

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

THOMAS ALAN LINZEY, JOHN STITH,)
PENNSYLVANIA GREEN PARTY, and)
WILL DONOVAN III,)

Plaintiffs,)

v.)

KIM PIZZINGRILLI,)
in her official capacity as)
Secretary of State)
of Pennsylvania, and)
RICHARD FILLING,)
in his official capacity as)
the Commissioner overseeing)
Pennsylvania's Bureau of)
Commissions, Elections and)
Legislation,)

Defendants.)

CIVIL ACTION)
NO. 3:CV-00-1300)
JUDGE CAPUTO)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' RENEWED
MOTION FOR SUMMARY JUDGMENT**

STATEMENT OF THE CASE

Plaintiffs filed a complaint on July 24, 2000 challenging the Commonwealth of Pennsylvania's mandatory candidate filing fee for ballot access, with no provision for waiver or alternative means of qualifying for the ballot. Plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. After hearing testimony and argument from the parties on July 25 and July 27, 2000, this Court granted the plaintiffs' motion for preliminary injunction with respect to plaintiff John Stith and other candidates who are unable to pay the challenged filing fees. The Court ordered defendants to provide such candidates an alternative measure for gaining access to the ballot. Defendants thereafter provided a waiver form which allowed candidates who attested to an inability to pay the fees, but otherwise qualified for the ballot, to appear on the November 2000 ballot without paying the fees.

On August 14, 2000, defendants served their Answer. On September 13, 2000, the parties filed with the Court a Joint Stipulation for the Voluntary Dismissal of Certain Plaintiffs. While plaintiffs William Belitskus, Anne Goeke, Barbara Knox, Eric Prindle, Jennaro Pullano, Ralph Nader, and the Nader 2000 Primary Committee have dismissed their claims,

plaintiffs John Stith, Thomas Alan Linzey, Will Donovan III, and the Pennsylvania Green Party continue to prosecute this action. On September 22, 2000, plaintiffs filed their original motion for summary judgment. On October 6, 2000 defendants filed a motion to hold plaintiffs' summary judgment motion in abeyance under FED. R. CIV. P. 56(f), pending further discovery, and on October 10, 2000 defendants filed a memorandum in opposition to plaintiffs' summary judgment motion, to which plaintiffs filed a reply on October 20, 2000.

On February 28, 2001 this Court ordered that plaintiffs' summary judgment motion be held in abeyance and that discovery proceed. After the parties expressed to the Court their concurrence that plaintiffs should be permitted to renew their summary judgment motion, the Court on May 14, 2001 issued an order scheduling briefing on summary judgment by both parties.

STATEMENT OF FACTS

The Commonwealth of Pennsylvania requires candidates for public office to pay a filing fee in order to qualify for the ballot. 25 P.S. §§ 2873, 2911, 2913, and 2914. These fees range from \$5 to \$25 for local offices; \$100 for State Senator, State Representative, and most offices filled by

county-wide or city-wide vote; and \$150 for U.S. Representative; to \$200 for the U.S. presidency and any statewide office. 25 P.S. § 2873.

Pennsylvania law provides no means for a candidate to qualify to appear on the ballot without paying these fees. There is no waiver for candidates who would face financial hardship from having to pay these fees, nor is there an alternative means for such candidates to qualify for the ballot. The same fees apply to candidates of minor political parties and “political bodies” as well as major party candidates.¹ Since 1990, defendants have received several inquiries from candidates seeking fee waivers. Defendants’ Supplemental Response to Plaintiffs’ Interrogatory No. 3, in Supporting Documents at Tab N.

In addition to the filing fees, all candidates must satisfy stringent signature requirements. Candidates of political bodies (those not nominated in a party primary) seeking statewide office must gather signatures of qualified electors equal to at least two percent of the highest vote cast for

¹ Pennsylvania law distinguishes between “political parties” eligible to participate in the Pennsylvania primary and other “political bodies”. 25 P.S. § 2831. Candidates of political parties seeking a place on the primary ballot must file nomination petitions and filing fees, 25 P.S. § 2873, while candidates of political bodies seeking a place on the general election ballot must file nomination papers with the same offices, and must pay the same filing fees. 25 P.S. §§ 2911, 2913, 2914. The Pennsylvania Green Party is a “political body” as defined by § 2831.

any statewide candidate in the previous election; political body candidates for other office must gather a number equal to at least two percent of the highest vote tally in the relevant electoral district. 25 P.S. §§ 2911 (c). For statewide candidates in the 2000 election that number was 21,739.

