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IN THE FLORIDA SUPREME COURT

CASE NO. 4D14-2739
LOWER CASE NO. 14-012324(09)

JENNIFER BRINKMANN

Appellant,

v.

TYRON FRANCOIS

Appellee.
_____/

INITIAL BRIEF OF JENNIFER BRINKMANN

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Preface

This Initial Brief is submitted on behalf of JENNIFER BRINKMANN, Plaintiff in the trial court, Appellee in the district court.

JENNIFER BRINKMANN is referred to as Brinkmann.

TYRON FRANCOIS is referred to as Francois.

DR. BRENDA SNIPES, in her official capacity as Supervisor of Elections for Broward County, Florida, is referred to as "the Supervisor" or Dr. Snipes.

The following symbols will be used:

"App. ___" references are to the Appendix to Petitioner's Initial Brief.

Unless otherwise indicated, all emphasis is supplied by the writer.

Statement of Case and Facts

Five candidates for Broward County Commissioner for District 2, all Democrats, qualified to have their names printed on the ballot for the August 2014 primary election.[1] (App. p. 2.) On June 20, 2014, the final day for qualification, Tyron Francois filed qualifying paperwork to run as a write-in candidate. *Id*. Pursuant to Florida Statutes section 99.0615, "[a]t the time of qualification, all *write-in candidates* must reside within the district represented by the office sought." (Emphasis added). It is undisputed that Francois resides outside the boundaries of District 2. *Id*.

In November 1998, Florida voters amended the Florida Constitution to limit the disenfranchisement of voters when "all candidates for an office have the same party affiliation and the winner will have no opposition in the general election." Universal Primary Amendment ("UPA"), Art. VI, s. 5, Fla. Const. Under those circumstances, "all qualified electors. . . may vote in the primary elections for that office." *Id.*

[1] As a result of the order of the trial court, the date of the primary election for Broward County Commissioner District 2 was to be held during the general election on November 4, 2014. Following the reversal of that order by the district court, the Supervisor of Elections has filed two alternative plans with the trial court on the grounds that it is not possible to change the election back to a closed primary in time for the election on November 4. (*See* Appendix to Motion for Expedited Review, Tab 1.)

Dr. Brenda Snipes, Supervisor of Elections for Broward County, Florida, qualified Francois as a write-in candidate, thereby closing the primary, even though Francois is a registered Democrat and resides at an address outside of the district for the office sought. (App. p. 2.) Jennifer Brinkmann filed a Complaint seeking declaratory and injunctive relief on the grounds that she, as well as tens of thousands of other Broward County voters who are not registered members of the Democratic party, should be permitted under the UPA to participate in the determinative District 2 election. *Id*.

The trial court conducted a full evidentiary hearing where, for the first time, counsel for Francois challenged the constitutionality of the residency requirement of section 99.0615. At the conclusion of the hearing, the trial court found that Francois was "not a qualified write-in candidate for the office of Broward County Commissioner District 2." (App. p. 2.) The Court further entered an injunction opening the primary election to all registered voters. *Id*.

Francois sought review in the Fourth District Court of Appeal. On September 10, 2014, the Fourth District Court of Appeal reversed the order of the trial court and closed the election to non-Democrats on the grounds that, notwithstanding the UPA, the residence requirement of Florida Statute section 99.0615 is unconstitutional. (App. p. 4.)

Summary of Argument

If permitted to stand, the Fourth District's striking down of Florida Statute section 99.0615 would deal an enormous blow to Florida's constitutional commitment to open primaries, rendering the Universal Primary Amendment ("UPA") meaningless in the process. For example, Francois's qualification would mean even write-in candidates from far-off areas of the State and from the same party as the primary's other candidates could successfully get on the ballot in the form of a blank line and close Broward County elections. Indeed, the open primaries envisioned by the UPA would virtually *never* occur in Broward County since, in every race, a candidate could get a complicit relative or friend—even from elsewhere in the State and from the same party—to close the race. The Fourth District's decision to close the election should be reversed for a number of reasons.

