IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

CASE NO. SC04-1755
LOWER COURT CASE NOS.: 04-CA-2140, 04-CA-2041

GLENDA HOOD, Secretary of the State of Florida, THE REFORM PARTY OF FLORIDA, THE REFORM PARTY OF THE UNITED STATES OF AMERICA, RALPH NADER, AND PETER MIGUEL CAMEJO,

Appellants,

vs.

HARRIET JANE BLACK; ROBERT RACKLEFF, WILLIAM CHAPMAN; and TERRY ANDERSON,

and

CANDICE WILSON, ALAN HERMANN, SCOTT MADDOX, as Chairman of the FLORIDA DEMOCRATIC PARTY, and the FLORIDA DEMOCRATIC PARTY,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

BRIEF OF APPELLEES

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September 16, 2004

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INTRODUCTION

Rather than limiting candidates for President and Vice President to those who can gather a sufficient number of signatures to show meaningful public support, the Florida legislature decided, in addition, to permit minor parties affiliated with national parties to place on the states' official presidential ballot the national party convention nominee. Being a national celebrity or a crusader for noble causes is immaterial. In this case, Ralph Nader and Peter Camejo, having decided not to go the signature-collecting route, have attempted to sail into Florida under the flag of convenience of a defunct Reform Party apparatus.

The Circuit Court, through Circuit Judge Davey, found that defendants failed to meet each of the requirements of Florida Statute Section 103.021(4)(a). Despite the expedited nature of this case, Judge Davey held two extended days of hearings, and received substantial testimony and documentary evidence. He issued detailed findings of fact finding "more than preponderant" evidence that Nader and Camejo have failed to meet three separate requirements of the Florida statute. The circuit court's findings are supported by overwhelming evidence establishing that Nader was nominated, not in a national convention, but in a committee telephone call, and that the Reform Party is neither a "national party" nor a "minor party," but a mere shell. This Court should sustain those findings.

STATEMENT OF THE CASE [1]

Reform Party Filing

On August 31, 2004, the RP-FLA filed materials with the Florida Secretary of State submitting for inclusion on the Florida ballot the names of Nader

[1] Transcript pages are cited herein by the transcript date and page. Citations to the transcript of September 15 ("9/15 Tr.") are made to the "Rough ASCII" version of the transcript, which was provided to counsel at 5:45 am on September 16.

and Camejo, purported presidential and vice presidential nominees of the Reform Party of the United States of America ("RP-USA"). The RP-FLA sought to rely on Florida Statutes Section 103.021(4)(a), which requires that the nominees of a "minor party" be "affiliated with a national party holding a national convention to nominate its candidates for President and Vice President."

On September 1, 2004, the Governor of Florida nominated the slate of Presidential electors submitted by the Reform Party. Florida's Secretary of State then announced her intention to order, on September 8, 2004, all County Supervisors of Elections to include Nader and Camejo on the Presidential ballot.

Preliminary Injunction

On September 2, two days after the RP-Fla made its filing to include Nader and Camejo on the ballot, plaintiffs filed two complaints against defendants. The complaints allege that the RP-FLA failed to comply with the requirements of Section 103.021(4)(a) so that its candidates are not eligible under Florida law for placement on the Florida ballot.

Because the Secretary of State intended to certify the names of candidates to be included on the ballot on September 8, plaintiffs requested an immediate hearing on their motion for preliminary injunction to prevent such certification. The circuit court commenced that hearing on September 8, the earliest possible date in light of Hurricane Frances and the Labor Day weekend. At the end of an eight-hour evidentiary hearing, Circuit Judge Kevin Davey found that plaintiffs "have amply discharged their burden of proving entitlement to a preliminary injunction." Order Granting Preliminary Injunction, Sept. 9, 2004, ¶ 8. The court found beyond "any reasonable doubt" that the RP-FLA did not comply with the statute in any of the following ways: the RP-USA is not a "national party"; the RP-USA did not nominate its candidates in a "national convention"; and the RP-

FLA is not a "minor party." *Id.* ¶¶ 8, 10. The court further held that plaintiffs lack an adequate remedy at law, that plaintiffs will suffer irreparable harm absent an injunction, and that injunctive relief will serve the public interest. *Id.* ¶¶ 11-13. The court found injunctive relief "necessary to remedy what the Court perceives to be the greater harm to Plaintiffs in particular and the Florida voter in general," and found that "emergency relief is essential" in light of the need to prepare the ballots for distribution overseas. *Id.* ¶¶ 12-13. The court therefore preliminarily enjoined Hood from certifying Nader and Camejo as candidates for the Florida presidential election ballot of 2004, and from certifying the electors offered by the RP-FLA. *Id.*[2]

Defendants' Avoidance of Preliminary Injunction

Defendants then initiated a multi-court procedural dance in order to avoid the order and proceed with the preparation of ballots that include Nader and Camejo. The RP-FLA, RP-USA, Nader and Camejo (collectively the "Reform Party Defendants") first orally moved for a stay, which Judge Davey denied. Tr. Sept. 9 at 28. Then the Reform Party Defendants filed a notice of appeal in the Florida Court of Appeal and sought an emergency stay. Appellants' Motion for Emergency Stay, Sept. 10, 2004. The Court of Appeal certified the case to this Court and did not decide the motion.

Finding that "the case involves matters of great public importance, which require immediate resolution by this Court," this court exercised its jurisdiction over the case, directed Judge Davey to proceed with the final hearing on

[2] In order to afford defendants a full opportunity to be heard and to expedite the final hearing on the merits, Judge Davey offered defendants the option of presenting evidence that afternoon or evening (*see* Tr. of Sept. 9 at 35, 37 ("Do you want to start this at 5:00, Mr. Sukhia? I'm willing to go through the night")), or by taking depositions on the following day and submitting the transcripts into evidence (*id.* at 42). The Reform Party Defendants declined both offers and requested more time to prepare. Judge Davey then scheduled a final hearing for September 15.

September 15 and entry of final order, and ordered all parties to file briefs by noon on September 16. Order of Sept. 13, 2004. In this way, the Supreme Court provided for this matter to be finally resolved in advance of September 18, the date on which the Secretary of State claims that absentee ballots must be distributed to overseas voters.

Having failed to convince the state courts to grant a stay, defendants exercised self-help. In the afternoon on Monday, September 13, the Secretary of State, who had not previously joined the Reform Party Defendants' appeal, filed a notice of appeal and invoked Florida Rule of Appellate Procedure 9.310(b)(2) providing an automatic stay of the injunction. Then, with the knowledge that this Court had set a schedule for adjudication of this case that would meet the Secretary of State's September 18 deadline, the Secretary of State decided that she could not and did not have to wait for the Florida courts to decide the matter, and instead immediately certified the ballot with the names of Nader and Camejo and directed the County Supervisors to print absentee ballots with such names -- notwithstanding Judge Davey's finding that these candidates are not eligible to appear on the ballot. Plaintiffs moved to vacate the stay. The Reform Party Defendants, however, filed a late-night notice of removal to federal court, thereby divesting the state courts of jurisdiction and preventing them from acting on the motion to vacate the stay.

The federal district court found no basis for federal jurisdiction. It further found that by their actions in the state courts, including the Secretary of State's decision to invoke the stay, defendants had waived any opportunity to remove to federal court. The federal district court remanded on September 14. Order of U.S.D.C., Sept. 14, 2004.

Upon return to state court, the Secretary of State took the position that the

stay was still in place and that she was not required to comply with Judge Davey's order. In the afternoon of September 15, Judge Davey vacated the stay. He further modified the preliminary injunction to undo the Secretary of State's late-night machinations by requiring that she instruct the Supervisors of Election that, if they had mailed any ballots containing the names of Nader and Camejo, they must immediately re-send corrected ballots with an explanation of the change. Order Granting Plaintiffs' Emergency Motion to Modify, Sept. 15, 2004, 1:25 pm.

The Secretary of State continued to resist, again appealing Judge Davey's order and again invoking an automatic stay.

Finally, this Court issued an order to the Secretary of State "to instruct the Supervisors of Elections to desist from mailing ballots to voters pending further order of this Court." The Court stated that it would consider Judge Davey's remedial order after consideration of the appeal. Order of Sept. 15, 2004.

Final Hearing

Judge Davey held a final hearing on the merits on September 15. The hearing lasted for more than eleven hours. Defendants presented fact and expert witnesses, and plaintiffs presented several rebuttal witnesses, in addition to the evidence admitted in the preliminary injunction hearing.

At the conclusion of the hearing, Judge Davey found in favor of plaintiffs and granted a permanent injunction. The Judge read detailed findings on the record in support of his conclusions that the RP-USA is not a national party, the RP-Fla is not a minor party under Florida law, and Nader and Camejo were not nominated at a national convention. Tr. 9/15 at 479-502. The Judge issued a short order incorporating his oral findings and enjoining the Secretary of State from mailing any ballots that include Nader and Camejo.

