for as in other precincts. The members of the committee shall, within thirty (30) days after their election, meet at the county seat and organize by electing from among their members a chairman and a vice-chairman, one of whom shall be a man and the other a woman, and other officers as are necessary.

(3) In the event of no election of committeemen or committeewomen, or of a vacancy occurring from any other cause in any county executive committee, the chairman shall call a meeting of the county executive committee by due notice to all members and the vacancy shall be filled by a majority vote of the members of the county executive committee attending from among the members of the party residing in the precinct where the vacancy occurs. In the event of no election or of a vacancy occurring from any other cause in the state executive committee, the executive committee, or a majority thereof, of the county so without representation, may fill the vacancy by the election of some person who is a member of the party in the county. Any officer or member of any of the committees may be removed and his or her office declared vacant upon a two-thirds vote of the entire membership of the committee at any regular meeting or at any special meeting, after ten days notice to the membership of the committee that a motion for that

purpose will be considered at a special meeting. The removal may be for any cause which in the opinion of two-thirds of the membership of the committee warrants the removal of the member. Any vacancy so created is filled as provided above.

(4) In the event of no election of precinct committeeman or committeewoman, or of a vacancy occurring from any other cause in any county executive committee, where such vacancy is not filled by the county executive committee as herein provided, the chairman of the state executive committee of such party may fill such vacancy by appointment, if, after giving sixty (60) days notice of his or her intention to do so, to the chairman of the county executive committee by registered mail, such vacancy is not filled by the county executive committee.

(5) In the event of no election of county committeemen or committeewomen of a political party in any county the chairman of the state executive committee of such party may appoint a committeeman and a committeewoman in each precinct in said county from the members of the party residing in the precinct to which the appointment is made and all appointments so made shall constitute the county executive committee of such party until the next election in such county when a county executive committee shall be elected as herein provided.

(6) The members of the state executive committee from each congressional district under the vice-chairman from such district shall perform all duties usually handled by congressional district committees if authorized.

(7) A majority of the members of the state or county executive committee shall constitute a quorum.

Approved by the Governor June 20, 1955.

Filed in Office Secretary of the State June 20, 1955.

IN THE DISTRICT COURT OF APPEAL OF

THE STATE OF FLORIDA, FIRST DISTRICT

CASE NO: 95-00547

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

Appellants

vs.

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

Appellees

_____/

An Appeal from the Circuit Court for Leon County

APPELLANTS' INITIAL BRIEF

Daniel F. Walker, of
D. FLEMING WALKER, P.A.
221 E. Seventh Avenue
Tallahassee, Florida
32303

(904)-224-5545

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STATEMENT OF THE CASE

The Libertarian Party of Florida, the Libertarian Party of Florida Executive Committee, and Richard Vajs filed a complaint in fall of 1993, challenging the constitutionality of the fee-distribution features of §99.103, Fla. Stat. (1993), insofar as the state executive committees of minor parties receive no percentage of the filing fees paid by their candidates for state and federal office, but the state executive committees of "major" political parties are statutorily entitled to a percentage of the filing fees paid by their respective candidates for state and federal office. [R 1-9]

When the Libertarian Party did not obtain sufficient valid petition signatures to place Vajs on the ballot, a second amended complaint was filed to substitute Robert Wilson, Libertarian candidate for District 4 in the State House of Representatives and for whom sufficient petition signatures were obtained for ballot access, for Vajs. [R 41-49]

The parties stipulated to the below facts, and the lower court heard arguments in chambers on November 29, 1994, on the parties' respective motions for judgment on the merits. The court rendered its opinion on January 11, 1995, granting the defendants' motion. [R 148-162] The plaintiffs filed Notice of Appeal on Feb. 10, 1995. [R 163]

STATEMENT OF THE FACTS

The Libertarian Party of Florida is a minor party under §97.021(15), Fla. Stat. (1993); at least three-fourths of its state executive committee was elected at each annual convention in 1992, 1993, and 1994. [R 149]

Robert Wilson was the Libertarian Party of Florida nominee in 1994 for District 4 of the Florida House of Representatives; he paid a qualifying fee of $1,278.42 to the Department of State and appeared on the November 8, 1994 general election ballot. [R 149]

SUMMARY OF ARGUMENT

The filing-fee distribution schematic set forth in §99.103(1), Fla. Stat. (1993) which provides that minor political parties receive no per cent of their candidates' filing fees paid to the Department of State, while "major" parties (with 5%+ statewide voter registration) receive approximately 53% of the filing fees paid by their respective candidates to the Department of State, violates the First and Fourteenth Amendments of the U.S. Constitution; Article I, Section 1 of the Florida Constitution; and, Article I, Section 5 of the Florida Constitution.