First, section 99.0615 is constitutional. The statute does not alter the constitutional eligibility requirements for the office of County Commissioner. It merely regulates how candidates may get on the ballot in order to protect the integrity of the political process from frivolous or fraudulent candidacies. The district court's conclusion that section 99.0615 alters the eligibility requirements for a County Commissioner is simply wrong and ignores the distinction between

eligibility requirements for office and the procedures for getting on the ballot. The procedural, regulatory requirement that a write-in candidate reside in the district on the date of qualification is no different, constitutionally, than the requirement that a non-write-in candidate either obtain a certain number of signatures or pay a qualifying fee, neither of which is considered a change to the eligibility requirements to hold office.

Second, because a write-in candidate does not constitute "opposition" as that term is used in the UPA, the primary should remain open to all voters irrespective of Francois's participation. The clear intent of the UPA is to open primaries where the primary is effectively the general election. Where a blank space on the general election ballot is all that stands between the primary winner and the office at issue, the primary is effectively the general election. Ignoring the party affiliation of a write-in candidate so that a tactical write-in candidate from the same party could close the primary only exacerbates the problem and renders the UPA a nullity.

Finally, Francois should have been precluded from challenging the constitutionality of section 99.0615 because he failed to provide proper notice to the Attorney General or the local state's attorney so as to give the State a meaningful opportunity to defend his challenge.

Argument

I. STANDARD OF REVIEW

The proper standard of review for issues involving constitutional or statutory interpretation by a district court is *de novo*. *Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 485 (Fla. 2008); *Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004).

II. FLORIDA STATUTES SECTION 99.0615 IS WHOLLY CONSTITUTIONAL

It is axiomatic that statutes regulating the conduct of elections come to the court with "an extremely strong presumption" of validity. *Bodner v. Gray*, 129 So. 2d 419, 421 (Fla. 1961). "[O]nly unreasonable or unnecessary restraints on the elective process are prohibited." *Pasco v. Heggen*, 314 So. 2d 1, 3 (Fla. 1975). The determination is "not whether there are procedures which are equal to or superior to that used by the state," but whether the procedure chosen by the legislature is valid. *Wetherington v. Adams*, 309 F. Supp. 318, 321-22 (N.D. Fla. 1970). Courts "must be convinced beyond a reasonable doubt that the act contravenes the superior law." *Mairs v. Peters*, 52 So. 2d 793, 795 (Fla. 1951). Florida's election laws "must be construed consistently," *in pari materia*, and "with the important constitutional right of voters to cast their votes effectively." *Cobb v. Thurman*, 957 So. 2d 638, 644 (Fla. 1st DCA 2006).

The district court's entire basis for finding Florida Statutes section 99.0615 unconstitutional is that it changes the eligibility requirements for the office of County Commissioner. The statute does no such thing. Like many other qualifying regulations, section 99.0615 merely establishes what a prospective candidate must do to get placed on the ballot. The court's holding, therefore, ignores the recognized distinction between constitutional eligibility requirements on *who* may run for office and qualifying regulations setting out *how* one gets placed on the ballot. *See Levey v. Dijols*, 990 So. 2d 688, 692 (Fla. 4th DCA 2008) (explaining the distinction between eligibility to serve and qualifying to run).

Ironically, the Fourth District succinctly explained this distinction in *Levey*. Eligibility for office is controlled by the Constitution. 990 So. 2d at 692. Eligibility cannot be restricted "beyond the requirements of the Florida Constitution." *Id.* One eligibility requirement for the position at issue in *Levey* was being "a member of the Florida Bar for the preceding five years." *Id.* Whether a person is qualified to run in an election, by contrast, is controlled by statute. *Id.* In *Levey*, a statutory oath was required. *Id.* After discussing eligibility requirements and qualification procedures, providing examples of both, the court made clear the two are separate inquiries. *Id.* ("The question here is not whether Mardi Anne Levey is eligible. . . . The question to resolve is whether she properly qualified to run in the election.").