STATEMENT OF FACTS

Evidence Supporting the Finding that the Reform Party of the United States is Not a National Party

The Reform Party was established in conjunction with Ross Perot's 1996 candidacy for President, and was at one time active in national politics. *See* Tr. 9/8 at 213; 9/15 at 16-17. But the evidence established that the RP-USA no longer engages in any of the activities of a national party.[3]

Today the RP-USA has essentially no national activities, apart from its attempts to have Nader and Camejo placed on the ballots of a handful of states. Beverly Kennedy, of the Reform Party "national committee," conceded that the RP-USA currently engages in *no* party-building activities at the national level. Tr. 9/15 at 125.[4] Its national presence consists of an 800 number and a website. *Id*. Indeed, the party "national committee" is, as described in a recent affidavit, "a committee of two," consisting only of Ms. Kennedy and one other person. Pl. Exh. I. At the same time, many state affiliates have essentially "disappeared," in the words of Ms. Kennedy. Robert Williams testified that, when he reached out to the RP-USA for assistance in building an affiliate in Tennessee, he received absolutely

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[3] Since 1996, the RP-USA has declined dramatically. The organization suffered a major division in 2000, with one faction nominating conservative commentator Patrick J. Buchanan for President and another faction nominating physicist John Hagelin. *Id*. at 216-17; *see* Tr. 9/15 at 18-19, 54. The headquarters of the RP-USA is currently located, and the party is run from, the home of its Chairman, Shawn O'Hara, in Hattiesburg, Mississippi. Tr. 9/15 at 45-46, 293. Under the leadership of O'Hara, who advances such positions as the execution of doctors and nurses who perform or assist in abortions and the abolition of the CIA, the party has become even further fragmented. Tr. 9/8 at 218

[4] Q. Ma'am, what activities, if any, does the national party do with regard to party-building and getting out the vote?

A. Actually, the national party does nothing in those regards.

Id.

no support and was unable to locate any materials that might guide him through the process. Tr. 9/15. Other witnesses likewise testified that when they considered becoming involved in the RP-USA and tried to obtain more information about the Party, they came up empty-handed. *Id*.

Between 2000 and 2004, registration in the RP-USA has dramatically decreased -- by as much as 85% in some states. Tr. 9/8 at 226. In addition, members from only ten states participated in the RP-USA's national committee meeting in April 2004, despite the fact that the meeting occurred over the phone and was called for the important purpose of changing party rules regarding nominations. *Id*. at 227-28.

Unlike genuine national parties, the RP-USA is not fielding candidates in federal elections throughout the country. Tr. 9/18 at 221-25. It is trying to place its candidates for President and Vice President on the ballot in seven states – Mississippi, Kansas, Michigan, Colorado, Montana, South Carolina, and Florida – in several of which its eligibility for ballot status has been brought into doubt by serious questions of fraud and other deficiencies. It currently claims to have candidates for other federal offices in only two states (Mississippi and Colorado), but thus far only Chairman Shawn O'Hara and the other Mississippi candidates have filed the necessary papers with the FEC. Pl. Exh. ZZ. The testimony was that "there was no support by the national group" for Reform Party candidates running in 2004.

Financial activity by the RP-USA has virtually ceased. A report filed with the Federal Election Commission ("FEC") this August stated that the RP-USA had only had $18.18 cash on hand. Pl. Exh. QQ. The RP-USA committee has received approximately $6,000 in contributions for the entire 2003-2004 election cycle. Pl. Exh. Q. The only fund-raising activity by the RP-USA for the 2004 election was a

newsletter that sold approximately 50 subscriptions. Tr. 9/8 at 195. Most of the RP-USA's state party affiliates have reported to the FEC that they have little or no cash on hand. Pl. Exh. R.

Finally, no evidence was submitted to suggest that the RP-USA promotes a party platform or party policies. The Party did not publish any minutes from its so-called "convention" in August 2004 (*id*. at 229-30), and has not even posted platforms or position statements on its website (*id*. at 230). This is in stark contrast to other minor parties, such as the Green Party and Libertarian Party, which hosted well-attended national conventions that publicized the parties' position on various national issues. *Id*.

The Treasurer of the RP-USA filed an official notice of termination with the Federal Election Commission on August 11, 2004. Pl. Exh. QQ. The Treasurer explained his reasons for filing the notice of termination as follows:

> In my research, regarding my position and my duties and responsibilities as treasurer, I was the point man for the entire party with the FEC. . . And I discovered by reading the [FEC] advisory opinion, 1998-2, that there were some very serious requirements by the FEC in order to be a national committee. And none of those requirements, not even one, was being maintained. They were just going about having a little country club. They were not a national committee. I begged and pleaded with them to fix the things, and they just denied.

Tr. 9/8 at 205. The filing terminated the status of the RP-USA as a "national party committee," so that the party may no longer accept contributions as a national committee and is no longer obligated to file reports with the FEC. In effect, the RP-USA announced that it was departing the national scene.

Evidence Supporting the Finding that the Reform Party of Florida Is Not a Minor Party

The evidence at the September 8 hearing also established that the RP-Fla is not a "minor party" within the meaning of Florida law. Ruben Hernandez, the Chairman of RP-Fla, testified that the Party has not run any candidates in Florida since 2002. Tr. 9/8 at 159. Janice Miller, a member of RP-Fla, testified that there is currently *no* state activity by the RP-Fla. Tr. 9/15 at 125. In fact, the RP-Fla has had no party-building or significant fund-raising activity in Florida since its nomination of Pat Buchanan for President in the 2000 election. Tr. 9/8 at 179.

Like the RP-USA, the RP-Fla has filed a termination of status notice with the FEC. *See* Pl. Exh. F. Through this act, the RP-Fla said it did not intend to receive contributions, or make expenditures, in excess of $1,000 during a calendar year. *See* 2 U.S.C. § 431(4)(A); 2 U.S.C. § 433(d); 11 C.F.R. § 102.3(a)(1). The RP-Fla thereby clearly indicated that it too no longer intended to be involved in federal elections.

Evidence Supporting the Finding that Nader Was Not Nominated at a "National Convention"

The evidence showed that, rather than nominating Nader and Camejo by a national convention, the RP-USA chose to appoint a special nominating committee that then nominated Nader in a telephone call. The RP-USA's constitution states that "[t]here shall be a National Convention." RP-USA Constitution Art III § 1, Pl. Exh. A. That national convention is "responsible for the governance of the Reform Party, and for providing for the fulfillment of the Object of the Reform Party." *Id.* § 2. The national convention is further defined as the "supreme governing body of the Reform Party at the national level," with "all power and authority over the affairs of the Reform Party," and the power and

responsibility to, *inter alia*, "adopt a national Reform Party platform," "adopt a national Statement of Principles," and provide rules for the "popular selection by Reform Party members" of presidential and vice-presidential candidates. *Id.* § 9.

The RP-USA constitution provides a detailed process to ensure that the national convention represents a broad constituency. It provides for approximately 600 delegates, including one from each U.S. congressional district, additional statewide delegates, executive committee members, and additional delegates from U.S. territories and possessions. Delegates are required to be elected pursuant to each state party's rules. *Id.* §§ 3-4; *see also* Tr. 9/15 at 44, 296.

The party chose not to nominate its 2004 candidates at a national convention.[5] It chose instead to delegate the nominating power to a specially appointed committee, pursuant to a new, alternative procedure. *See* 2004 Reform Party Presidential Nomination Rules Art. III § 1 ("April 29 Rules") Pl. Exh. I. Rules adopted on April 29, 2004, create a committee of "Presidential Nomination and Endorsement Voting Members ('PNEVMs')," made up of national committee members who meet special qualifications. That committee is then to hold a "Nomination and Endorsement Session," in which the PNEVMs will nominate candidates for the party. *Id.* Art. III § 9. The April 29 Rules provide that the nomination is then "binding upon" the RP-USA and its state affiliates. *Id.* § 3.

This "Nomination and Endorsement Session" took place less than two weeks later, on May 11, 2004, not in a convention hall or in any other physical venue but over the wires of the telephone network – in an old-fashioned, voice-only conference call. Only 65 individuals were designated as members of the "National Committee Voting List, eligible to become voting "PNEVMs,"[6] and only

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[5] A convention scheduled to take place in Ohio was canceled. (Tr. 9/8 at 189.)

[6] *See* Minutes of National Committee Meeting, Apr. 29, 2004 (Pl. Exh. J) (selecting PNEVMs).

35 to 40 of the eligible PNEVM's participated in the phone call. Tr. 9/15 at 28, 110. The participating PNEVMs nominated Ralph Nader as the RP-USA's presidential candidate. RP-USA Press Release, May 11, 2004, Pl. Exh. K.