The lower court misapplied federal and state precedent by characterizing the challenged statute as a ballot-access statute -- which it is not -- and that error cascaded into an adoption of governmental interests which were irrelevant to and illegitimately invoked as sufficient to cloak the fee-distribution disparity with the appearance of constitutionality.

A ballot-access statute is a measure designed to make a candidate or party show that there exists sufficient public support to justify the party or candidate being placed on the ballot. For example, a candidate presumably can raise funds from the public in an amount necessary to pay a filing fee if enough popular support exists for the candidate to be placed on the ballot. The existence of a filing fee within the Florida Election Code is not being challenged.

What is challenged is one of the inherent attributes of the filing fee which comes to the fore only if a minor party has obtained enough petition signatures for ballot placement of a candidate, and that candidate has qualified for the ballot and has funds to pay the fee. How the filing fee is distributed has absolutely nothing to do with ascertaining

whether there is sufficient voter support to justify placing a party or candidate on the ballot. If there is sufficient voter support, the laundry list of "compelling state interests" invoked in ballot-access cases -- e.g., preventing factionalism, voter confusion, a multiplicity of parties, etc. -- is rendered moot, because the voters have shown that they want an additional party or candidate on the ballot.

Making the error of treating this case as one of ballot-access, the lower court proceeded to misinterpret somewhat relevant caselaw, and relied upon irrelevant precedent. Distinguishing factors between this case and others were disregarded or overlooked. The burdens on the plaintiffs' fundamental rights of political association (Illinois St. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)) were incorrectly identified as "minimal" despite the obvious disincentive to political competition and participation, and despite the absence of legitimate reasons for the statutorily mandated disparity in the flow of internally-generated benefits to major parties in light of the lack of similar benefits for minor parties.

An improper condition was placed on the exercise of political association and participation rights of the plaintiffs, a condition which not only had nothing to do with earning ballot access, but penalized the attainment of earning a place on the ballot against major party competitors in the electoral arena.

The lower court judgment should be reversed, and §99.103(1) should be declared unconstitutional to the extent that minor parties are prohibited from receiving the same percentage of their candidates' filing fees as the major parties receive from their respective candidates.

ARGUMENT

ISSUE 1

THE LOWER COURT MISAPPLIED STATE AND FEDERAL JURISPRUDENCE BY MISINTERPRETING THE NATURE OF THE CASE, PROJECTING IRRELEVANT STATE INTERESTS WITHIN THE CASE, AND GIVING INSUFFICIENT WEIGHT TO THE BURDENS UPON THE PLAINTIFFS' RIGHTS OF POLITICAL ASSOCIATION AND PARTICIPATION.

A. Little, Boudreau, and McNamee are distinguishable in significant aspects from this case, sufficiently so to merit more severe scrutiny of the rights and interests at issue.

The lower court decision rested heavily upon Little v. Florida Dept. of State, 19 F.3d 4 (11th Cir. 1994), Boudreau v. Winchester, 642 So.2d 1 (Fla. 4th DCA 1994), and McNamee v. Smith, 647 So.2d 162 (Fla. 1st DCA 1994). [R 155, 158, 159, 160]

A litany of scrucial factors and considerations distinguish the case on appeal from the three cases noted above.

(1) Not in Little, Boudreau, or McNamee was there an issue of one ballot-qualified candidate, on a partisan ticket, facing a situation where he was offsetting more election-administration costs than a similarly-situated, ballot-qualified opponent for the same office. In this case, the State retained on hundred per cent of the filing fee paid by plaintiff Robert Wilson, since he was a minor party candidate. The State, however, retains only a small portion (15% of two-thirds) of the filing fees paid by major-party candidates, including the opponents of Robert Wilson. Wilson, as a minor party candidate, encountered a condition on the exercise of his political association rights not faced by any of the plaintiffs in Little, Boudreau, or McNamee.

