IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-1317; SC10-1319

CHARLIE CRIST, et al.,

Appellants,

v.

ROBERT M. ERVIN, et al.,

Appellees.

REPLY BRIEF OF APPELLANTS

On Appeal from a Decision of the Second Judicial Circuit,
in and for Leon County
Case No. 2009 CA 001386

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REPLY ARGUMENT

I. The Filing Fee Statutes Are Not Facially Invalid Because Filing Fees Are Deposited Into the General Revenue Fund and Then Are Used to Fund the Administration of Justice.

Despite raising a host of claims to support their assertion that the challenged Filing Fee Statutes[1] are unconstitutional, Appellees, Robert M. Ervin and Davisson F. Dunlap (collectively, Ervin), do not contest that their ultimate objection is simply to the method of accounting by which the Legislature appropriates funds for the administration of justice.[2] [AB 19 ("Since the mere deposit of funds into the General Revenue Fund constitutes an illegal tax, the Legislature cannot 'cure' this invasion of rights by subsequent proof that all of these illegal taxes are ultimately appropriated at the end of the year back into the state court system to pay for the essential costs of the administration of justice.")][3] Because no constitutional or

[1] The Filing Fee Statutes are sections 28.241, 34.041, and 28.2455, Florida Statutes.

[2] Importantly, this case is not about the amount that litigants must pay in court filing fees. [AB 14 ("Appellees do not contest the amount of the filing fees or their obligation to pay a reasonable fee as a condition of lodging their case in court.")]

[3] The answer brief is cited as [AB #] and the State's initial brief is cited as [IB #] where # is the page number. The amicus brief of the Trial Lawyers Section of the Florida Bar is cited as [TL #] and the amicus brief of the Florida Chapter of the American Board of Trial Advocates is cited as [FLABOTA #], where # is the page number. Record citations are [R* #] where * is the volume number and # is the page number.

other requirement is placed on the Legislature to use any particular accounting method, Ervin's challenge fails. Appellants (excepting Chief Financial Officer Alex Sink) (collectively, the State), briefly address a few additional points, including the answer brief's reliance on an incorrect burden of proof and the appropriate constitutional analysis.

A. Ervin bears the heavy burden of demonstrating that the statutes lack any rational basis.

Ervin asserts repeatedly that the Appellants had the burden of proof to demonstrate the constitutionality of the Filing Fee Statutes, apparently because of his mere allegation that the right of access to the courts is infringed. The burden of proof only shifts to the defender of a statute, however, when a fundamental right is first shown to be sufficiently burdened. N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 626 (Fla. 2003) (strict scrutiny "applies to legislation impinging on certain fundamental rights"); *see also* Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001) (determining first that the petitioner's access to courts was burdened before analyzing the claim under heightened scrutiny).[4]

[4] Ervin spends some time in his brief discussing a heightened dual rational basis/strict scrutiny analysis, which he claims applies here, that he derives from his reading of Mitchell. [AB 24] His reading is wrong. That case provides that *after the right of access to the courts is deemed infringed*, typical strict scrutiny review is used, such that the state must show no "compelling interest" or "public necessity" and that there is no "alternative method of correcting the problem/overpowering public necessity." Mitchell, 786 So. 2d at 528.

Therefore, before Ervin can claim that the State has the burden to prove that the Filing Fees Statutes are constitutional, he must show that his right of access to the courts has been infringed. To do that, he must show that the fees were not used to fund the administration of justice. Farabee v. Bd. of Trs., Lee County Law Library, 254 So. 2d 1, 5 (Fla. 1974).

Ervin cannot show, nor does he even find it necessary to assert, that the filing fees deposited into the general revenue fund do not equal the amount appropriated for the administration of justice. Given that he has made no showing that his right of access to the courts is restricted by the Filing Fees Statutes, strict scrutiny is inapplicable. The Filing Fee Statutes need only "bear a reasonable relationship to a permissible governmental objective." Lane v. Chiles, 698 So. 2d 260, 263 (Fla. 1997). And it is Ervin's burden to overcome the presumption favoring the Filing Fee Statutes' constitutionality. State v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985) ("in the absence of an impingement upon constitutional rights ... an act of the legislature is presumed to be constitutional"). Accordingly, Ervin's arguments that the Filing Fee Statutes are not the least intrusive means or are not narrowly tailored to the funding of the administration of justice are inapt. Rather, in fulfilling its constitutionally-imposed responsibility to appropriate funds and manage the state budgetary process under article III, section 19, the accounting method the Legislature has chosen has not been shown to be facially unreasonable.