It is not genuinely disputable that Nader was nominated at the May 11 telephone call. Several RP-USA witnesses admitted this point. *See* Tr. 9/8 at 190 ("As far as I knew, that was the final endorsement. That was the purpose of the telephone conference, and that was the purpose of the rule change."); *see also* Tr. 9/8 at 154, 156, 169, 199-200. And the RP-USA's own statements make the same admission. *E.g.*, RP-USA Press Release, May 11, 2004 ("Since Monday, May 10th, the Reform Party USA has been successfully holding their nomination/endorsement session for president via teleconference. . . . Tonight, Tuesday, May 11th, at 8:00pm Central Time, a presidential candidate will be selected to represent the Reform Party USA."), Pl. Exh. K. Similarly, the RP-Fla represented in its Filing with the Florida Secretary of State that the nomination of Ralph Nader had been made on May 11, 2004.[7]

The Reform Party Meeting in Irving Texas

More than three months after it nominated Nader, the RP-USA held a meeting in Irving, Texas. The Party announced that this would be only "a working convention, since the Presidential nomination/endorsement of Ralph Nader has already been made." Pl. Exh. M. A "Call to National Convention" invited delegates to participate in the "*Certification* of the official Reform Party of the United States of America Presidential/Vice-Presidential Nominees/Endorsees." Pl. Exh. N (emphasis added). The former Treasurer of the RP-USA testified that the

[7] No vice presidential selection was proposed for the callers' approval or otherwise emerged from the May 11 conference call. Instead, on June 21 Nader himself unilaterally picked Camejo to be his vice presidential running mate. Nader for President Press Release, June 21, 2004, www.votenader.com/media_press/index.php?cid=80.

August meeting was convened for the specific purpose of enabling the party to assert later that it had complied with Florida's statutory "national convention" requirement. Tr. 9/8 at 191-92; *see also* Tr. 9/15 at 29 (testimony by national committee member that meeting was set up because "Florida's laws required a national convention"). He further testified that, following the rules change in April 2004, the national convention had no authority to nominate the RP-USA's presidential candidates and could only ratify the nomination that had been made on the May 11 telephone call. Tr. 9/8 at 191, 199-200.

The so-called "national convention" in Irving was but a faint shadow of the formal national conventions that RP-USA has held in the past, and a faint shadow of the event contemplated by the RP-USA constitution. Approximately 63 people attended (Tr. 9/15), ten of whom were from Chairman O'Hara's home state of Mississippi. Pl. Exh. S. Florida sent delegates from only five of its 25 congressional districts to the meeting. Tr. 9/8 at 156-57. The C-SPAN recording of Nader's speech at the "convention" reveals with stark clarity sparse attendance in the tiny room used for this event. *See h*ttp://www.cspan.org/search/basic.asp?resultStart=1&ResultCount=10&BasicQueryText=nader.

ISSUES PRESENTED FOR REVIEW

The sole issue presented for review is whether there is competent evidence to support the circuit court's finding that the Reform Party of Florida ("RP-FLA") failed to satisfy the requirements of Florida Section 103.021(4)(a) for inclusion of the names of its candidates for President and Vice President of the United States on the Florida ballot, for the reasons that the RP-FLA (1) is not a minor party, (2) is not affiliated with a national party, and (3) did not nominate its candidates through a national convention.

JURISDICTION

This Court has jurisdiction over case because it presents an appeal from a final judgment.

SUMMARY OF THE ARGUMENT AND STANDARD OF REVIEW

As this Court has repeatedly held, "the function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause. It is not the function of the appellate court to substitute its judgment for that of the trial court through evaluation of the testimony and evidence from the record on appeal before it." *Shaw v. Shaw*,334 S.2d 13, 16 (Fla. 1976). Rather, the test for this Court "is whether the judgment of the trial court is supported by competent evidence." *Id.*

The evidence in this case overwhelmingly supports the circuit court's finding that the RP-FLA fails to satisfy the requirements of Florida Section 103.021(4)(a) for qualifying its candidates to Florida's presidential ballot. Indeed, whereas a failure to meet even one element of that section would be sufficient to disqualify Nader and Camejo from the ballot, the trial court found, and the evidence demonstrates, that the RP-FLA failed each and every one of the statute's three separate requirements. These findings are supported by witness testimony, documentary evidence, and expert opinion, and there is no basis to disturb those findings on appeal.

ARGUMENT

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE RP-FLA DID NOT COMPLY WITH ANY OF THE REQUIREMENTS OF SECTION 103.021(4)(A)

Florida has enacted a comprehensive statutory scheme for the qualification of candidates to be listed on the presidential and vice presidential

election ballot. Candidates of major parties must qualify through a political primary that is regulated under Florida law. *See* Fla. Stat. § 103.101. Independent and third-party candidates may also qualify for the ballot through an affirmative demonstration of sufficiently widespread support for their candidacies. Ordinarily, that support must be demonstrated by submitting a petition signed by one percent of the registered voters of the state. *Id.* §§ 103.021(3) & (4)(b).

In 1999, Florida amended its law to provide an alternative means by which a qualifying "minor party" can have the name of its presidential candidate included on the ballot. *Id.* § 103.021(4)(a). Section 103.021(4)(a) provides as follows:

> A minor party that is affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States may have the names of its candidates for President and Vice President of the United States printed on the general election ballot by filing with the Department of State a certificate naming the candidates for President and Vice President and listing the required number of persons to serve as electors.

Thus a third party may bypass the petition requirement, but only if it meets three separate requirements: i) it must be a "minor party" as that term is defined by Florida law, ii) it must be "affiliated with a national party," and iii) it must have candidates who were nominated through "a national convention to nominate candidates for President and Vice President of the United States." All three requirements must be met. Yet, as discussed herein, the RP-Fla and its nominee fail to meet *any* of them.

The requirements of Section 103.021(4)(a) are not just empty matters of form. Rather, they are central to the integrity of the entire statutory scheme. *See Polly v. Navarro*, 457 So. 2d 1140, 1144 (Fla. 4th DCA 1984) ("Our

legislature has determined the criteria for valid candidacy," and "[w]e would be remiss in our duty if we allowed [a candidate] to remain on the ballot" who does not meet those criteria); *State ex rel Taylor v. Gray*, 25 So. 2d 492, 496 (Fla. 1946) (compliance with the Florida Election Code "constitutes a condition precedent to the exercise of the rights and privileges thereof"). Florida's Election Code is designed to limit the ballot to those candidates that have demonstrated broad support, whether through a primary process in the case of the major-party candidates, or through a valid petition, or through nomination by an affiliated national party at a national convention. This requirement serves Florida's paramount interest in "protect[ing] against a proliferation of candidacies rendering the state's election processes confusing and impracticable." *Beller v. Adams*, 235 So. 2d 502, 509 (Fla. 1970).

If any group can gain access to the Florida ballot simply by calling itself a "national party" and conducting a telephone conversation, then the exception will swallow the rule, and the showing of widespread support that the statute seeks to demand will be demoted from a criterion the Florida Legislature intended as meaningful and chose to make mandatory, to a guideline lacking both content and bite – one that politicians determined to cut corners would have no need to take seriously. Any handful of individuals – devoid of widespread support in Florida or nationwide – will be in a position to enter its presidential and vice-presidential favorites in the Florida electoral sweepstakes.

A. The Evidence Supports the Trial Court's Finding that the RP-Fla's Candidates Were Not Nominated in a "National Convention."

The evidence clearly supports the trial court's finding that the RP-USA did not nominate Nader and Camejo through a "national convention" as that term is commonly understood. The "national convention" element of Section

103.021(4)(a) is critical to the statutory scheme because it serves to require a demonstration of broad public support that substitutes for the primary required of major party candidates or the traditional petition requirement for independent and minor parties. *Cf. Ervin v. Richardson*, 70 So. 2d 585, 587 (Fla. 1954) ("[T]he primary is a part of the general election machinery and as such retains its traditional character as substitute for the caucus petition or nominating convention."). It is indisputable that the RP-USA nominated Nader in a telephone call among members of a small committee of "PNEVMs." As set forth below, the circuit court correctly held that this telephone equivalent of the proverbial "smoke-filled room" is not a "national convention."

1. The May 11 Conference Call Was Not a "National Convention" Under the Plain Meaning of the Term.

The Court need look no further than the common understanding of the term "national convention" to affirm that the RP-USA does not comply with Section 104.021(a)(4). Indeed, treating the May 11 meeting as a "national convention" would contravene the common understanding of that frequently employed term and, by departing from its plain meaning, would depart from the Florida Legislature's intent in using it. *See Hayes v. David*, 875 So. 2d 678, 680 (Fla. 1st DCA 2004) ("One of the fundamental rules of statutory construction is that when the language under review is clear and unambiguous, it must be given its plain and ordinary meaning."); *Vreuls v. Progressive Employer Servs.*, 2004 WL 1920037, at *2 (Fla. 1st DCA Aug. 30, 2004) (same).

> The common understanding of a "convention" is:
>
> (a) the summoning or convening of an assembly; (b) an assembly of persons met for a common purpose, especially a meeting of the delegates of a political party for the purpose of

> formulating a platform and selecting candidates for office.