(2) Not in Little, Boudreau, or McNamee was there an issue of some political parties financially benefiting from their respective candidates' filing fees while other political parties were denied the same statutory - directed benefit from the filing fees of their candidates. In this case,

the Libertarian Party of Florida obtained a sufficient number of petition signatures to place Wilson on the general election ballot, thus attaining ballot access by showing a modicum of public support among voters. Despite having jumped the hurdle of ballot access, the party with which Wilson was affiliated received no financial support from Wilson's filing fee, though the two "major parties" benefited from the filing fees paid by their respective nominees who opposed Wilson on the general election ballot. No such scenario existed in the trio of 1994 decisions cited by the lower court.

(3) Of great importance is this: Unlike the plaintiffs in Little, Boudreau, and McNamee, Robert Wilson had no alternative route to the ballot which he, as a minor party candidate with sufficient funds to pay the fee, could legitimately invoke.

In Little, a candidate for non-partisan judicial office could obtain ballot-access without paying a filing fee by collecting and submitting a sufficient number of petition signatures in lieu of paying the fee, under §105.035(3), Fla. Stat. (1993). In Boudreau, a Republican candidate who did not want a portion of his fee transmitted to the party with which he was affiliated also had an alternative route of ballot access of which he could avail himself and yet remain a Republican; he could have obtained a number of petition signatures from at least three per cent of registered voters in the district of the office sought, under §99.095(3), Fla. Stat. (1993); the same features applied in McNamee. None of these cases involved disparate distributions of candidate filing fees between or among competing candidates for the same office.

In the case on appeal, no genuine alternative to payment of the filing

fee exists for a minor party candidate who has sufficient funds to pay the fee. The Libertarian Party submitted the necessary amount of petition signatures for Wilson's placement on the ballot; there is no statutory alternative for submittal of a supplemental amount of signatures to be submitted in lieu of the filing fee. Wilson in good faith determined he had sufficient funds to pay the filing fee; obviously, he did so.

Wilson could do nothing else, could invoke no alternative route to the ballot without paying the filing fee and yet remain what he was -- a candidate on the Libertarian Party ticket.

The sole "alternative" for Wilson to avoid paying the fee, as a minor party candidate, would have been for him (under §99.096(5), Fla. Stat. (1993)) to swear an oath (and file it with the Department of State) that he was "unable to pay such fee without imposing on his personal resources or upon resources otherwise available to him[.]" To have had sufficient funds to pay the fee, which he did, and yet sign an oath of undue financial burden, would have placed Wilson in the position of committing an act of false swearing, in violation of §104.011, Fla. Stat. (1993).

The only "alternative" open to Wilson, as a Libertarian Party nominee and for whom sufficient signatures were collected to place him on the ballot, was the illusory, sham alternative of signing an oath of undue burden which he could not sign in good faith; this is borne out by the fact of him actually paying the filing fee.

The lower court failed to consider this feature of the case. Because of that failure, the lower court decision should be reversed.

B. The lower court mistakenly treated the case sub judice as a ballot-access case and improperly relied upon Storer v. Brown as persuasive precedent.

The lower court, by upholding the challenged statute, in part, because "discourages factioanlism and a multiplicity of splinter parties" [R 158], greatly confused the concept of satisfying conditions in order to make the ballot with the totally unknown and jurisprudentially unrecognized concept of applying post-access disincentives and competitively punitive measures against only certain political entities and candidates who have earned a place on the ballot.

The lower court cited Storer v. Brown, 415 U.S. 724, 736, 94 S.Ct. 1274, 1282 (1974) as precedent. [R 158] A review of Storer shows just how inapplicable that precedent is to this case.

At issue in Storer were party-disaffiliation requirements for independent candidates, petitioning percentage standards for ballot-access, the time period within which signatures could be collected, and eligibility standards for those who could validly sign a petition.

None of the statutory features challenged in Storer were to be applied because, contemporaneously or after, a non-major-party candidate earned placement on the ballot.

The precedential value is further undermined upon consideration of the governmental interests favorably referenced in Storer: political stability, assurance of majority winners, an understandable ballot, and prevention of clogging of election machinery. Storer, 415 U.S. at 728-732. All of these are rationales for making the act of obtaining ballot placement something to be earned -- but, once earned, not something to be penalized.

Once Robert Wilson's place on the ballot was earned by virtue of the Libertarian Party's petitioning efforts, Wilson was on the ballot -- and any state interest concerning stability, clogged electoral machinery, or an understandable ballot was rendered moot. How a filing fee is to be distributed once paid has nothing to do with standards pertaining to whether there is sufficient voter interest to justify the ballot placement of a candidate or a party.