Section 99.0615 regulates how write-in candidates qualify to run in an election, so the district court's focus on a change to eligibility is misplaced. Using *Levey*'s terminology, section 99.0615 does not "define[] a person's 'eligibility' to serve" for County Commissioner. *Id.* Rather, it regulates the procedure for "'[q]ualifying' to run" in the election. *Id.*

A regulation governing how to be placed on the ballot could conceivably become an eligibility requirement, but only when it applies to every method of ballot placement and so becomes a *de facto* eligibility requirement. Here, section 99.0615 does nothing more than provide a procedure that must be followed by one type of candidate: write-ins. There is no precedent for finding such legislation unconstitutional.

Although he must comply with the procedural requirements for qualifying as a write-in candidate set forth in section 99.0615, Francois maintains his eligibility to hold the office of Broward County Commissioner for District 2 without having to move into District 2 until he takes office. Francois was given a choice of how to qualify to be placed on the ballot. Each of those statutorily proscribed methods for being placed on the ballot requires compliance by a candidate with procedural requirements that differ from the eligibility requirements set forth in the Florida Constitution, but none of them have ever been considered unconstitutional qualifications. *See Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding the

constitutionality of a Georgia 5% petition-signature requirement for ballot placement). *See also, e.g., Storer v. Brown*, 415 U.S. 724 (1974) (upholding California's statutory provision denying ballot access to independent candidates who had been affiliated with any political party within one year of the immediately preceding primary election).

Francois could successfully run for office and be placed on the ballot in any of several ways. Francois could run as a Democrat by paying a "qualifying fee" or by petition by obtaining the requisite number of signatures. *See* Fla. Stat. § 99.092 (fee); § 99.095 (petition). He could run without party affiliation either by paying the required fee or by petition. *See* Fla. Stat. §§ 99.092, 99.0955. In addition, he could change his party affiliation to Republican and run by paying a filing fee or run by petition. *See* Fla. Stat. §§ 99.092, 99.095 Finally, Francois could run as a Democratic write-in candidate or a Republican write-in candidate (after changing his party affiliation) after first moving to District 2. *See* Fla. Stat. § 99.0615. Under this last scenario, only by running as a Republican write-in candidate could he even arguably close the primary.

There is no dispute that the procedural requirements for non-write-in candidates pass constitutional muster. Viewing Florida's Election Code *in pari materia*, as the Court must do, *see Florida Dept. of State, Div. of Elections v. Martin*, 916 So. 2d 763, 768 (Fla. 2005), the procedural requirement that a write-in

candidate reside in the district on the date of qualification is no different, constitutionally, than the procedural requirement that a non-write-in candidate either obtain a certain number of signatures on a petition or pay a qualifying fee. Indeed, neither of those requirements for non-write-in candidates is considered an additional eligibility requirement imposed by the legislature despite not being expressly authorized in the Florida Constitution itself. *See Danciu v. Glisson*, 302 So. 2d 131 (Fla. 1974). In *Danciu*, the trial court upheld the constitutionality of a statute requiring an independent candidate to submit and have certified the signatures of 5% of the total registered voters of Florida. *Id.* at 132. The legislature's decision, under section 99.0615, to impose different requirements on write-in candidates for getting on the ballot is closely analogous to *Danciu*'s approval of different requirements for how party and independent candidates could get on the ballot.

Relying on *Danciu* and dispositive to this appeal, in *Pasco v. Heggen*, 314 So. 2d 1 (Fla. 1975), this Court held that, as with requiring petitioning candidates to obtain a certain number of signatures, the legislature is likewise empowered to set reasonable regulations for write-in candidates. *Pasco* concerned the constitutionality of a statute that, like section 99.0615, established a procedure for write-in candidates that differed from the procedure for other candidates. In upholding the statute, the Court found that such procedures enable the legislature

"to protect the integrity of its political process from frivolous or fraudulent candidacy by requiring the prospective write-in candidate to file an oath that he possesses the requisite qualifications and will accept the office if elected thereto. . . . [S]tates have an interest, if not a duty, to ensure that this end is met." *Id*. at 3 (citing *Bullock v. Carter*, 405 U.S. 134 (1972)). Here, as discussed in greater detail below, the legislature is satisfying this duty by putting in place reasonable restrictions on write-in candidates to prevent them from disenfranchising tens of thousands of voters by running for office on a last minute lark when they do not even reside in the geographic location where they seek to hold office. This is precisely what happened here.