The Merriam-Webster Online Dictionary, available at http://www.m-w.com.[8] Black's Law Dictionary, which similarly defines "convention" as "an assembly or meeting of members or representatives" then in turn defines "assembly" as:

> The concourse or meeting together *of a considerable number* of persons *at the same place.*

Black's Law Dictionary (6th Ed. 1990) (emphasis added).

Political conventions in the United States, whether on the national, state or local level, historically have been organized assemblies of delegates, meeting in person and in a formally structured process, endowed with authority to debate and act, or authorize others to act, on behalf of a functioning political party. And *national* political conventions are typically multi-day affairs attended by hundreds if not thousands of delegates acting in a representative capacity. This traditional meaning derives parlance from the fact that the essence of a convention is the act of "convening," which in the ordinary sense means "to come together; to meet" and is synonymous with "meet, assemble, congregate." Webster's New 20th Century Dictionary (Unabridged), 2d ed. 1977 at 399.

Thus the word "convention," because it is so universally understood in political and governmental contexts as to call for no special definition, is nowhere expressly defined in Florida law, but it is consistently used by the Legislature in a manner that implies travel by participants in order to congregate at

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[8] When necessary, the plain and ordinary meaning [of a term used in a statute] "can be ascertained by reference to a dictionary." *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000); *accord Bush v. Holmes*, 2004 WL 1809821, at *8 (Fla. 1st DCA Aug. 16, 2004) (using American Heritage Dictionary of the English Language to define term "indirect"); *Florida Caucus of Black Senators v. Crosby*, 877 So. 2d 861, 864 (Fla. 1st DCA 2004) (using Merrian Webster's Collegiate Dictionary to define meaning of term "assist").

a single locale. The Legislature adopted, for example, a grant program to attract "national conferences" to Florida and to encourage the commerce of traveling participants. *See* Fla. Stat. Ann. § 288.124 (West 2004) ("Commission on Tourism is authorized to establish a convention grants program . . . for the purpose of attracting national conferences and conventions to Florida."). The Legislature's use of the term elsewhere similarly suggests that it shares the common understanding that a "convention" is an in-person assembly.[9]

The Presidential Election Campaign Fund Act, which provides federal funds to qualifying national parties (including minor parties) for their national nominating conventions, likewise clearly contemplates that a national "nominating convention" is a physical gathering of persons in one place.[10] The regulations implementing the Act define "nominating convention" as follows:

> "Nominating convention" means a convention, caucus, or other meeting which is held by a political party at the national level and which chooses the presidential nominee of the party through selection by delegates to that convention or through similar means.

11 C.F.R. § 9008.2(g). Indeed, the regulations repeatedly refer to a physical assembly. *See* 11 C.F.R. § 9008.7(a)(4)(i) ("Convention expenses" include expenses "for preparing, maintaining, and dismantling the physical site of the convention, including rental of the hall, platforms and seating, decorations,

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[9] *See, e.g.*, Fla. Stat. Ann.§ 112.061(6)(a) (West 2004) ("All travelers shall be allowed for subsistence when traveling to a convention or conference . . ."); Fla. Stat. Ann. § 112.061(9)(a) (West 2004) ("The Department of Financial Services shall adopt such rules . . . , to predetermine justification for attendance by state officers and employees and authorized persons at conventions and conferences . . . ."); Fla. Stat. Ann. § 112.061(11)(a) (West 2004) (authorizing "a uniform travel authorization request form which shall be used by all state officers and employees and authorized persons when requesting approval for the performance of travel to a convention or conference.")

[10] The Reform Party USA qualified for such funds in 2000 but not 2004 because of its poor showing in the 2000 election.

telephones, security, convention hall utilities, and other related costs"). And in calculating limits on expenses, costs incurred on transporting and lodging those attending the convention are exempted. *See* 11 C.F.R. § 9008.8(b)(3).

Here, RP-USA obviously did not meet, assemble, or congregate on May 11. Instead, the uncontradicted evidence was that the small committee of "PNEVMs" simply picked up telephones to listen in on, and occasionally contribute to, a conversation, without ever seeing those to whom they were speaking or listening. If this is a "national convention" then every court's interstate telephonic status conference also constitutes some kind of "national convention."[11] Such a notion, of course, would be absurd and would manifestly conflict with the Florida Legislature's clear intent to require a modicum of popular support akin to that evidenced by the petition requirement.

2. The RP-USA Nominated Nader Through a Committee, Not Through its National Convention.

There was also ample evidence, including defendants' own admissions, to support the circuit court's finding that Nader was nominated by a committee that was not the body that the Reform Party itself defines as its national convention. The RP-USA's constitution states that "[t]here shall be a National Convention." Pl. Exh. A, Art III § 1. The national convention is defined as the "supreme governing body of the Reform Party at the national level," with responsibility for its governance. *Id.* §§ 2, 9. It is defined as an assembly consisting of approximately 600 delegates to broadly represent the entire country.

[11] By the same token, if this is a "national convention" then an amendment to the United States Constitution that Congress proposes to the "several States" for ratification "by Conventions in three fourths thereof" (U.S. Const., Art. V) could become "Part of [our] Constitution" upon being approved in 38 multi-party telephone conversations. *But see Hawke v. Smith*, 253 U.S. 221, 227-29 (1920) (ratification by either Article V method, "by Legislatures or conventions, call[s] for action by deliberative assemblages representative of the people," not by the expressions of assent or dissent of a multitude of individuals – even if that multitude includes every person eligible to vote in the state).

Id. § 3. The constitution further contemplates a formally called, in-person meeting. *See id.* § 10 (requiring a formal "Call to National Convention," which shall, *inter alia*, specify "the . . . place" of the meeting).

This year, however, the RP-USA chose to nominate its 2004 presidential candidates not through a national convention, but instead through a specially appointed committee. On April 29, the RP-USA adopted rules providing for delegation of the nominating power to a new committee, under a procedure that was designed to be separate and distinct from its national convention. Pl. Exh. I. The April 29 rules create a committee of "PNEVMs," made up of national committee members who meet special qualifications. The PNEVMs are given the power to nominate and endorse a candidate for President pursuant to a "Nomination and Endorsement Session," rather than that decision being made by the delegates to the national convention. *Id.*, Art. III § 1. A small group of PNEVMs spoke to one another by phone on May 11 and nominated Nader. Pursuant to the April 29 rules, their choice was then "binding upon" the Reform Party state parties. *Id.* § 3; *see also* Tr. 9/8 at 198-99 (testimony by former RP-USA Treasurer William Chapman that nomination power was shifted from national convention to PNEVMs).

Indeed, the question is not an open one. This Court has already specifically held that "nomination by a committee is not a nomination by a primary or convention." *Board of Commissions of Leon County v. Moore*, 118 So. 313, 317 (Fla. 1928). The *Moore* case concerned a situation in which two candidates, Moore and Clark, tied in the Democratic primary. The Executive Committee of the Democratic party then chose Clarke as the party's nominee. When Moore later sought to run against Clarke as an independent, Clark complained that Moore's candidacy was in violation of Florida's election laws. *Id.* at 314-16. The particular

statute permitted a candidate to be on the ballot as an independent so long as he "has not participated, as a voter or candidate, in the affairs of a political party *furnishing a nominee,* as aforesaid, *during its last convention* or primary election." *Id.* at 316 (emphasis added). Thus that statute, like this one, required the Court to determine whether nomination by a party committee was the same thing as nomination by a "primary or convention." The Court noted that where terms have "a definite and precise meaning the courts have no power to go elsewhere in search of conjecture in order to restrict or extend the meaning." *Id.* at 318 (citing Black on Interpretation of Laws). Applying the plain meaning of the words, the Court held that the committee nomination did not fall within the statutory requirement of nomination by a "primary or convention." *Id.*

In this case as well, nomination by the "PNEVMs" cannot satisfy the requirement of Section 103.021(4)(a) that the candidate be nominated by the party's "national convention." The PNVMs were a different body altogether from the national convention as set forth in the RP-USA constitution.

There is no question, moreover, that the RP-USA considered the "Nomination and Endorsement Session" to be an alternative to, rather than an example of, a national convention. The April 29 Rules deliberately and unambiguously created a process for nomination by a committee that was separate and distinct from the party's "national convention." The April 29 Rules vested the power to select a presidential nominee in the PNEVMs rather than the delegates to a national convention.[12] The April 29 Rules did not purport to amend the RP-USA

[12] As explained by Janice Miller, a member of the national committee, "the convention said we don't want to deal with these [nominating rules], they delegated that duty to the national committee." . . . The constitution says that the convention will provide rules for the nomination and endorsement. And they delegated that authority to the national committee who had more time to deal with it than the convention did." Tr. 9/15 at 107.

constitution or alter the powers otherwise reserved to the national convention as the "supreme governing body" of the party.[13] Nor did the April 29 Rules purport to characterize the "Nomination and Endorsement Session" as the party's national convention. On the contrary, the April 29 Rules themselves make reference to the national convention,[14] thus confirming that the "Nomination and Endorsement Session" is something different from and additional to the national convention.