The appellants further note that any alleged state interst in discouraging a "multiplicity of parties" is only of vital importance if there is a state interest in "assuring majority winners," an interest often cited (as it was in Storer). That alleged interest is not of a compelling nature in Florida, given that Article VI, Section 1 of the Florida Constitution only requires a plurality standard, not a majority standard, for victory at the general election stage.

The presupposition of the lower court opinion, that similarly situated candidates and parties on the ballot can yet be unequal under the law in order to prevent factionalism, is unheard of in American jurisprudence. Under that reasoning, virtually anything would be permissible to prevent the presence of more than two parties or two competing candidates for a given office at a general election. A vote for a minor party candidate could be counted as one-half of a vote -- to prevent a multiplicity of parties, of course. Donations to minor parties could be declared taxable income, but not so for "major" parties -- to "foster the activity and development" of major parties, of course,

Neither such a presupposition, nor the decision of the lower court, should be allowed to stand.

C. The lower court failed to recognize and account for the burdens upon the exercise of the plaintiffs' rights of political association, and incorrectly identified such concerns as "speculative."

The lower court asserted that the plaintiffs "have not adduced facts that would support such speculative claims" such as the statute penalizing "individual, minor party candidates for forcing them to bear or offset election costs to a greater degree than major party candidate." [R 154]

What the lower court referred to as "speculative" is merely a matter of statutory analysis, recognizing the facts, and engaging in some deductive reasoning (to the extent such observations are not self-evident).

As the lower court recognized in a footnote [R 154], Wilson paid a filing fee of $1,278.42; fifty-three per cent of that amount is $677.56. It is the amount of $677.56 which would have been transferred to the Libertarian Party of Florida executive committe <u>if</u> minor parties and their state and federal candidates were treated the same as major parties (and their candidates) under §99.103.

"Major" parties, those with greater than 5% statewide voter registration, receive a significant percent of the filing fees paid by their candidates to the Department of State. The parties are to use the funds to meet their "expenses." The major parties are financially strengthened by the infusion of funds directly traceable to the filing fees paid by their candidates to the Department of State; this is apparent from the relevant statutes.

Minor parties such as the Libertarian Party of Florida receive no percentage of the filing fees paid by their candidates, such as Robert

Wilson, to the Department of State. Minor parties receive no funds from the filing fees of their similarly-situated candidates with which to "meet expenses." This is self-evident, simply deduced from the statutes.

Plainly, a competitive burden falls upon minor political parties. "A burden that falls unequally on new or small parties . . . impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and -- of particular importance -- against those voters whose political preferences lie outside the existing political parties. [citation omitted] By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." Anderson v. Celebrezze, 460 U.S. 780, 793-794, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). The fee-distribution -- merely a direct rebate of funds provided by the candidate, his supporters, or both, nothing else (such tax revenues or bond proceeds) -- obviously enhances the effectiveness of the relevant group, currently only the Democratic and Republican parties. The effectiveness of competing minor parties is not similarly enhanced by the filing fees of their respective candidates.

The harm of the Libertarian Party is all the more recognizable in light of the citizens' "constitutional right . . . to create and develop new political parties." Norman v. Reed, --- U.S. ---, 112 S.Ct. 698, 705 (1992). It is self-evident that the "development" of the Libertarian Party of Florida is harmed when it is denied the same percentage of its candidates' filing fees as are received by competing major parties from

the filing fees paid to the Department of State by their respective candidates who also are on the ballot.

Finally, it is self-evident that when the State retains 100 per cent of one candidate's fee, and the State retains less than 50 per cent of the same filing fee paid by a competing candidate for the same office, then the candidate (e.g., Robert Wilson) whose fee was totally retained by the State is offsetting a greater percentage and greater absolute amount of election-related administrative costs than is the candidate (from a major party) of whose filing fee the government retains less than fifty per cent. "A state might permissibly charge a nondiscriminatory fee [emphasis added] that advances the regulatory interest of reimbursing the state for its election expenses, particularly if it offers alternative avenue of ballot access, but it cannot use the fee to decide who deserves to be on the ballot." Fulani v. Krivanek, 973 F.2d 1539, 1547 (11th Cir. 1992). The filing fee at issue is not nondiscriminatory; how it is distributed, and how much of it is retained by the State, are inherent attributes of the fee. The burden of this discriminatory fee is further compounded by the absence of a ballot-access avenue for minor party candidates which is not contingent upon payment of the fee by candidates who have sufficient funds.