The district court's reliance on *State v. Grassi*, 532 So. 2d 1055 (Fla. 1988), is wholly misplaced as that case did not concern the legislature's authority to put specific procedures in place for candidates, like Francois here, seeking to use one way to get on the ballot. Rather, *Grassi* involved a statute that subjected *all* candidates to a stricter eligibility requirement than that provided for in the Constitution. Because it was impossible to get on the ballot under *any* method without complying with the statute's residency requirement, the statute went beyond establishing procedures for a particular form of being placed on the ballot

and sought to change the Constitution's eligibility requirements.[2] Conversely, section 99.0615 does not hold *all* candidates to stricter residency requirements. The district court, accordingly, erred in concluding "*Grassi* addressed an identical claim as is present in this case." (App. p. 4.)

Further distinguishing *Grassi* is how it was an obvious response to draconian measures adopted to keep candidates out of races. 532 So. 2d at 1055-56 (describing how challenged statute imposed criminal penalties on candidates who were not residents of the district "at the time he qualifies" for the election). Section 99.0615, by contrast, has a salutary effect on elections by helping to limit the undemocratic tactic of letting unrestricted write-in candidates close primaries that are effectively the general election.

Ballot qualifying procedures may differ in their approach for different types of candidates, but they all serve the same purpose. A candidate by petition has no right to be on the ballot if it is discovered prior to the election that he or she actually failed to obtain the proper amount of signatures. Similarly, a candidate subject to a qualifying fee has no right to be on the ballot if prior to the election his or her check bounces. By the same measure, a write-in candidate that fails to comply with section 99.0615 has no right to be on the ballot. In each case, while

[2] The district court's reliance on *Wilson v. Newell*, 223 So. 2d 734 (Fla. 1969), is similarly unavailing.

remaining constitutionally eligible, the candidate simply fails to timely follow the procedures to run for office that are designed to protect the integrity of the political process.

The different procedures set out in sections 99.092, 99.095, 99.0955, and 99.0615 led to the need for section 99.0615's residency requirement. Both party and non-party candidates must either pay a qualifying fee in the amount of "3 percent of the annual salary of the office" sought, plus an additional 1 percent for party candidates, or submit petitions signed by "at least 1 percent of the total number of registered voters" in their district. Fla. Stat. §§ 99.092, 99.095(2)(a). Without such restrictions, write-in candidates are in the unique position of not being prevented from making a late and calculated decision to run for office in an effort to aid a political ally who is running against other legitimate candidates. Section 99.0615 serves to discourage such ploys.

Moreover, in addition to its anti-fraud function, section 99.0615 promotes the will of the people as expressed through passage of the Universal Primary Amendment. The UPA was passed in the 1998 general election to provide that primaries would be "opened" to all electors if all candidates have the same party affiliation and there will be no opposition in the general election:

> If all candidates for an office have the same party affiliation and the winner will have no opposition in the general election, all qualified

> electors, regardless of party affiliation, may vote in the primary elections for that office.

Art. VI, s. 5, Fla. Const. The purpose of the UPA was "to allow all registered electors to vote in a primary election" where the winner will effectively be the person elected to office. Comments to 1998 Amendment, Art. VI, s. 5, Fla. Const.

In proposing the UPA, the Constitution Revision Commission sought to encourage voter participation in Florida elections where the outcome was essentially determined in the primary. *See* Comments to article VI, section 5. The Commission's motivation in proposing the amendment is best exemplified by the Commissioner's comments at the public meetings on the matter:

> I have no problem with [the closed primary] system, except the reality of what happened in many counties where one party greatly outnumbers the other results in…numerous situations *where the minority party fields no candidates*. Therefore, we have many situations in which the public at large does not get to vote for those officials because, *in effect*, the primary becomes the general election.
>
> Candidates, therefore, run only in their own party although that election is the same as the general election. People literally have situations where their school board members, their county commissioners, their state representatives are people that are only elected by members of one party. What this proposal will do is ensure that everyone, Independents, Republicans, Democrats, can vote in the situation in which the primary is *in effect*…the final election and the general election.