Accordingly, while the RP-USA could have adopted rules so that its national convention choose its nominee, as it has done in the past, it chose not to do so this year. It instead decided that a special party committee would make the decision, acting by telephone call. Nomination by a committee is not nomination by the national convention, as required by the statute. Nor should this Court reach out to treat the May 11 telephone call as a "national convention" where even the RP-USA did not intend that call to serve as such a gathering. The court below merely respected the RP-USA's own nomenclature and governing principles, rather than imposing some concept alien to it.

3. The August Meeting to "Confirm" the Nomination Cannot Satisfy the National Convention Requirement.

More than three months after it nominated its presidential candidate, the Reform Party held a meeting in Irving, Texas that it denominated a "national convention." Although it decided to "certify" its nominees at this meeting in what it later conceded was an attempt to satisfy Section 103.021(4)(a) *nunc pro tunc*,

[13] The minutes of the National Committee meeting at which the April 29 Rules were adopted indicate that there was a motion to amend the proposal so that National Convention delegates, rather than National Committee members, would comprise the PNEVMs and so that the meeting of the PNEVMs would be called in the same manner as a National Convention. This motion was defeated on a voice vote. *See* Pl. Exh. J at 11-12.

[14] *See* Pl. Exh. I, Art. II § 2 (providing for amendment or modification of the April 29 Rules by vote of the National Convention).

that meeting does not come close to satisfying the statutory requirement that the party hold a "national convention to nominate candidates."

First, the Reform Party had *already nominated* Nader in the May telephone conference call. Thus, whatever else it may have been, the Irving meeting clearly was not a convention "*to nominate candidates*" as required by Section 103.021(4)(a). It is indisputable that the April 29 Rules provided that the committee of PNEVMs would nominate the candidates, rather than the national convention, and it is undisputed that these rules have not, to this day, been changed. *See* 9/8 Tr. at 198-99. It is also indisputable that Nader was nominated in the May 11 meeting of the PNEVMs. *See*, *e.g.*, Tr. 9/18 at 154, 189; *see also, e.g.*, Pl. Exh. K. The RP-Fla's filing with the state also made this representation. Pl. Exh. KKK.[15] The April 29 rules make clear that the May 11 "Nomination and Endorsement Session" was to be sufficient, in and of itself, for nomination of a presidential candidate. Pl. Exh. I, Art. III. Reinforcing that understanding, the April 29 rules dictate that the selection of the Nomination and Endorsement Session "is binding" on the state parties. *Id*. § 3. Moreover, Nader had already accepted the nomination well in advance of the Irving meeting (*see* Pl. Exh. KKK at 5 (Nader's 8/13/04 letter of acceptance)), and the Reform Party repeatedly instructed its members, in advance of the Irving meeting, that Ralph Nader *was*

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[15] Its official document is entitled "Ratification of Prior Nomination and Endorsement," and states:

> THIS IS TO CERTIFY that, at the National Convention of the Reform Party of the United States of America, held in Irving, Texas from August 27 through 29, 2004, the Convention formally ratified *the previous nomination/endorsement made on May 11*, 2004, by adopting the following motion to –
>
> Ratify *the previous Ralph Nader Nomination/Endorsement made at the 5/11/04 RPUSA Nomination and Endorsement Session . . .*
>
> (Pl. Exh. KKK 2) (emphasis added).

already the party nominee. *See, e.g.*, Pl. Exh. S (RP-USA Press Release of August 24, 2004, declaring "Today, Ralph Nader is the endorsed/nominated Reform Party Candidate for President.").

Indeed, the RP-USA has conceded that the Irving meeting was *not* held "to nominate candidates." It announced that the Irving meeting "will be a working convention, since the presidential nomination/endorsement of Ralph Nader has already been made." Pl. Exh. M. In its call convening the meeting, the RP-USA identified the agenda as the "Certification" – not nomination – "of the official Reform Party of the United States of America Presidential/Vice-Presidential Nominees/Endorsees." Pl. Exh. N. William Chapman, former treasurer of the RP-USA, testified that the Irving meeting was called for the specific purpose of enabling the party to assert later that it had complied with Florida's statutory "national convention" requirement. Tr. 9/8 at 192 (purpose of the meeting was "to have the ballot access for Florida to put Mr. Nader and Mr. Camejo on the Florida ballot."); *see also* Tr. 9/15 at 29 (testimony by national committee member that meeting was set up because "Florida's laws required a national convention"); *accord* Tr. 9/15 at 111 (same testimony by another national committee member).

In any event, even if one ignores the RP-USA's own rules and procedures and the record of what had already transpired, it is plain that the Irving meeting was no "convention," as the statute uses that term, for it lacked any of the key indicia of such a gathering discussed above – to wit, the elements of formality, adherence to set procedures, wide participation, structured opportunity for the exchange of ideas, and authority to take binding decisions. Attendance at the Irving meeting was spotty at best. Tr. 9/15; Pl. Exh. S. For that meeting, the RP-USA apparently did not follow the procedures set forth in its constitution for the

selection and participation of delegates from every state, ensuring broad participation and representation. *See* Pl. Exh. A (RP-USA Constitution Art. III). Most importantly, a nomination having already been made weeks earlier that was "binding" under the April 29 Rules, the delegates had no mandate to select a presidential nominee, regardless of intervening events. *See* Pl. Exh. I, April 29 Rules, Art. 1 § 3.[16] The result was a meeting that bore little resemblance to the national conventions that are contemplated by the RP-USA constitution or within the common understanding of the term as employed in Section 103.021(4)(a).

In short, because the RP-Fla's candidates were not nominated in a "national convention" under Florida law, Nader and Camejo's presence on the ballot renders it unlawful. To prevent this taint, neither their names nor any reference to the Reform Party can be permitted on the ballot.

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[16] Chapman testified that the nomination that occurred in the May 11 telephone call was binding, and that the "convention" only had authority to ratify the existing nomination -- not to effect a new one. Tr. 9/18 191, 199-200. Nor was any attempt made to change or revoke the April 29 Rules in advance of or in connection with the Irving meeting:

> Q To your knowledge, was there any rule change between May 11 and August that took the power from the nominating -- from the national committee and gave it back to the national convention?
>
> A No, sir. I was not aware of any change in any way.
>
> Q So what happened was, we have a shift -- by rule, of the Reform Party U.S.A., a shift of the power in April to nominate or endorse to the national committee, that's what happened, and it was never shifted back by any rule or any document to the national convention?
>
> A No, sir. I believe the intent was to just ratify it at the convention and they were to have the convention in order to support Florida being on the ballot.

9/8 Tr. at 198-99.

4. Section 103.021(4)(a) Does Not Unduly Burden Defendants' First Amendment Rights.

At the hearing before the Circuit Court, the private-party defendants – and, surprisingly, the Secretary of State -- suggested that the elements of Fla. Stat. § 103.021(4)(a) must be construed to empty of any real content the convention-nomination route to ballot access, in order to ensure that the statute not raise serious constitutional questions. But as fairly and properly construed by the Circuit Court, the Florida statute plainly does not infringe the constitutional rights of minor parties or their candidates.

Florida has enacted a comprehensive statutory scheme for the qualification of candidates to be listed on the presidential and vice presidential election ballot. Candidates of *major* parties must qualify through a political primary process that is regulated under Florida law. *See* Fla. Stat. § 103.101. This requirement is on the whole much *more* onerous than the burdens placed on minor parties. Indeed, Florida goes much further than most states in providing ballot access to minor party candidates. A recent amendment to the Florida Constitution provides that "the requirements for . . . a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters." F.S.A. Const. art. VI, sec. 1. In accord with this mandate, the Florida Legislature recently liberalized the means by which minor parties may ensure that their presidential and vice-presidential candidates appear on the Florida ballot, by providing for *two distinct ballot-access alternatives*.

First, minor parties may qualify their presidential and vice-presidential candidates through an affirmative demonstration of sufficiently widespread support for their candidacies. Ordinarily, that support must be

demonstrated by submitting a petition signed by one percent of the registered voters of the state. F.S.A. 103.021(4)(b). Before the 1999 statutory amendment, this petition requirement was the *exclusive* means by which a minor party could place its presidential candidates on the ballot. But in 1999 Florida amended its ballot access laws to add subsection 103.021(4)(a), the provision at issue in this case, which provides an *alternative* means of ballot access for minor parties. Subsection (a) provides virtually automatic ballot access for the presidential and vice-presidential candidates of a minor party, *without* the need to collect voter signatures, if the party is "affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States."[17]

Defendants apparently will argue that the affiliation/convention requirement of subsection (a) imposes an unconstitutional burden on minor parties' ballot-access or other constitutional rights if that requirement (particularly the phrase "holding a national convention to nominate candidates for President and Vice President of the United States") is construed – as the Circuit Court did construe it – in accord with plain meaning and common understanding. As we explain below, there is no basis for this argument. But even if there were some reason to think that subsection (a), *standing alone*, raised serious constitutional questions, that subsection does *not* stand alone. A minor party unable to meet that requirement (or unsure whether it will meet that requirement) may always opt for the petitioning option of subsection (a), an option that is unquestionably constitutional, under a very long line of decisions upholding signature and other

[17] The only additional requirement under subsection (a) is that by September 1 the minor party must file with the Secretary of State a certificate naming the candidates for President and Vice President and listing the required number of persons to serve as electors.

indicia-of-support requirements much more onerous than the one-percent requirement found in subsection (b).[18] Those cases "establish with unmistakable clarity that States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.'" *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 n.9 (1983)).