Asserting that the statute fails the lesser scrutiny, Ervin argues that "[b]ecause the filing fees are desperately needed by the clerks of court to operate their offices, there is no rational basis for these fees to be diverted and delayed from immediately paying the costs of operating the state court system." [AB 17] But Ervin points to no record evidence showing any sort of a meaningful delay in the payments appropriated for the administration of justice, or that any delay is owed to the accounting method chosen. Additionally, because the Legislature must first appropriate all moneys spent by state agencies, it would make no difference if these fees were deposited first into a separate trust fund. Chiles v. Children A, B, C, D, E & F, 589 So. 2d 260, 264 (Fla. 1991) (holding the power to appropriate is legislative). The Legislature would still have to engage in its usual budgetary process before the courts could use the funds.

B. Ervin cannot, nor has he attempted to, show that the Filing Fee Statutes are unconstitutional in every circumstance, as required to establish their facial invalidity.

The trial court did not rule on Ervin's as-applied challenge, and so it cannot be considered here. [R13 2446 ("In this case, the Plaintiffs have challenged the statutes on their face as applied to them, *and have met the requirements for a facial challenge*" (emphasis added)] While Ervin argues that the Filing Fee Statutes are unconstitutional as applied, he fails to cite any portion of the trial court's order that actually ruled on this issue, thereby foreclosing its consideration here. State v.

Barber, 301 So. 2d 7, 9 (Fla. 1974) ("An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made.").

To show that the Filing Fee Statutes are facially unconstitutional, Ervin must demonstrate that they violate his right of access to the courts under every possible factual scenario. Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 265 (Fla. 2005) ("in a facial constitutional challenge, we determine only whether there is any set of circumstances under which the challenged enactment might be upheld"); Cashatt v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) (noting that a "facial challenge to a statute is more difficult than an 'as applied' challenge, because the challenger must establish that no set of circumstances exists under which the statute would be valid."). Therefore, it is not at all "impertinent," as Ervin suggests [AB 21], to presume for the sake of this argument that the fees are wholly directed to funding the administration of justice, particularly where the record and the past legislative appropriation bills show this to be the case. *See* [IB 12-13]. Rather, Ervin must prove that his argument succeeds in all circumstances, even when the funds derived from filing fees are appropriated entirely to the administration of justice.

As this Court's precedent demonstrates, when court filing fees are used to fund the administration of justice, they are entirely permissible and do not infringe

on litigants' right of access to the courts. Farabee, 254 So. 2d at 5. Ervin and his amici point out that the statutes do not mandate that the Legislature return the funds to article V entities, a point that is legally irrelevant. [AB 22; FLABOTA 27; TL 10] In analyzing the facial constitutionality of the Filing Fee Statutes, it is enough that this circumstance can and does occur. Neither the caselaw nor the appropriate facial analysis of the Filing Fee Statutes allows this Court to consider the unlikely situation where filing fee collections deposited to the general revenue fund exceed the appropriations to the administration of justice in a given year.

Because this appeal concerns a facial challenge, Ervin's claim that the record shows that at one point, certain fees were not appropriated back to the state court system is constitutionally irrelevant. [AB 10 ("It is also apparent from the record that the Legislature did not in 2008 reappropriate any of the general revenue from increased filing fees back into the state court system.")] The record citation provided for that assertion, moreover, is to a meeting packet from a 2008 Legislative Budget Conference Committee Report. This meeting packet does not carry sufficient weight to overcome the presumption favoring the constitutionality of the Filing Fee Statutes, particularly given the fungible nature of money and the plain language of the legislative appropriations bills. Additionally, the statement therein ignores the fungible quality of general revenue funds. The terms used by the meeting packet to describe the appropriations do not alter the fundamental

point that all money appropriated from the state general revenue fund comes from the same source.