See Tr. of Comm'n Meeting, Dec. 12, 1997, pp.116-17, available at http://www.law.fsu.edu/crc/minutes/crcminutes121297.html. Such statements unequivocally demonstrate that the UPA was, at least in part, sold to the public as

intended to provide the mechanism for all qualified voters to cast a meaningful ballot in elections where only one party was fielding any candidates. The Fourth District has even acknowledged that "[c]urrent election laws . . . effectuate the stated purpose of the UPA by giving all registered voters an opportunity to participate in the electoral process." *Telli v. Snipes*, 98 So. 3d 1284, 1287 (Fla. 4th DCA 2012).

Critically, in addition to being easily distinguishable because it concerns eligibility requirements rather than procedures for getting on the ballot, *Grassi*, the case upon which the district court primarily relies, was decided *prio*r to passage of the UPA and the enactment of section 99.0615. In *Miller v. Mendez*, 804 So. 2d 1243 (Fla. 2001), a majority of this Court joined in Chief Justice Wells' concurrence expressing the view that if deciding the issue from a clean slate without being constrained by *Grassi* and its ilk, the Court would permit the legislature to put forth residency requirements at the time a candidate submits the oath of candidate. *Id*. at 1247 (Wells, C.J., concurring) ("[W]ere I writing on a clean slate, I would hold the residency requirement to be at the time of filing. I believe the intent of the Constitution is that electors within the territorial jurisdiction should make a choice of candidates who at the time of the election are living within that territory. I believe it would be beneficial for the Legislature to define this residency requirement.") The UPA provides just such a clean slate,

particularly when also taking into account that section 99.0615 speaks to procedures for getting on the ballot and not eligibility requirements.

Finally, the district court's holding entirely ignores the well-settled proposition that there is no constitutional right to be a write-in candidate. *See Burdick v. Takushi*, 504 U.S. 428, 438-39 (1992) (holding that "in light of the adequate ballot access afforded under Hawaii's election code, the State's *ban* on write-in voting imposes only a limited burden on voters' rights to make free choices and to associate politically through the vote") (emphasis added). *See also Smith v. Smathers*, 372 So. 2d 427, 429 (Fla. 1979) (finding that the complete abolishment of write-in candidates is impermissible not because of any constitutional right to be a write-in candidate, but because it "constitutes a denial of the right to vote for a candidate of one's choice"). Against that fundamental principle, it makes no sense to find that a regulation merely determining how write-in candidates qualify to be on the ballot is a constitutional issue.

In summary, because section 99.0615 does not alter the eligibility requirements for the office of County Commissioner but instead effectuates the legislature's authority to protect the integrity of the political process from frivolous or fraudulent candidacies by regulating how one qualifies to be on a ballot as a write-in candidate only, the statute is constitutional.

III. BY CLOSING THE PRIMARY, THE FOURTH DISTRICT IGNORED THE "OPPOSITION" REQUIREMENT UNDER THE UNIVERSAL PRIMARY AMENDMENT, WHICH SHOULD EXCLUDE WRITE-IN CANDIDATES, PARTICULARLY IF FROM THE SAME PARTY AS ALL OF THE OTHER CANDIDATES

A. The Universal Primary Amendment Requires "Opposition" in the General Election to Close a Primary

Even if section 99.0615 is unconstitutional as the district court held, the court still erred in closing the primary under the Universal Primary Amendment. The Fourth District no doubt felt constrained on this issue by its previous holding in *Telli v. Snipes*, 98 So. 3d 1284, 1286-87 (Fla. 4th DCA 2012). In that case, the court rejected the plaintiff's efforts to open the Democratic primary where the winner would be the only name to appear on the general election ballot along with a blank space to represent two write-in candidates. *Id*. at 1285. Below, the district court held that Francois, a write-in candidate, constituted opposition as that term is used in the UPA. (App. p. 2.) (holding "Francois's status as a qualified write-in candidate would constitute 'opposition'" under the UPA). In doing so, the court impermissibly ignored the plain intent of the voters in passing the amendment.