The federal Constitution did not compel Florida to provide any means of ballot access for minor parties *beyond* the petitioning alternative in subsection (b). In 1999, however, Florida took a long step *beyond* what is constitutionally required, and amended its ballot access laws to provide an alternative method for ballot access for minor parties affiliated with *national* parties (i.e., those that have demonstrated a certain level of seriousness, organization and national support), if those national parties choose their nominees at a national convention. The addition of this second method of ballot access surely renders section 103.021(4) more, rather than less, constitutionally secure. The fact that the RP-FLA does not qualify to use this alternative method does nothing to alter the fact that Florida offered the putative party a means of ballot access that easily passes constitutional muster. The RP-FLA chose not to avail itself of that option, even though it was transparent to any reasonable observer that the odds were exceedingly slim, if not nonexistent, that the RP-FLA would be able to satisfy the affiliation/convention requirement of subsection (a).[19] But it suffices for constitutional purposes that Florida made that

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[18] *See, e.g., American Party of Texas v. White*, 415 U.S. 767, 782-88 (1974); *Storer v. Brown*, 415 U.S. 724, 740 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 792-93 (11th Cir. 1983) (citing cases) (upholding Florida law requiring minor party to have petition signed by 3% of the state's registered voters in order to have the names of its candidates for statewide office printed on the general election ballot).

[19] This discussion proceeds on the assumption, which the Circuit Court rejected, that the RP-FLA is, in fact a "party" for purposes of F.S.A. 103.021(4). *See infra* Part I.B.

method available to minor parties such as the RP-FLA. *See, e.g., Green v. Mortham*, 155 F.3d 1332, 1337 (11th Cir. 1998) (even if Florida filing fee would be unconstitutional burden on ballot access standing alone, it is a reasonable, nondiscriminatory means of regulating ballot access "so long as there is an alternative means of ballot access as exists in Florida's signature petition alternative") (citing *Lubin v. Panish*, 415 U.S. 709, 718-19 (1972)), *cert. denied*, 525 U.S. 1148 (1999).

In any event, even if Florida had absolutely *required* minor parties to satisfy the affiliation/convention requirement of subsection (a), that requirement would be constitutional. For instance, in *American Party of Texas v. White*, 415 U.S. 767 (1974), the United States Supreme Court declined to even "take seriously" a constitutional challenge to a requirement that minor parties make nominations for statewide office by convention, *id.* at 781 – even though that convention requirement was imposed *in addition to* a requirement that minor parties also "demonstrate a significant, measurable quantum of community support," such as by collecting signatures, *id.* at 782.[20] The fact that Florida has provided a nomination-by-national-convention method of ballot access that can be satisfied *without any additional showing of community support* makes subsection (a) much less vulnerable to constitutional challenge than was the provision the Court upheld in *American Party of White*.

The affiliation/convention requirement of subsection (a) is a reasonable, nondiscriminatory option that advances "important regulatory interests" of Florida. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351,

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[20] *See also id.* ("It is too plain for argument . . . that the State . . . may insist that intraparty competition be settled before the general election by primary election or by party convention.").

358-59 (1997).[21] "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Id.* at 358; *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.") (internal citations omitted); *Danciu v. Glisson*, 302 So. 2d 131, 133 (1974) ("The courts have consistently recognized that the states have a legitimate interest in keeping ballots within manageable limits.").

In particular, "'a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.'" *Storer v. Brown*, 415 U.S. 724, 733 (1974) (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)); *see also Timmons*, 520 U.S. at 366 ("The State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported . . . ."). The affiliation/convention requirement of subsection (a) is a reasonable means of advancing these and other important state interests.[22] In the *absence* of proof of community support (such as that demonstrated by the signatures required by subsection (b)), subsection (a)'s requirement that the state party be affiliated with a national party that does, *in fact*, nominate its presidential candidates at a real (not pretextual) national convention, provides some assurance to the State and its voters that the party is characterized by the sort of regularity, structure, seriousness and broad democratic governance

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[21] For additional discussions of the pertinent constitutional standard, *see, e.g.*, *Green*, 155 F.3d at 1335-37; *Libertarian Party of Florida v. Smith*, 687 So. 2d 1292, 1294 (1996).

[22] The Federal Constitution does not require Florida to prove, or make a particularized showing, that a ballot-access regulation will alleviate such problems – it is sufficient that the regulation is a reasonable response that does not significantly impinge on constitutionally protected rights. *Munro*, 479 U.S. at 194-96.

that has historically been associated with meaningful political parties in this nation. Like the "popular support" requirement of subsection (b), subsection (a) "protects the party's name and platform against use by unauthorized, truly independent candidates who seek to play off the party's success for their own benefit." *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 795 (11th Cir. 1983). If subsection (a) were construed, as defendants urge here, so that any rag-tag and fleeting assembly of individuals can simply designate themselves a "national party," and so that a hastily convened and unstructured meeting of a few dozen such individuals to "confirm" a nomination already made can constitute a "national convention to nominate candidates for President and Vice President of the United States," then the frequent, indeed routine, result will be precisely what occurred here and what the federal court of appeals described in *Libertarian Party of Florida* -- namely, the use of an obsolescent party's name by "truly independent candidates who seek to play off the party's [past] success for their own benefit." The pro forma meeting that a handful of people calling themselves a "national party" convened near the Dallas airport this August, unlike an *actual* "national convention to nominate candidates," does not provide Florida or her voters any of the assurances that subsection (a) was designed to ensure. Therefore the Circuit Court was right to construe that subsection in accord with its plain meaning, so that satisfying the requirement might actually provide the indicia of seriousness, widespread support and stable structure that the legislature intended. Such a reading of F.S.A. 103.021(4) raises no serious constitutional questions.[23]

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[23] At the conclusion of the Circuit Court hearing, defendants cited cases, such as *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), in which the U.S. Supreme Court has held that the Constitution limits the degree to which the state may regulate the internal governance of political parties. Those cases are inapposite here. Section 103.021(4) does not in any respect attempt to regulate with whom the RP-FLA affiliates, how the RP-USA nominates

B. The Reform Party of the United States Is Not a "National Party."

The evidence also fully supports the circuit court's finding that the RP-Fla fails to meet the second requirement of Section 103.021(4)(a) in that it is not "affiliated with a national party." "National," as used in the statute, requires activities "of, affecting, or involving *a nation as a whole*, as distinguished from subordinate areas." Webster's Third New International Dictionary (1986) (emphasis added).[24] While the RP-USA at one time satisfied this definition, it has over the last eight years devolved to a mere shell. Its activities today, rather than involving the nation as a whole, are located entirely within a small number of states and involve only a tiny coterie of individuals. *See* Tr. at 218.

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candidates, or any other matter of internal party governance. Instead, one of the ballot-access options that Florida makes available to minor parties simply looks to some common characteristics of serious, stable political parties, as indicia of the sort of party processes and relationships that offer some protection against the frivolous or fraudulent use of the party to satisfy ballot-access rules in the absence of substantial popular support.

Section 103.021(4)(a) is neither a reward for parties that organize themselves and choose candidates through convention, nor a penalty upon those that do not. Ballot access has never been understood in our legal system as either a carrot or a stick; rather, it has been construed as part of the larger polity's means of organizing its formal processes for selecting those who govern. In this respect, Florida is in effect using the "national party" and "convention" standards as a proxy for an entirely legitimate inquiry (*i.e.*, "Is the party and its nomination process for real, and not simply an empty vehicle for faux, unaffiliated candidates?"), without the use of any constitutionally suspect criterion (such as race, religion or ideology). Use of a "convention" as a yardstick for serious political deliberation is hardly a novel or troubling notion in our constitutional system, *see, e.g.*, U.S. Const. Art. V, even if a political party's choices with respect to conventions are in some manner arguably protected against state interference (but cf. *Democratic Party*, 450 U.S. at 124 n.28 ("Obviously, States have important interests in regulating primary elections . . . . A State, for example, 'has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.'") (*quoting Bullock*, 405 U.S. at 145)).

[24] Florida looks to the dictionary definitions of undefined terms. *See supra* n. 6.