Monies collected in filing fees are placed into the Commonwealth's General Fund and commingled with other revenues. Defendants' Admission No. 3. The fees charged do not correlate to the cost of processing ballot applications. The Commonwealth estimates that it spends approximately \$33,785 in wages to personnel involved with the processing of nomination petitions and papers in even years, and 40-50% as much in odd years. *See* Memorandum from Commissioner Filling to Louis Lawrence Boyle, April 23, 2001, p. 2, produced in response to Plaintiffs' discovery requests, in Supporting Documents at Tab L. Non-labor costs are not fully itemized, but \$9,000 in printing expenses are listed, *Id.*, bringing the total listed costs to \$42,785 in even-numbered years.

According to Defendants, the amounts raised by filing fees are \$70-80,000 in even-numbered years and \$22-23,000 in odd-numbered years. Defendants' Response to Plaintiffs' Interrogatory No. 2, at Tab I. Thus the amounts raised in filing fees bear no relation to the amounts needed to process nominating petitions and papers.

In addition, the size of the fee charged to candidates does not correspond to the costs in processing the particular candidate's petition or papers. As detailed in Plaintiffs LR 56.1 Statement of Material Facts, ¶¶ 15-17, State Senate candidates in various districts gathering widely disparate numbers of signatures are yet are charged the same \$100 fee, even though the Commonwealth must expend more staff time reviewing petitions with greater numbers of signatures. Testimony of Mona Accurti, July 27 Preliminary Injunction Hearing ("July 27 Hearing") pp. 32-33, in Supporting Documents at Tab B; Defendants' Ex. 1 from Preliminary Injunction Hearing, at p. 4, Supporting Documents at Tab J; 25 P.S. § 2873. Similarly, political body or minor party candidates for statewide office must gather 21,000 signatures while major party candidates for statewide office need only gather 2,000 signatures, yet all must pay the same \$200 filing fee. Testimony of Mona Accurti, July 27 Hearing, at pp. 32; 25 P.S. § 2873.

Defendants themselves have admitted that the costs of processing nominating papers for minor party and political body candidates for statewide office are different from the costs of processing nominating petitions for major party candidates for statewide office, yet all are charged the same \$200 fee. Defendants Admission No. 4. Defendants also admit that the costs of processing nominating petitions and papers for state

senators and state representatives vary according to the number of signatures required in each district, yet all pay the same \$100 fee. Defendants' Admission No. 5.

Plaintiffs John Stith and Thomas Alan Linzey are otherwise qualified candidates for public office in Pennsylvania who cannot pay the filing fee without suffering substantial hardship, as detailed in Plaintiffs' LR 56.1 Statement of Material Facts ¶¶ 6-8 and as demonstrated by the supporting documents cited therein. Mr. Stith's monthly expenses nearly exceed his monthly income, causing him to forgo dental care, a new prescription for his eyeglasses, and even health insurance, and to pay high interest on credit card debt. Deposition of John Stith at pp. 17-18, 31-33, Supporting Documents at Tab C. Mr. Linzey is similarly unable to pay Pennsylvania's filing fee. *See* Plaintiffs' LR 56.1 Statement of Material Facts ¶ 8.

Plaintiff Will Donovan III is a low-income voter who favors the candidacies of Stith, Linzey and others unable to pay the Commonwealth's mandatory filing fees. Mr. Donovan is unable to make financial contributions to his preferred candidates for office that would assist them in the payment of Pennsylvania's filing fees. *See* Plaintiffs' LR 56.1 Statement of Material Facts ¶ 9 and documents cited therein.