Far from the "budgetary maze" Ervin and an amicus describe [FLABOTA 6] it is easy to verify that the Legislature has appropriated more to the administration of justice than it took in from filing fee collections. As shown in the initial brief, for Fiscal Year 2008-2009, the Legislature appropriated over one billion dollars to the administration of justice entities while taking in around $186 million in court-related collections. [IB 12-13] This information also demonstrates that the Legislature is not "overly reliant" on filing fees to fund the courts. [FLABOTA 8] Far from a "surplus" of revenue [AB 16], filing fees reimbursed the general revenue fund for only about 20% of the funds appropriated to the administration of justice. [IB 9]

To the extent Ervin makes an argument that the Filing Fee Statutes are unconstitutional as applied, that argument is nothing more than a repackaging of his facial arguments. He makes no allegation and offered no proof that any portion of his particular filing fee was used for funding anything other than the administration of justice, which he would have to show to establish a challenge to the statutes as applied. Therefore, Ervin's challenge to the Filing Fee Statutes as applied fails in this Court both on procedural grounds and on the merits.

C. The Filing Fee Statutes are constitutional.

As the answer brief makes explicitly clear, the system Ervin is challenging is nothing new. [AB 4 ("In the four decades preceding Revision 7, civil action filing fee statutes expressly required that some portion of the fees be … deposited directly into the State General Revenue Fund")] Over the past forty years, only the amounts of the fees and the portion of those fees deposited into the general revenue fund have changed. Those amounts are not challenged here.

To the extent Ervin seeks to have the money collected via filing fees controlled by the judiciary itself, his arguments must fail. The judiciary is constitutionally prohibited from appropriating money. Art. V, § 14(d), Fla. Const. The court system's "inherent powers to protect its fundamental right of the independence of the Judiciary as a co-equal branch of government under the separation of powers doctrine" [AB 37], have never been extended to allow the judiciary to control funds.

In his answer brief, Ervin asserts that the funding derived from the filing fees is owed directly to the clerks' offices. [AB 16 ("The purpose of the filing fee statutes is to fund the costs of operating the state clerks of court offices with 'adequate and appropriate filing fees for judicial proceedings.")] But the constitution does not require that the money be directed in this, or any, particular manner. Instead, article V, section 14 explicitly provides that fees may also be used

to fund "selected salaries, costs, and expenses of the state courts system." And this Court's precedent states that the fees may be used for the costs of the administration of justice. Farabee, 254 So. 2d at 5. No provision in the constitution or caselaw requires all fees collected to be directed to the clerks' offices.[5]

Ervin, the trial court, and amici also assert that the courts are underfunded, thereby allowing greater judicial latitude over the filing fees at issue. But, as this Court stated in considering a challenge to the underfunding of another article V entity, "it is not the function of his Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount." In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1136 (Fla. 1990). Ervin did not challenge the amount of money appropriated to the court system and makes no connection to support his argument that the transfer of fees collected to the general revenue fund is somehow related to the underfunding of the court system. The record reveals no evidence that the court system is insufficiently funded due to the purported unconstitutionality of the Filing Fee Statutes. The Legislature makes a judgment about how much to appropriate to article V entities, and then transfers money from various trust funds and/or the general revenue fund. Whether the $80 filing fee is placed in the general

[5] As noted in CFO Sink's reply brief at page 11, the clerks' offices are funded separately from other administration of justice entities by an appropriation released quarterly by the Florida Clerk of Court Operations Corporation.

revenue fund or a trust fund has no effect on the amount of the appropriation to the courts. The question of whether the court system is underfunded or not, an issue with significant separation of power issues, is simply not germane to the facial challenge that Ervin has made. In re Prosecution, 561 So. 2d at 1136 (citing art. VIII, § 1(c), Fla. Const.).