As the circuit court noted in its findings, the experts for plaintiffs and defendants[25] agreed on the following basic criteria by which to judge whether a party functions as a "national party": (1) "partybuilding," or the ability to stimulate interest in the political process; (2) the ability to recruit and run national candidates across the country; (3) the ability to raise money in order to conduct political activities; and (4) the ability to promote, develop and publicize issues. Tr. 9/15, Permanent Injunction Findings; *see also* Tr. 9/8 at 220 (Lichtman testimony).[26] The evidence fully supported Judge Davey's conclusion that under each of these criteria the RP-USA is not a "national party."

First, the party is engaged in virtually no partybuilding. *See* Tr. 9/15 at 125-26 (testimony of Beverly Kennedy). The national party is essentially an 800 number, a website, and a "national committee" that is "a committee of two." *Id.;* Pl. Exh. I. Asked "what act what activities, if any, does the national party do with regard to party-building and getting out the vote?," Ms. Kennedy of the RP-USA "national committee" responded, "Actually, the national party does nothing in those regards. Tr. 9/15 at 125. Witnesses testified that when they reached out to the RP-USA for assistance with state partybuilding, they were unable to obtain any support, materials or assistance. Tr. 9/15. At the same time, registration in the RP-USA has dramatically decreased -- by as much as 85% in some states between 2000 and 2004. Tr. 9/8 at 226. And members from only ten states participated in

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[25] Plaintiffs presented Dr. Dr. Allan Lichtman, a professor of history at American University in Washington, D.C., and author of several scholarly works concerning insurgent parties. Tr. 9/8 at 211-12. Defendants presented two experts, Dr. Richard Winger and John D. Gillespi, also academic scholars who have studied and written about minor parties. Tr. 9/15 at 159-60, 244-25.

[26] The expert called by appellants at the September 15 hearing agreed that the key indicia of a national party are party building, the number of candidates the party runs nationwide, the promotion of a party platform, and fundraising capabilities. He opined, however, that the coming together of a handful of individuals from two separate states would be adequate to constitute a "national party" within the meaning of Florida law. (Tr. 9/15.)

the RP-USA's national committee meeting in April 2004, despite the fact that the meeting occurred over the phone and was called for the important purpose of nominating the Party's presidential candidates. *Id*. at 227-28.

Unlike genuine national parties, the RP-USA is not fielding candidates in federal elections throughout the country. Tr. 9/18 at 221-25. It is trying to place its candidates for President and Vice President on the ballot in seven states – Mississippi, Kansas, Michigan, Colorado, Montana, South Carolina, and Florida – in several of which its eligibility for ballot status has been brought into doubt by serious questions of fraud and other deficiencies. It currently claims to have candidates for other federal offices in two states (Mississippi and Colorado), but thus far only Chairman Shawn O'Hara and the other Mississippi candidates have filed the necessary papers with the FEC. Pl. Exh. ZZ. The testimony was that "there was no support by the national group" for Reform Party candidates running in 2004. *Id.* at 194-95.

RP's ability to raise money -- while considered by the circuit court to be the least important indicator -- is virtually nil. A report filed with the Federal Election Commission ("FEC") this August stated that the RP-USA had only had $18.18 cash on hand. Reform Party, FEC Form 3X, Aug. 11, 2004, Pl. Exh. QQ. The RP-USA committee has received approximately $6,000 in contributions for the entire 2003-2004 election cycle. Pl. Exh. Q. The only fund-raising activity by the RP-USA for the 2004 election was a newsletter that sold approximately 50 subscriptions. Tr. 9/8 at 195. Most of the RP-USA's state party affiliates have reported to the FEC that they have little or no cash on hand. Pl. Exh. R.

Finally, no evidence was submitted to suggest that the RP-USA stands for or promotes any position, idea, or collection of ideas, however broad. As the Judge found, the party's only promotion of ideas concerns its promotion of Nader.

And Nader himself did not even want an RP-USA nomination. Tr. 9/8 at 196-97. He has chosen to run as an independent in certain states rather than as a Reform Party candidate. *See* Tr. 9/15 at 154.

In acknowledgement of its current moribund status, the RP-USA this August filed with the FEC an official notice that it was terminating its status as a "national committee" of a political party. Pl. Exh. P; *see* Tr. 9/8 at 206 (RP-USA former Treasurer testifying that he terminated because "They were just going about having a little country club. They were not a national committee."). This termination notice signaled that the party, bowing to the reality of its essential demise, no longer intends to operate as a national political party at all. Its filing effectively terminated the RP-USA as a national committee.[27] For the RP-USA to be deemed a "national party" in the face of this vanishing act, the concept would have to be emptied of all meaning.

Federal standards, which Judge Davey also considered, also strongly suggest that the RP-USA is not a "national party." The FEC's standards for "national committee" status require one to consider the following criteria:

> A committee demonstrates that it is a national committee of a political party by the nomination of candidates for various Federal offices in numerous states; by engaging in certain activities on an ongoing basis (rather than with respect to a particular election) such as supporting voter registration and get-out- the-vote drives; and by

[27] A different faction of the Reform Party USA apparently sought to counter the termination by filing an "Amended Statement of Organization" on August 16. Because the termination notice automatically terminated the national committee's status, the amended statement is of no effect. To re-qualify, the committee is required to re-register and will be treated as a new entity pursuant to 2 U.S.C. §§ 432(g) and 433(a) and 11 C.F.R. §102.1(d).

> publicizing issues of importance to the party and its adherents throughout the nation. Other indicia include the holding of a national convention, the establishment of a national office and the establishment of state affiliates.

FEC Advisory Opinion 1996-35 (interpreting the term "national committee" in Federal Election Campaign Act, 2 U.S. C. § 431(14)). According to the FEC, "the most important element in determining the extent of a committee or party's national activity is the degree to which the organization successfully attains ballot access for its Presidential and Congressional candidates." *Id.* A committee does not qualify for national committee status where, as here, "its activity is focused solely on the Presidential and Vice Presidential election." FEC Advisory Opinion 1992-44; FEC Advisory Opinion 1996-35. Instead, the FEC has advised that "[a] committee demonstrates that it is a national committee of a political party by the nomination of candidates for various Federal offices in numerous states." FEC Advisory Opinion 1995-16. For this purpose, only candidates who have made the proper filings with the FEC and who have contributions or expenditures in excess of $5,000 are considered candidates. *See* FEC Advisory Opinion 2001-13. The FEC has accordingly denied national committee status to a party with 9 federal candidates (other than president and vice president) in 3 states (FEC Advisory Opinion 1992-44); to a party with 8 such candidates in 5 states (FEC Advisory Opinion 1996-35; and to a party with 5 such candidates in 1 state (FEC Advisory Opinion 1988-45. It would most certainly deny national party status to the RP-USA today because, under the FEC's standards, the Reform Party has no candidates for any other federal office.

C. The Evidence Supports the Court's Finding that the RP-Fla Is Not a "Minor Party" for Purposes of This

Statute.

The evidence also overwhelmingly supports the circuit court's finding that the RP-Fla is an inactive, moribund organization that does not constitute a "minor party" under Florida law. The party has not run any candidates in Florida since 2002 (Tr. 9/8 at 159), and has had no party-building or significant fundraising since its nomination of Pat Buchanan during the 2000 presidential election (*id*. at 179). In fact, the RP-Fla representative called by appellants testified that the RP-Fla currently has *no* state activity. (Tr. 9/15). As of January 2001, the RP-Fla terminated its reporting obligations to the FEC, thereby indicating it no longer would be active in federal elections. *See* Letter from FEC to C. Owenby, Jr., Jan. 19, 2001. Pl. Exh. F. In sum, the RP-Fla is doing nothing to play the role of a political party. Like the national party, the local party has also been reduced to an empty shell, and it cannot satisfy the requirement of Section 103.021(4)(a) that the applicant be an actual functioning party in Florida.

COURT GRANTED THE APPROPRIATE RELIEF

In addition to proving their legal right to relief, appellees have demonstrated the elements necessary for a permanent injunction by showing that they lack an adequate remedy at law and will suffer irreparable injury absent an injunction. *See Leon County Classroom Teachers Association, FTP-NEA v. School Board of Leon County*, 363 So.2d 353 (Fla. 1st DCA 1978).[28] The Secretary of

[28] Plaintiffs have also established their standing to seek relief. To establish standing under Florida law, "[t]he party must allege that he has suffered or will suffer a special injury. Thus, the court must determine whether the plaintiff has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation." *Wexler v. Lepore*, 878 So. 2d 1276, 2004 Fla. App. LEXIS 11691, *8 (Fla. Dist. Ct. App. 4th Dist. 2004) (holding that unopposed candidate had standing to challenge recount procedure). This test is met here for two reasons.

State's recent actions, in pursuing every conceivable procedural trick to avoid complying with an order to remove unqualified candidates, confirms that a clear injunction is essential.