The UPA was passed in the 1998 general election to provide that primaries would be "opened" to all electors if "all candidates for an office have the same party affiliation and the winner will have no opposition in the general election." Art. VI, s. 5, Fla. Const. The purpose of the Amendment was "to allow all

registered electors to vote in a primary election" where the winner will effectively be the person elected to office. Comments to 1998 Amendment, Art. VI, s. 5, Fla. Const.

The UPA was intended to encourage voter participation where the outcome was essentially determined in the primary. *See* Comments to article VI, section 5. As stated in a Constitution Revision Commission meeting, lawmakers were concerned with "situations in which the public at large does not get to vote for those officials because, in effect, the primary becomes the general election." *See* Tr. of Comm'n Meeting, Dec. 12, 1997, *supra*. This results in situations where many elected officials "are people that are only elected by members of one party." *Id.* The UPA was intended to remedy such an undemocratic process by "ensur[ing] that everyone, Independents, Republicans, Democrats, can vote in the situation in which the primary is in effect…the final election and the general election." *Id.*

In *Gray v. Bryant*, 125 So. 2d 846, 852 (Fla. 1960) this Court recognized that the constitution is the most sacrosanct of all expressions of the people. "The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for

the will of the people to be frustrated or denied." *Id*. Moreover, "[i]n construing an amendment to the state Constitution, it is proper to consider the circumstances which led to the adoption of the amendment and the purpose designed to be accomplished." *Bd. of Pub. Instruction of Polk County v. Bd. of Com'rs of Polk County*, 50 So. 574, 576 (1909)

B. Write in Candidates are not "Opposition" as that Term is Used in the Universal Primary Amendment

As highlighted by the discussions at the committee hearing, *supra*, the circumstances leading to the adoption of article VI, section 5(b) were to allow all registered voters to participate in a party primary when the minority party was fielding no candidates in the general election. A write-in candidate is necessarily not fielded by *any* party. *See* §100.051, Fla. Stat. (requiring the supervisor of elections to place on the general election ballot the names of candidates who have been nominated by a party). Thus, keeping a primary election closed solely on the basis that a write-in candidate represented by a blank space on the general election ballot is "opposition" under a broad definition of the term ignores the policy behind the UPA.

Treating a write-in candidate as "opposition" sufficient to side-step the mandates of the UPA flies in the face of the principle that the words used in the

Constitution should be given their ordinary meaning *so as to fulfill the intent of the voters*. *See Gray*, *Advisory Opinion to Governor*, and *Williams*, *supra*. In fact, such a broad construction effectively renders the UPA completely meaningless and ignores its vindication of voting rights. *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975) ("We must tread carefully on that right [to vote] or we risk the unnecessary and unjustified muting of the public voice. [R]efusing to recognize an otherwise valid exercise of the right to a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, . . . in effect [nullifies] that right.").

Defining the term "opposition" as used in the UPA to include non-viable candidates all but ignores this Court's cautionary instruction against adhering to statutory scripture at the expense of a citizen's sacred right to vote. That the disregard of the UPA's purpose is felt almost exclusively at the local level makes the district court's interpretation of "opposition" under the UPA all the more troubling in light of the increasingly important role local government plays in the every day life its citizens. *Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc.*, 158 F.3d 92, 120 (2d Cir. 1998) ("[I]nstitutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens.") (quoting *Avery v. Midland County*, 390 U.S. 474, 481 (1968)). In fact, the election of a local officer might very well be more important to local residents than the

election of a United States Senator. *See Id.* (citing *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 55 (1970)).

