IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v. CASE NO. 87,342

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

Respondents.
_____/

On Petition for Discretionary Review of a Final Decision by the First District Court of Appeal

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondents (the "State") accept Petitioners' "Introduction" as a sufficient statement of the case and facts for purposes of determining this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

The Court has discretionary jurisdiction to accept review. However, this case does not present an important enough issue to justify review; the result was just. Review on the merits should be declined.

ARGUMENT

ISSUE

ALTHOUGH THIS COURT HAS JURISDICTION, THE OPINION BELOW IS SOUND AND DOES NOT WARRANT FURTHER REVIEW

The First District Court of Appeal upheld §99.103(1), Florida Statutes, against several challenges under the U.S. and Florida Constitutions. This Court has jurisdiction under Art. I, §3(b)(3) of the Florida Constitution, to review opinion below.

This Court should not, however, exercise its jurisdiction. The opinion below is well reasoned, and relies on current federal and state precedent. It recognizes that §99.103 is designed to protect the State's compelling interest in "preventing factionalism and a multiplicity of splinter parties." (slip op., p. 5)

Specifically, the opinion below rejected the Party's argument that the State's interest ends once a minor party candidate qualifies to be on the ballot. In so doing, the court observed that although "petition requirements and other limitations on ballot access" may best effectuate the State's interest, §99.103 is reasonably related to its purpose. (slip op., p. 5-6)

By noting the existence of "petition requirements an other limitations on ballot access," the court implicitly recognized that §99.103 does not stand alone, but is part of the package of laws the Legislature has found necessary to protect the State's interest in preventing factionalism. Consequently, there is no merit to the Party's contention that "the fee-distribution statute is completely unrelated to ... state interests" (juris. brief, p. 3).

The Party's other contention is also without merit. The Party urges that review is appropriate because §99.103 affects the "financial strength of new and minor parties" and imposes a "condition on the exercise of political associative rights." (juris. brief, p. 3)

There is nothing in the record to support the Party's point about financial strength of new and minor parties, a point which approaches argument on the merits.[1] To the

[1] The State questions the inclusion of briefs on the merits as appendices to the Party's jurisdictional brief. See Fla.R.App.P. 9.120(d) (Petitioner's brief, limited solely to the issue of the supreme court's jurisdiction...." [e.s.]).

contrary, the trial court expressly rejected this point based on lack of record support. (See trial court's order of final judgment, attached as Appendix B, at p. 7.) Moreover, a "new" party with more than 5% of the voters would be entitled to a filing fee rebate.

It must be remembered that the Party's challenge to §99.103 is more narrow than it appears at first blush. A minor party candidate is not affected by §99.103 if that candidate avoids a filing fee altogether by submitting an "undue burden" affidavit under §99.096(5), Fla. Stat. Conversely, a minor[2] party candidate--like Appellant Wilson--paying a fee admits the fee is not an undue burden.

Both points advanced by the Party as grounds for review fail, and do not justify this Court's exercise of its discretionary jurisdiction. Restated, this case does not "present[] an important enough issue"; its "result was essentially just." Kogan, G. & Waters, R. *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova Law Review 1201 (no. 2B, Winter 1994) (discussing the concept of "discretion").

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jurisdictional brief. See Fla.R.App.P. 9.120(d) (Petitioner's brief, limited solely to the issue of the supreme court's jurisdiction...." [e.s.]).

[2] Major party candidates cannot avoid filing fees merely by submitting an affidavit. To avoid a fee, they must collect signatures equal in number to 3% of their party's voters. §99.095, Fla. Stat.

CONCLUSION

The Party's petition for discretionary review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **DANIEL F. WALKER**, Esq., 221 East Seventh Avenue, Tallahassee, Florida 32303; this 23d day of FEBRUARY, 1996.

Charlie McCoy

CHARLIE MCCOY

IN THE SUPREME COURT OF FLORIDA

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

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B. "Order of Final Judgment", case no. 93-5017 (Fla. 2d Cir. Ct. Jan. 11, 1995)

Appendix A

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

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

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

Appellants,

v.