The lower court mistakenly asserted that "the statute's First Amendment implications are so minimal that a rational basis test applies." [R 153] In light of Anderson v. Celebrezze, Norman v. Reed, and Fulani v. Krivanek, the inherently discriminatory filing-fee -- with its harm to the

development of minor parties such as the Libertarian Party, and with its skewed burden of election-administration costs borne more heavily by minor party candidate than by competing major-party candidates -- cannot reasonably be said to have "minimal" implications for the exercise of First Amendment rights.

D. The interests of the State are insufficient to justify the burdens placed upon the plaintiffs' First Amendment rights.

As asserted previously, this is not a ballot-access case, and the usual litany of "compelling state interests" -- preventing factionalism, preventing voter confusion, preventing a multiplicity of parties -- are rendered moot and irrelevant once a minor party (candidate) has satisfied the requirements for obtaining access to the ballot, namely, submitting sufficient petition signatures from registered voters to show a modicum of public support to justify placing a qualified candidate on the ballot. The litany of "compelling interests" in this case were eviscerated once the Libertarian Party satisfied the petitioning standards for placing Wilson on the ballot.

(Parenthetically, we note that precedent is not strong for the imposition of filing fees even in ballot-access cases. The use of filing fees to limit ballot length or access to the ballot has been determined "extraordinarily ill-fitted to that goal." Bullock v. Carter, 405 U.S. 134, 146, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). Furthermore, "[the state] cannot use the fee to decide who deserves to be on the ballot." Fulani v. Krivanek, 973 F.2d 1539, 1547 (11th Cir. 1992).)

The lower court initially recognized that this case was not a ballot access case, approvingly noting the plaintiffs' "concession" that it was

not. [R 152] However, the lower court later resorted, incorrectly, to framing the case as a ballot-access case, asserting that, "Numerous federal and state decisions have held that discouraging factionalism is a rational basis for ballot access statutes." [R 160] By characterizing the case as one of ballot-access, the lower court incorrectly relied upon the prevention of factionalism as a legitimate and relevant state interest.

The only possible state interest left for consideration is that of "fostering political parties' activity" (Wetherington v. Adams, 309 F.Supp. 318 (N.D. Fla. 1970), an objective cited in Boudreau v. Winchester, 642 So.2d 1, 2 (Fla. 4th DCA 1994). Nothing in the case at hand would harm that interest.

Unlike the plaintiffs in Boudreau and McNamee, Robert Wilson sought to have his filing fee shared with his political party. Wilson wanted to "foster political party activity." The plaintiffs in Boudreau and McNamee did not.

The only way to bend the "fostering political party activity" interest in support of the discriminatory fee-distribution scheme is to (1) limit the parties whose activity is to be fostered to "major" parties, thus adopting an inherently discriminatory objective, and (2) to frame this case as a ballot-access case, thus allowing the cornucopia of "anti - factioanlism" interests back into consideration.

The plaintiffs do not challenge the fact and law that other parties receive a percentage of their respective candidates' filing fees. The decisions in Boudreau and McNamee would be left unaffected by a reversal of the lower court in this case.

E. The lower court improperly placed undue reliance on Buckley v. Valeo due to the distinguishing factors between it and this case.

First and foremost, nothing in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976) concerned the payment of a statutory fee as a condition of being placed on the ballot -- particularly a fee with an inherently discriminatory attribute which had nothing to do with ballot-access -- and that is at the core of the case on appeal.

Accordingly, the lower court's considerable reliance on Buckley was distinctly misplaced. This is not to deny whatever propriety or correctness of the principles at stake in Buckley; it is simply to deny that those principles are of more than mild relevance to this case.

The plaintiffs further note that the funds at issue in Buckley were general tax revenues, not funds (1) which were solely and directly traceable to a particular candidate, (2) paid by that candidate (3) as a condition (4) for being placed on the ballot.

Nothing in Buckley was akin to the statute at issue in this case, a statute requiring payment of a fee as a condition, unrelated to compelling state interests, for participating as a candidate in the electoral process.