Plaintiffs Linzey, Stith, and Donovan are members of the Pennsylvania Green Party. The Pennsylvania Green Party represents the interests of the elderly, college students, and low-income citizens and voters. Testimony of John Stith, July 25 Temporary Restraining Order Hearing (“July 25 Hearing”) at p. 27-28, in Supporting Documents at Tab A. Because the plaintiffs are low income, and represent the interests of lower-income voters and citizens, they are disproportionately affected by the Commonwealth’s mandatory filing fees.

ARGUMENT

The Commonwealth’s policy of charging all candidates a mandatory filing fee facially discriminates on the basis of wealth. *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974). The evidence, viewed in the light most favorable to defendants, does not support any valid state interest served by this discrimination. The evidence irrefutably establishes that Plaintiffs are injured by this discrimination as candidates, voters and a political party. Therefore plaintiffs are entitled to judgment as a matter of law.

I. Summary Judgment Standard

Summary judgment is appropriate if there is “no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law.” FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party seeking summary judgment bears the initial burden of showing the district court that there is an absence of genuine dispute over any material fact. *Celotex*, 477 U.S. at 323. In responding to a summary judgment motion, the non-moving party cannot rest on its pleadings, but must present some “specific facts showing that there is a genuine issue for trial.” *Id.*, 477 U.S. at 324; accord *Federal Laboratories, Inc. v. Barringer Research Limited*, 696 F.2d 271, 274 (3d.Cir.1982).

II. The Pennsylvania statutory filing fee requirement is unconstitutional as a matter of law.

The U.S. Supreme Court has unequivocally held on two occasions that a state which charges a fee for access to its ballot must provide an alternative for candidates unable to pay the fee. *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974). A system that provides no alternative to the payment of filing fees “falls with unequal weight on voters, as well as candidates, according to their economic status,” thereby violating the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. *Bullock*, 405 U.S. at 144. More recently, the Supreme Court has reaffirmed that “[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license,” *M.L.B. v. S.L.J.* 519 U.S. 124, 117 S.Ct. 555, 568 (1996)(citing *Bullock*, 405

U.S. at 144-49 and *Lubin*, 415 U.S. at 718). Under the authority of *Bullock*, numerous courts have invalidated filing fees when there was no waiver or alternative means of qualification. See e.g., *Brown v. North Carolina State Board of Elections*, 394 F.Supp. 359 (W.D. North Carolina 1975); *Dillon v. Fiorina*, 340 F.Supp. 729 (D. New Mexico 1972); *Harper v. Vance*, 342 F.Supp. 136 (N.D. Alabama 1972); *Fair v. Taylor*, 359 F.Supp. 304 (M.D. Florida 1973).

In the absence of a waiver or alternative means of ballot qualification, Pennsylvania's filing fees exclude candidates from the ballot who are otherwise qualified but are unable to pay the fees because of financial hardship. By restricting non-wealthy candidates' access to the ballot, the fees also deny Pennsylvania voters the opportunity to vote for candidates of their choice. "The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the communities" *Bullock*, 405 U.S. at 144; see also *Lubin*, 415 U.S. at 716 ("The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters."); *Anderson et al. v. Celebrezze*, 460 U.S. 780, 786-787 (1983). The availability of a write-in

candidacy is not an adequate alternative to constitutional ballot access requirements. *Lubin*, 415 U.S. at 719 n. 5.

A regulation affecting candidate and voter rights in this manner must be “closely scrutinized” and will pass constitutional muster only if it is reasonably necessary to the accomplishment of a legitimate state objective.

Bullock, 405 U.S. at 144. The Supreme Court stated in *Bullock* that:

Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in *Harper*, that the laws must be “closely scrutinized” and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster.