D. Appellees, and the Public, Will Be Irreparably Harmed in the Absence of Emergency Relief

The Florida Supreme Court has long recognized that injunctive relief is available to enforce the electoral code:

> The right to vote . . . is not inherent. It is secured by law. So long as the security extends only to the naked right to vote it is purely political, but when the law takes it over and throws around it safeguards in the interest of the voter and requires it to be exercised under rules and regulations to safeguard the ballot and the body politic it becomes more than a naked political right and will be protected in like manner as a civil right. . . . [W]hen the law prescribes rules and regulations for the party to

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First, under Florida law, an eligible voter or elector may file an action to compel a government officer to comply with the state's election laws. *See, e.g., League of Women Voters v. Smith,* 644 So. 2d 486 (Fla. 1994) (mandamus petition filed by League of Women Voters of Florida seeking to require the Secretary of State to disapprove verified signatures on petitions); *Carroll v. Firestone,* 497 So. 2d 1204 (Fla. 1986) (electors filed a petition for a writ of mandamus to compel secretary of state to remove a proposed amendment to the Florida Constitution from the ballot).

Second, the Florida Democratic party has standing under such precedent as *Orange County v. Gillespie*, 239 So.2d 132 (Fla. 4th DCA), *cert. denied*, 239 So.2d 825 (Fla. 1970) (county and its commissioners could file suit seeking declaratory and injunctive relief to prevent candidate from being placed on the ballot for state representative); *Ballard v. Cowart*, 238 So.2d 484 (Fla. 2d DCA 1970) (same). Indeed, standing would exist even under the more restrictive federal standards. In *Gottlieb v. FEC*, 143 F.3d 618, 620 (D.C. Cir. 1998), for example, the court approved a theory of "competitor standing" in the political arena, so long as the plaintiff challenging a government benefit granted to another group or entity can demonstrate that the plaintiff itself is eligible to receive the same benefits as the person or group it is challenging. This test is met here, because the Democratic candidate is eligible to receive the benefit in question: placement on the November ballot. Indeed, Nader himself has invoked a theory of "competitor standing" in challenging FEC rules permitting the use of corporate money in the staging of federal candidate debates. *See Becker v. FEC*, 112 F. Supp. 2d 172, 179 (D. Mass. 2000), *aff'd*, 230 F.3d 381 (1st Cir. 2000).

> conduct an election *any interested elector may invoke the aid of a court of appropriate equitable remedies to enforce such rules and regulations*.

Joughin v. Parks, 147 So. 273, 274 (Fla. 1933) (emphasis added). This Court has the authority to enjoin the Secretary of State from ordering Nader and Camejo to be placed on the ballot. *Coalition to Reduce Class Size v. Harris*, 2002 WL 1809005 (Fla. Cir. Ct. July 17, 2002), *aff'd* 827 So. 2d 959 (Fla. 2002). To fail to exclude the names of unqualified candidates "could result in the election of an unqualified nominee. Our legislature has determined the criteria for valid candidacy, and [the candidate] does not meet them. We would be remiss in our duty if we allowed him to remain on the ballot." *Polly v. Navarro*, 457 So. 2d 1140, 1144 (Fla. 4th DCA 1984); *accord Perez v. Marti*, 770 So. 2d 284, 290-91 (Fla. 3d DCA 2000) (affirming disqualification of candidate for school board for failure to establish proper residency and ordering name removed from ballot).

Because the imminent preparation and dissemination of ballots that contain the names of unqualified candidates is "a palpable violation of the registration or election laws [that] is about to take place," *Wexler v. Lepore*, 2004 WL 1753408, at *5 (Fla. 4th DCA Aug. 4, 2004), injunctive relief is appropriate. If the Reform Party's Certification is not immediately revoked and the sixty-seven County Supervisors of Election proceed with the preparation of ballots that include the names of Nader and Camejo, the State will have sanctioned the legitimacy of candidates whose "party" has utterly failed to comply with the laws of Florida that regulate the conduct of elections. No matter what efforts are launched by Appellees or others to educate the voting public as to what the Reform Party is, and most importantly what it is not, ballot confusion and voter distraction from the critical and substantive election issues are inevitable.

As this Court is well aware from the parties' prior filings, the

Supervisors of Elections must be given clear and immediate direction as to the proper presidential ballots. Moreover, the actions of the Secretary of State, in disregarding the schedule set by this Court and instructing Supervisors to include Nader and Camejo on absentee ballots, some of which have already been mailed, make it clear that absent such clear and immediate direction there is a substantial risk that Nader and Camejo will be included on additional ballots, notwithstanding their failure to meet the state's legal requirement. The circuit court was therefore correct in finding that a permanent injunction is essential to avoid irreparable harm to appellees and to the Florida voters.

E. Appellees Have No Adequate Remedy at Law

The harm to appellees, should this Court deny injunctive relief, certainly cannot be measured in dollars. It can be prevented only by this Court's issuance of a permanent injunction prohibiting the inclusion of Nader and Camejo on the ballots for the November 2004 general election. *Polly*, 457 So. 2d at 1144 (ordering removal of candidate's name from ballot where, among other things, movants were without remedy at law to contest candidate's unqualified status).

F. The Relief Requested Is in the Public Interest

There is no public interest that transcends that of protecting the integrity of the election process, a process that is at the heart of the body politic in our system of government. Florida has provided access to that process to all political parties, providing that they satisfy certain reasonable prerequisites.

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot -- the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Jenness v. Fortson, 403 U.S. 431, 441-42 (1971) (recognizing that there are "differences in kind between the needs and potentials" of major political parties, and "different routes to the printed ballot"). The Reform Party has flouted those routes and those requirements, and in doing so, it threatens Florida with the very parade of horribles described by the Supreme Court: confusion, deception, and frustration of the democratic process.

THE COURT SHOULD ORDER THE SECRETARY OF STATE TO TAKE CORRECTIVE ACTION

On September 15, the circuit court entered an order modifying its September 9 preliminary injunction to require the Secretary of State to: (a) promptly destroy all ballots containing the names of Ralph Nader and Peter Camejo and any related materials containing any reference to such names, (b) instruct all Supervisors of Elections who have already mailed or otherwise distributed ballots containing the names of Ralph Nader and Peter Camejo to print and mail or distribute, to all persons who received or who may receive such incorrect ballots, corrected ballots that do not contain Nader's and Camejo's names; and (b) instruct all Supervisors of Elections to include in the corrective mailings "a clear written notice indicating that the previous ballot did not comply with the requirements of Florida law and will not be counted and that the new, corrected ballot is the valid form." Order Granting Plaintiff's Emergency Motion to Modify Preliminary Injunction. This Court indicated that it would consider whether to implement the corrective actions ordered by the circuit court once it determined whether Nader's and Camejo's names belong on the ballot. As proven

in the circuit court, Nader and Camejo are unqualified to remain on the 2004 presidential ballot and, accordingly, the corrective relief ordered by the circuit court should be immediately enforced.

Corrective action is essential to ensure uniformity and to minimize any voter confusion that may have already occurred by the mailing of improper ballots. In addition, considerations of equity weigh heavily in favor of such relief. Despite the urgency of this matter, the Secretary of State delayed *four days* after the entry of the preliminary injunction before invoking an automatic stay pending appeal and certifying the ballots to include Nader's and Camejo's names. Although plaintiffs moved immediately to vacate that stay, Nader and the Reform Party filed a baseless notice of removal to federal court, temporarily delaying the circuit court and this Court from enforcing Florida law. Their blatant attempts to evade this Court's jurisdiction should not be rewarded by allowing deficient ballots to remain in circulation.

For the reasons set forth herein, the Court should order the Secretary of State to comply with the circuit court's September 15 order modifying the preliminary injunction by instructing the Supervisors of Elections to destroy defective ballots, and mail corrected ballots and the requisite written notices to all absentee voters who received defective ballots listing Nader and Camejo as presidential candidates.

CONCLUSION

For the reasons set forth herein, the Court should deny appellants motion, and should sustain the district court's Order granting a permanent injunction and should further order the Secretary of State to take corrective actions to replace any defective ballots.

Dated: September 16, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law has been furnished by Facsimile and U.S. Mail to: Rachel Rodriquez, Office of the Governor, The Capitol, Room 209, Tallahassee, Fl. 32399, Richard Perez, General Counsel, Department of State, The Capitol, PL-01, Tallahassee, FL, 32301, by Facsimile and Federal Express to Peter Camejo, 767 Halidon Way, Folsom, CA 95630, Ralph Nader, 1400 16th Street, N.W., Suite 225, Washington, D.C. 20036, The Reform Party of Florida, 15404 Kristy Court, Tampa FL 33618, The Reform Party of the United States, 420 2 South 22nd Avenue, Hattiesburg, Mississippi 39401.

this ___ day of September, 2004.

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Mark Herron, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure, have been complied with in this Brief and the size and style of type used in this brief is Times New Roman 14 point.

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Mark Herron, Esq.