Furthermore, the funding scheme in Buckley which was attacked as invideously discriminatory to minor party presidential candidates was upheld, in part, because those candidates who qualified to receive tax-funding of their campaigns had to accept a burden not placed upon those who were ineligible for public funding; recipient of tax funds had (and have) to stay within certain spending limits. Those who do not qualify for public/tax fudning do not have to abide by spending limits.

By analogy to the challenged statute of §99.103(1), major party state executive committees are not required to satisfy or abide by any countervailing burdens or conditions -- such as expenditure ceilings -- in order to receive a percentage of their respective candidates' filing fees. Neither minor party executive committees nor their candidates enjoy any potential financial benefit denied to major party committees who reap the rewards of §99.103.

If the precedent of Buckley is to be applied, it cuts both ways. The lower court failed to take into account the absence of a countervailing burden for major parties under the Florida scheme, a burden which deeply undercuts the value of Buckley for the State.

The U.S. Supreme Court noted that "acceptance of public financing entails voluntary acceptance of an expenditure ceiling, Non-eligible candidates are not subject to that limitation." Buckley, 242 U.S. at 95. The lower court in this case failed to take that feature into account when citing Buckley as persuasive precedent.

(We also note an error in footnote 9 of the lower court's opinion, where it is alleged that, "A minor party under federal law would be a major party under Florida law." [R 156] The Federal public campaign financing law defines a "minor party" as one whose presidential candidate at the preceding general election received at least five per cent of the popular vote. 26 U.S.C. §9002(7). Under Florida law, party status as "major" or minor depends on the number of registered voters affiliated with a party as of January 1 of a general election year. See §97.021(15), Fla. Stat. (1993). Recent electoral success in the presidential election has nothing to do with party status under Florida law.)

ISSUE 2

THE LOWER COURT IMPROPERLY ANALYZED FLORIDA CONSTITUTIONAL CONSIDERATIONS BY FAILING TO RECOGNIZE THE TEXT-BASED RIGHT OF CANDIDACY WHICH, WHILE PROTECTED UNDER THE STATE CONSTITUTION, IS NOT RECOGNIZED UNDER FEDERAL JURISPRUDENCE.

The lower court asserted that the plaintiffs did not allege that Robert Wilson's right of political participation -- more specifically, right of candidacy -- is broader under the state constitution than the Federal constitution. [R 161]

We note that would be redundant, since there is no recognized right of candidacy under the Federal constitution, but there is such a recognized right under Florida constitutional law. "The declaration of rights expresly states that, 'all political power is inherent in the people.' The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable disqualifications to run. [citations omitted]" Treiman v. Malmquist, 342 So.2d 972, 974 (Fla. 1977). The right of candidacy is derived from explicit state constitutional text -- the inherent political power clause -- which is absent from the Federal constitution. It is further buttressed by reference to the preamble, which states that among the objectives for the existence of the state constitution is to "guarantee equal civil and political [emphasis added] rights to all . . . ." As noted years ago, "No mention of political rights is made in the preamble to the federal constitution. Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. Every citizen has the right of voting for public officers and of being elected. These are the rights which the humblest citizen possesses. [footnote omitted]" In re Apportionment

Law, Senate Joint Res. No. 1305, 263 So.2d 797, 813 (Fla. 1972)(Dist. Ct. J. Spector, dissenting).

The right of candidacy, particularly when read within the context of associational freedoms under the state constitution, is obviously burdened by the disparate distribution of filing fees under §99.103. Whether a candidate pays a fee with his own funds or with funds contributed by supporters, "supporting a candidate is speech and represents political expression at the core of the electoral process. State v. Dodd, 561 So.2d 263 (Fla. 1990), citing Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)." State v. Republican Party, 604 So.2d 477, 479 (Fla. 1992), The funds paid by candidates such as Wilson to satisfy fee requirements are funds voluntarily and directly raised or donated by the candidates themselves or by their supporters, not by government via taxation. The "appropriation" defended by the State is not an appropriation of tax revenues, but a mandated disparate treatment of private financial support made as an act of political expression.

In State v. Republican Party, 604 So.2d 477 (Fla. 1992), a 1.5% assessment on contributions to all political parties and political committees was declared unconstitutional, despite State arguments that the effect on First Amendment rights was de minimis. State, 604 So.2d at 479. If a 1.5% assessment on all such contributions is unconstitutional, then a de facto 53% "assessment" on privately-provided funds to secure ballot qualification only for minor party candidates is likewise contrary to the state constitutional right of candidacy.