405 U.S. at 144, citing *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

Mandatory filing fees receive the same degree of scrutiny regardless of the size of the fee. *Lubin*, 415 U.S. at 714 (noting that a fee of \$1, \$100 or \$700 would have the same exclusionary effect). In fact, the *Bullock* decision arrives at “close scrutiny” after it compares the injury from Texas’ candidate filing fees to the \$1.50 poll tax struck in *Harper*, and finds the nature of the injury to be similar. *Bullock*, 405 U.S. at 142-44. While acknowledging that the poll tax affected the rights of voters more directly than did the filing fees at issue in *Bullock*, the Court in *Bullock* nevertheless

held that a candidate filing fee, like the poll tax, “falls with unequal weight on voters, as well as candidates, according to their economic status,” and applied the same close scrutiny to filing fees that it had applied to the \$1.50 poll tax. *Id.* at 144.

Even if subjected to the most deferential rational basis review, Pennsylvania’s filing fees would fail because they do not serve any legitimate state interest put forward by the Commonwealth. While filing fees may have the effect of limiting the number of candidates appearing on the ballot, they are not a valid means of determining a candidate’s seriousness. *Lubin*, 415 U.S. at 716-717; *Bullock*, 405 U.S. at 145-146.

Filing fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the extent of the voter support of an aspirant for public office. A wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check. We have also noted that prohibitive filing fees, such as those in *Bullock*, can effectively exclude serious candidates. Conversely, if the filing fee is more moderate, as here, impecunious but serious candidates may be prevented from running.

Lubin at 717; *see also Fulani v. Krivanek*, 973 F.2d 1539, 1547 (11th Cir. 1992)(rejecting the avoidance of ballot confusion as a rationale for filing fees).

Additionally, Pennsylvania’s stringent signature requirements ensure that only candidates with demonstrated popular support will gain ballot access, regardless of filing fees, as discussed *supra* at pp. 4-5. *See*

Plaintiffs' LR 56.1 Statement of Material Facts ¶¶ 3-4. Indeed, such signature requirements are precisely the type of alternative qualifying measure used in most states to avoid running afoul of *Bullock* and *Lubin*.

The State cannot claim a legitimate interest in having candidates pay the costs of elections, which are a state function. The *Bullock* opinion says of primary elections,

“We also reject the theory that since the candidates are availing themselves of the primary machinery, it is appropriate that they pay that share of the cost that they have occasioned.... [T]he costs do not arise because candidates decide to enter a primary or because the parties decide to conduct one, but because the State has, as a matter of legislative choice, directed that party primaries be held. The State has presumably chosen this course more to benefit the voters than the candidates.”

Bullock, 405 U.S. at 147-48. This logic holds even greater force in the context of a general election, which is an indispensable part of the state's electoral process.

Dicta in *Bullock* states that the Court might evaluate the State's asserted interest differently “if the fees approximated the costs of processing a candidate's application for a place on the ballot,” *Bullock*, 405 U.S. at 148 n. 29. However, the evidence in this case establishes that the Commonwealth's filing fees do *not* approximate processing costs, as discussed at length in the Statement of Facts, *supra* at pp. 5-7, and in Plaintiffs' LR 56.1 Statement of Material Facts ¶¶ 11-17. Neither is there

evidence in legislative history that the fees were adopted for this purpose. *See* Defendants Admission No. 1, in Supporting Documents at Tab K. The Commonwealth does not place the monies collected into a segregated account to process ballot applications, but rather places the fees into the Commonwealth's General Fund, where they are commingled with other revenues. Defendants' Admission No. 3. Finally, this *dicta* in *Bullock* was clearly superceded by *Lubin*, which held that even a \$1 fee -- far too little cover costs -- could be unconstitutional. 415 U.S. at 714.

Thus, Pennsylvania's filing fees exclude candidates based on wealth and restrict the franchise of voters while serving no legitimate state interest. The right of candidates to ballot access is "intertwined with the rights of voters," *Lubin*, 415 U.S. at 716, and it is low income voters who are most likely to feel the burden of exclusionary filing fees. *Bullock*, 405 U.S. at 144. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)(footnote omitted) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)(The constitutional right to vote is "a fundamental political right....preservative of all rights").

In the face of such a clear constitutional violation, the Commonwealth should be barred from enforcing its mandatory candidate filing fees and should be ordered to offer non-wealthy candidates an alternative means of qualifying for the Pennsylvania ballot.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that the Court grant their renewed motion for summary judgment. A proposed form of Order is attached.

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