C. Same Party Write in Candidates are not "Opposition" as that Term is Used in the Universal Primary Amendment

Moreover, even if a write-in candidate from a different party or no party at all constitutes "opposition" for purposes of the UPA, the primary for District 2 should nevertheless remain open as all of the candidates in the election are still from the same party. Francois is a registered Democrat. Thus, even with his participation, there is still no opposition from a non-Democrat in the general election. Accordingly, even if Francois properly qualified to be on the ballot, because he is a registered Democrat, the primary should remain open under the mandates of the UPA because all candidates have the same party affiliation. To find otherwise would mean all write-in candidates would close primaries, contravening the plain intent of the UPA to keep at least some primaries open.

The UPA would be rendered meaningless if the primary election remained closed as a result of the mere presence of a write-in candidate who has the same party affiliation as all of the other candidates. Any time a candidate desired a closed primary, that candidate would only need to recruit a fellow party member to act as a write-in candidate, thereby closing the primary to voters outside the party.

The UPA was expressly intended to avoid closing primaries where they are, "in effect," the general election.

Accordingly, even if this Court agrees that section 99.0615 is unconstitutional, that portion of the district court opinion reversing the trial court's opening of the Democratic Primary for the office of Broward County Commissioner for District 2 to all voters regardless of party affiliation should be reversed and the trial court's order reinstated.

IV. FRANCOIS DID NOT PROPERLY PRESERVE HIS CHALLENGE TO THE CONSTITUTIONALITY OF FLORIDA STATUTES SECTION 99.0615 BECAUSE HE FAILED TO PROVIDE THE STATE A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN THE PROCEEDINGS BELOW

The trial court should not have been required to rule on the constitutionality of section 99.0615 because Francois failed to provide the Attorney General or the state attorney with a meaningful opportunity to defend his challenge. Florida Rule of Civil Procedure 1.071 provides that a party "drawing into question the constitutionality of a state statute . . . must promptly . . . (a) file a notice of constitutional question . . . and (b) serve the notice and the [relevant filing] . . . on the Attorney General or the state attorney of the judicial circuit in which the action is pending." The district court improperly ignored Francois's failure.

The purpose of notifying the Attorney General or the appropriate state's attorney is to afford them the opportunity to defend the State's position if they so

choose. *See State ex rel. Shevin v. Kerwin*, 279 So. 2d 836, 838 (Fla. 1973) (explaining that the notice requirement allows "the Attorney General [to] be fully prepared to intervene in those causes in which intervention becomes necessary"); *Martin Mem'l Med. Ctr., Inc. v. Tenet Healthsystem Hospitals, Inc.*, 875 So. 2d 797, 800 (Fla. 1st DCA 2004) (the "purpose of this statute" is "to ensure that the state . . . is aware of any litigation in which a plaintiff seeks a declaratory judgment that any of the enumerated forms of legislation is unconstitutional, and afforded an opportunity to present the state's position").

In this case, Francois never served notice of his constitutional challenge on the Attorney General and only served the state's attorney for Broward County on the day of the determinative hearing in the case. That the case was heard on an expedited basis is no excuse for Francois's failure to provide the State with a meaningful opportunity to defend the statute. Even with the emergency treatment afforded by the trial court, Francois still had more than two weeks' notice between the time he was served with the Complaint and the day of the final hearing. Francois also received repeated notifications of the attempts to have the matter expedited. Francois has only himself to blame for not providing the Attorney General or state's attorney with effective notice of his constitutional challenge.

Accordingly, even if the district court's other rulings are correct, the order of the trial court should have been affirmed because the issue was not properly

preserved as a result of Francois's failure to provide meaningful notice to the State of his constitutional challenge.

Conclusion

Based on the foregoing, this Court should reverse the September 10, 2014, opinion of the Fourth District Court of Appeal and reinstate the order of the trial court opening the primary election for the office of Broward County Commissioner from District 2.

Respectfully submitted,

By: /s/ Daniel S. Weinger
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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic service to all counsel on the attached Mailing List on this 29th day of September, 2014.

Certificate of Type Size and Style

The undersigned counsel certifies that the type and style used in this brief is 14 point Times New Roman.

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