The disparate filing-fee distribution scheme of §99.103 improperly burdens the right of candidacy under the state constitution, a right which by virtue of its very existence is more expansive than under the Federal constitution. For the same reasons that the alleged state interests improperly burden burden Federal constitutional rights of political association, those same insufficient state interests fail to justify the unequal distribution of filing fees paid by minor party candidates to the Department of State.

ISSUE 3

THE LOWER COURT FAILED TO ADDRESS THE IMPOSITION OF THE FILING FEE DISTRIBUTION SCHEME AS AN UNCONSTITUTIONAL CONDITION ON THE EXERCISE OF RIGHTS OF POLITICAL ASSOCIATION AND PARTICIPATION.

The challenged statutory distribution of filing fees paid by minor party candidates upon qualification to run for office is an improper condition placed upon those who exercise their rights of political association with a minor party.

It is self-evident that when a citizen associates with like-minded voters in a political party, to promote the philosophy or policies of that group in opposition to others, then that citizen experiences a condition placed upon the exercise of his rights if that citizen (e.g., Robert Wilson) runs for public office and his filing fee is in no way shared with his party, though the filing fees of his opponents are shared with their (major) parties. Given that the amount of the filing fee paid by Wilson <u>which was retained by the State</u> was far greater than the amount of filing fees paid by Wilson's opponents and retained by the State, the fee distribution scheme's disparate treatment has the

effect of being a de facto tax on minor party candidates' rights and upon the associational and development rights of minor parties themselves. As scholar Richard Epstein states, "Coercive tax burdens cannot be waived selectively for those whose views conform to the dominant political position, any more than additional taxes can be imposed on those whose do not. State gifts work as much of an illicit redistribution of wealth as state fines." Epstein, "The Supreme Court, 1987 Term -- Forward: Unconstitutional Conditions, State Power, and the Limits of Consent," 102 Harv. L. Rev. 4, 75 (1988).

The State has conditioned the right of minor party candidates to qualify for the ballot, and of supporters of a minor party to associate for political beliefs, by establishing a fee-distribution system which financially strengthens only the major parties -- the parties of the opponents of the minor parties such as the Libertarians. No relevant or legitimate state interests exist to justify this measure which has nothing to do with ascertaining whether sufficient public support is present so as to justify placing a given minor party candidate on the general election ballot.

This non-ballot-access condition, lacking any legitimate rationale for its existence, is inimical to the core values of the First Amendment of the U.S. Constitution, Article 1, Section 1 of the Florida Constitution, and Article 1, Section 5 of the Florida Constitution. The lower court failed to examine the fee-distribution disparity as an unconstitutional condition, and accordingly its judgment should be reversed.

CONCLUSION

The decision of the lower court should be reversed. Section 99.103(1), Fla. Stat. (1993) should be declared contrary to the 1st and 14th Amendments of the U.S. Constitution, 42 U.S.C. §1983, and Article 1, Section 1 and 5 of the Florida Constitution. The Secretary of State should be enjoined from retaining a higher percentage of filing fees paid by minor party candidates to the Department of State than is retained from fees paid by major-party candidates to the Department of State.

How a filing-fee is distributed by law is not a ballot-access measure, for how the fee is distributed has nothing to do with measuring whether there is enough popular support to merit the placement of a party or candidate on the general election ballot. Accordingly, none of the "compelling state interests" invoked by the lower court -- such as preventing factionalism -- were relevant or legitimate to justify the provisions for distribution of filing fees, a distribution scheme which plainly favors major parties to the disadvantage of minor parties with ballot-qualified candidates.

The distribution attribute of the filing fee requirement is inherently injurious to the political association and participatory rights of minor parties, their candidates and supporters; no legitimate state interest exists for the inherent discrimination concerning the distribution of filing fees.

To fail to strike down this condition on associational rights would be to grossly confuse the application of standards concerning the earning and attainment of ballot access with the heretofore unheard of concept of penalizing those who do satisfy ballot-access standards.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Charlie McCoy by U.S. Mail (1st Class) on this 21st day of April, 1995.

Daniel F. Walker
Attorney for Appellants
221 E. Seventh Ave.
Tallahassee, FL 32303
(904)-224-5545
Fla. Bar No. 0935328