CASE NO.: 95-547

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

Appellees.

_____/

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

(A)

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.

Appendix B

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY

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

Plaintiffs,

vs. CASE NO. 93-5017 CV

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

Defendants.
_____/

ORDER OF FINAL JUDGMENT

This cause came before the court on the parties' respective motions for final judgment on the merits. Plaintiffs challenge the constitutionality of §99.103, Florida Statutes on First Amendment and Equal Protection grounds under the U.S. Constitution. They also contend that §99.103 violates their rights of political association and participation under Art. I, §1 and §5 of the Florida Constitution.[1]

[1] Originally, the plaintiffs included Richard Vajs, the Libertarian Party's candidate for the U.S. House of Representatives, First District. When Vajs did not obtain enough signatures to be on the ballot, Plaintiffs filed a second amended complaint to substitute Robert Wilson for Vajs. Wilson was the Libertarian Party's candidate for the Florida House, District 4. Otherwise, the facts alleged in the original compliant did not materially change. References to the "complaint" are to the second amended complaint.

I. FINDINGS OF FACT

The parties agreed to the material facts, through a stipulation and supporting exhibits filed October 25, 1994. The court finds those facts facially reasonable and adequately supported, and adopts them by reference. For convenience, the stipulated facts are set forth:

The Division of Elections [Dept. of State] has registered the Libertarian Party of Florida as a minor political party. The party has filed, with the Department of State, the required Statement of Organization required under §97.021(15), Florida Statutes.

The Libertarian Party has formed an executive committee. At the last three annual conventions, 1992-1994, at least three-fourths of the committee members were elected at each convention.

Robert Wilson is the Libertarian Party of Florida's candidate in the 1994 general election for District 4 of the Florida House of Representatives. As part of qualifying for that race, Wilson paid a fee of $1,278.42 to the Department of State. Wilson has qualified to appear on the November 8, 1994 general election ballot. [cites to exhibits omitted]

II. CONCLUSIONS OF LAW

1. Introduction

A political party which does not include at least 5% of the state's registered electors is defined as a "minor political party". §97.021(15), Fla.Stat. "Major" political parties are not separately defined. However, the statute at issue expressly limits rebates of filing fees to executive committees of parties including at least "5 per cent of the

total registration of such counties." §99.103(1). For convenience, such parties will be referred to as "major" parties.

Major party candidates must pay a qualifying fee under §99.061. Alternatively, under §99.095, major party candidates may obtain verified signatures of at least 3% of that party's electors.

In contrast, minor party candidates must obtain verified signatures of "3 percent of the registered electors of state" or "geographical entity represented by the office." Signatures for minor party candidates are not limited to registered electors affiliated with the minor party. §99.096.

When a minor party candidate, under written oath, certifies that the qualifying fee would impose an "undue burden on his personal resources or upon resources otherwise available", that candidate is exempted from paying the fee. §99.096(5) Otherwise, such candidate will pay the same qualifying fee as a major party candidate for the same office.

Statutory treatment of qualifying fees is found in several places. Under §99.092, a qualifying fee has three components: a filing fee, an election assessment, and a party assessment when applicable.[2] The filing fee component represents 4.5% of the salary of the office sought.

Initially, the state retains one-third of the filing fee (i.e., 1.5% of the salary of the office) paid by any candidate, and transfers that amount to the Election Campaign Trust Fund. §99.092(1). The remainder is distributed pursuant to §99.103. Id.

Under §99.103(1), the state executive committee of a political party receives a rebate of part[3] of the remaining two-thirds of the filing fee when two conditions are met. First, three fourths of that committee must have elected at the last previous election for committee members. Second, the party must be comprised of at least 5% of the registered voters "of the counties." Effectively, the executive committees of major political parties only are eligible to receive a rebate of filing fees.

2. Standard Of Review

Section 99.103, Fla.Stat., is a codified exercise of the Legislature's appropriations power. The statute directs that State revenue (filing fees) be appropriated to specific uses. Part of such revenue goes to the Election

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[2] The election assessment and party assessment components are not at issue here.