As explained in the initial brief, the caselaw across the country wholly supports the State's position in this case, with the lone exception of Lecroy v. Hanlon, 713 S.W.2d 335 (Tex. 1986), a nearly 25-year-old Texas case. [IB 19-22] While this Court's decisions in Flood v. State, 117 So. 285 (Fla. 1928), and Farabee v. Board of Trustees, Lee County Law Library, 254 So. 2d 1 (Fla. 1971), may be obsolete given the fundamental alterations to court funding that followed Revision 7, they need not be deemed such in order for the State's arguments here to succeed. *See* [IB 15 n.13]. The principle of those cases, that a court fee is not a tax and thereby does not infringe on court access if it is used to pay for essential elements of the administration of justice, is wholly embraced by the State's argument. Farabee, 254 So. 2d at 5. The Court explained in Farabee that a court fee is constitutionally problematic only if an excess of the amount needed to fund the administration of justice is collected and the excess is used for general purposes. Id.; *see* Flood, 117 So. at 386 ("any balance remaining thereafter to be used … for

general county purposes" (citing Ch. 12004, Acts of 1927)).[6] That would be relevant here if the amount of the fees collected by the clerks was in excess of the amount needed to fund the administration of justice and the excess was diverted to the general revenue fund for other uses. Instead, here the amount collected by the clerks is *inadequate* to fund the administration of justice. That amount, regardless of where it is housed, is supplemented with vast amounts of general revenue.

Ervin also suggests that the decision in Fox v. Hunt, 619 So. 2d 1364 (Ala. 1993), is the only case that supports the State's position, and attempts to distinguish that case because "Alabama primarily funds its court system by the local governments." [AB 27] He also attempts to distinguish Fox because while Florida collected $186 million[7] in court service charges, the Alabama case was addressing a collection of only $500,000. [AB 31] Neither of these details, however, alter the principle of that case nor the decisions of nearly all other courts to have considered this issue, as explained by the Oklahoma high court in another related case: "The legislature may impose court costs and not violate the open

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[6] The suggestion by one amicus that Farabee holds that a fee "paid over into General Revenue … cease[s] being a legally sustainable fee and instead [is] an unconstitutional tax," [TL 6] is incorrect. The Court in Farabee was wholly concerned with how the fees are spent, and not from what fund they are spent.

[7] Again, this $186 million is the amount collected from *court-related service* charges, and not only from the charges collected under the challenged Filing Fee Statutes. *See* [IB 12 n.11]; [R13 2415].

access or sale of justice clause when such costs are in the nature of reimbursement to the state for services rendered by the courts." Fent v. State, 2010 WL 165086, at *7 (Okla. Jan. 19, 2010).

Ervin points to this Court's decision in In re Advisory Opinion to the Governor, 509 So. 2d 292, 303 (Fla. 1989), in which it noted, in dicta, that "fees collected cannot be used for general revenue purposes." That decision cited to Farabee and does not at all diminish the State's arguments. While it speaks in terms of general revenue purposes, as does Farabee, the case says nothing about the constitutionality of accounting methods or of placing the funds for the administration of justice into the general revenue fund before its appropriation.

Finally, Ervin asserts that the additional bases for the trial court's order follow from the underfunding of the clerks offices. But here again, he cites to no caselaw or record evidence to support his argument (nor did the trial court). This unsupported argument cannot be the grounds for striking a statute as facially unconstitutional. Ervin's conclusory arguments that the alleged underfunding of the clerks' offices inherently leads to violations of other fundamental rights, such as those to jury trials and due process, is as unsuccessful as the trial court's summary order on the same matters. [AB 39-40] Absent any additional legal analysis to support his arguments, Ervin cannot meet his heavy burden of

overcoming the Filing Fees Statutes' presumption of constitutionality on those grounds.

In short, what Ervin ultimately seeks is the constitutionalization of a particular accounting measure — the use of a trust fund for court filing fees. But trust funds are created by the Legislature and expire by constitutional mandate after four years unless extended. *See* [IB 18]; art. III, § 19(f), Fla. Const. If the Legislature let all trust funds expire, all the money would be swept into the general revenue fund. Art. III, § 19(f)(4), Fla. Const. Then all filing fees would go to the general revenue fund and the only two numbers that would be relevant — and the only ones relevant here — are the amount that comes from the clerks' offices and the amount that goes to the administration of justice. As long as the second is larger than the first, there can be no constitutional violation.

CONCLUSION

For the foregoing reasons, the Filing Fee Statutes are facially constitutional and the trial court's determination that they are invalid should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE/SERVICE

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