[3] The rebate is specified under §99.103(1) to be filing fee minus the one-third already transferred to the Election Campaign Financing Trust Fund, and minus 15% (of the two-thirds remaining) transferred to general revenue. Under §99.103(2), the actual rebate consists of 95% of what is left. Mathematically, this works out as the filing fee x .67 x .85 x .95, or about 53%.

Campaign Trust Fund; part to the General Revenue Fund; and part to rebates.

Section 99.103 does not regulate the content or manner of speech, or the ability to seek redress from governmental action. It does not address the formation of a political party, and does not regulate a candidate's choice of parties. As Plaintiffs concede, it does not regulate ballot access.[4]

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 Plaintiffs' rights of political association. Plaintiff Wilson chose to associate with the Libertarian Party despite the fact that the party's executive committee was not eligible for a rebate.

Plaintiffs acknowledge that the "State of Florida is not required to craft a statutory scheme by which <u>any</u> political party is entitled to a portion of its candidates' filing fees." [e.s.] (motion for summary judgment, p. 13).[5] Of itself, the rebate or retention of filing fees does not implicate the U.S. or Florida Constitutions.

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[4] Plaintiffs' motion for summary judgment (p. 9) declares: "The election law being challenged is not a ballot-access law; that is a significant factor in this case."

[5] Plaintiffs' moton for summary judgment will be cited as "MSJ", p. __.

At most, 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. Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) and refined[6] in later cases. See Burdick v. Takushi, __ U.S. ___, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245 (1992) (the appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in Anderson); Tashjian v. Republican Party of Conn., 479 U.S. 209, 213, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (courts must identify legitimacy of interests advanced by state and consider the extent to which they necessitate burdening voter rights [citing Anderson]); 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; and describing that test as one which "ranges from strict scrutiny to a rational-basis analysis, depending on the circumstances." [e.s.]).

3. Section 99.103 Under The U.S. Constitution

As part of their First and Fourteenth Amendment claims, Plaintiffs urge the Party is "burdened" because the major parties receive a financial advantage; and that §99.103 drains minor parties' resources and thus reinforces the "duopoly" of the Democrat and Republican parties. (MSJ, p.

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[6] Plaintiffs' motion for summary judgment, (p. 7) also urges this court to employ a "refined" Anderson test.

4) Plaintiffs further urge that the statute damages the Libertarian Party's right to compete with other parties. Finally, Plaintiffs contend that the statute penalizes individual, minor party candidates by forcing them to bear or offset election costs to a greater degree than major party candidates. (MSJ, p. 5)

Plaintiffs have not adduced facts that would support such speculative claims; the parties to this case have not so stipulated. There is nothing in the record that would allow this court to conclude the statute drains Wilson and the Libertarian Party's resources, etc. See Buckley v. Valeo, 424 U.S. 1, 93 at n. 126, 96 S.Ct. 612, 640 at 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.").

The Libertarian Party's statewide executive committee would have received less than $700.00[7] if it had been eligible for a rebate from Wilson's filing fee. Moreover,

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[7] The parties stipulated that Wilson paid a filing fee of $1278.42; fifty-three percent of which is $677.56.

this money was paid by Wilson; the executive committee was not required to pay anything.

Wilson's decision to use much of his early campaign resources[8] to pay a filing fee indicates that the fee must not have been so debilitating as Plaintiffs now describe. Also, it would seem that any Libertarian Party candidate--if the Party's resources are so limited--could avoid the fee pursuant to the "undue burden...upon resources otherwise available" provision of §99.096(5). 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 Buckley, 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 rejected, among others, the argument that equal protection required Congress

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[8] As of July 29, 1994, Wilson reported only $1,550 in his campaign account. Of that, he used $1,278.42 for his filing fee. See Ex. C of the parties' Joint Stipulation.

to permit taxpayers to designate particular candidates or parties as recipients of their money:

> The appropriation ... is like any other appropriation from the general revenue except that its amount is determined by reference to the aggregate of the one- and two-dollar authorization on taxpayers' income tax returns. This detail does not constitute the appropriation any less an appropriation by Congress. The fallacy of appellants' argument is therefore apparent; every appropriation made by Congress uses public money in a manner to which some taxpayers object.

Id.; 424 U.S. at 91-92, 96 S.Ct. at 669.

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 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.[9] 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

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[9] 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." A minor party under federal law would be a major party under Florida law.

received public money for presidential nominating convention expenses. New parties received nothing. Id.

For the presidential campaigns themselves, the major party candidates received up to $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) to political parties that do not have at least 5% of the registered voters. If Congress can deny public money based on the number of votes received in an earlier election, the Florida Legislature can deny rebates to parties which include less than 5% of the registered voters.

Plaintiffs do not attack the 5% amount as unreasonable. They do 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. They concede that the Legislature could retain all filing fees, thereby denying rebates to all parties.

All that is opposed by Plaintiffs is the fact that minor parties cannot receive public money. Plaintiffs' arguments against §99.103 are essentially no different from the arguments that were unsuccessful in Buckley. Plaintiffs too must fail.

As the challenged 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. In so doing, it discourages factionalism and a multiplicity of splinter parties. 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. See McNamee v. Smith, 19 Fla.L.W. D1286 (Fla. 1st DCA June 7, 1994) (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.").

In Boudreau v. Winchester, 19 Fla.L.W. D1247 (Fla. 4th DCA June 8, 1994), the Fourth District addressed the propriety of a qualifying fee, not its later use. Boudreau attacked the 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. 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, and 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. It upheld the assessment for the reasons expressed in Buckley v. Valeo. Id.

The Boudreau 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 v. Adams, 309 F.Supp. 318 (N. D. Fla. 1970)--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.

Applying a rational basis test, §99.103 can reasonably be said to discourage factionalism through financial support of the executive committees of major political parties. 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. See McNamee, 19 Fla.L.W. at D1286 (noting that decision was "limited to the legality [not]...the wisdom of the challenged scheme."). Section 99.103 is sound under the U.S. Constitution.

4. Section 99.103 Under The Florida Constitution

Plaintiffs contend they have a separate right of political association and participation under the Florida Constitution, and that §99.103 violates this right. They rely on State v. Dodd, 561 So.2d 263 (Fla. 1990). That decision, which 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. Instead, Dodd cited only one Florida case, and relied heavily on several U.S. Supreme Court decisions.

Plaintiffs do not allege that Wilson's individual right of participation ("candidacy") is broader under the Florida Constitution. Instead, they cite two marginal Florida cases. The first, Treiman v. Malmquist 342 So.2d 972 (Fla. 1977) invalidated a law requiring a judicial candidate to have been registered to vote in Florida in the last preceding general election. That law obviously involved a candidate's ability to get on the ballot. Here, a candidate must already be on the ballot to get a rebate, if a filing fee had been paid at all. While Treiman relied upon federal and state court decisions, it did not intimate that the Florida Constitution extends broader rights against allocation of public money than does the U.S. Constitution.

The decision in Plaintiffs' second case, State ex rel Siegendorf v. Stone, 266 So.2d 345 (Fla. 1972), involved the sufficiency of a judicial candidate's qualifying papers. Finding the deficiency technical, the Court declared the candidate duly qualified. While the Court bolstered its decision by weighing the insignificant deficiency against the important right to participate in government by running

for election, the decision did not turn on the constitutionality of any statute. It simply found that the candidate had complied with the basic statutory requirements for qualifying.

Plaintiffs have not shown their 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.

III. JUDGMENT

Plaintiffs have not shown that §99.103, Florida Statutes, is unconstitutional. Therefore, the Defendants' motion for final judgment on the merits, declaring §99.103 to be constitutional, is granted. Final judgment is entered in favor of the Defendants.

ORDERED this 11th day of January, 1995.

Circuit Court Judge

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L. RALPH SMITH, JR.
Circuit Judge