10-1973

Lubin v. Panish

Lewis F. Powell Jr.

8/30/72 - JHW

Call for Response
Await Discussion

Involves validity of Calif. filing fee in primary election - namely 1% of salary of office.

Q is whether this case is controlled by Bullock v Carter (1971) invalidating Texas filing fee.

Jay says Calif. scheme is close enough to Bullock to justify affirmance. Bullock may not be clear as to where to draw line, but it is too soon to re-examine.

No Response

No. 71-1583
Brown v. Chote
App. from three jdgek court-ND Cal.--(Hamlin, Wodlenberg, Swelgert)
Hamlin dissenting.

Resp. was a candidate for Congress in California. ~~Calxxxlx~~ Cal. law required that a fee of $425 must be paid in advance ~~xf~~ to entitle resp. to a place on the ballot for the June primary election. That same law provides that in every election, that a fee payable to the Secretary of State ~~fxx~~ for filing a declaration of candidacy shall be 1% of the first year's salary for ~~thatxxffixxx~~ the office sought, in resp. case $425. Resp. alleged he was an indigent, ~~xpuxxdx~~ could not ~~affx~~ afford the fee and that the filing fee requirement ~~xixixixxx~~ discriminated against indigents and ~~dixxx~~ x disadvantaged persons in violation of the equal portection clause. The three judge court upheld his claim to the extent of issuing a preliminary injunction ~~againstxCalxxfxom~~

~~xi~~

$42,500

forbidding Cal. from collecting the fee for the primary. From this judgment Cal. appeals.

In its opinion the three judge court relied heavily on Bullock v. Carter which you will remember was handed down by this Court in February. In Bullock, the Supreme Court struck down as violative of the equal protection clause a Texas election filing fee system where fees ranged from $150 to as high as $8900. The court below noted that in the instant case as in Bullock, the state made no showing of some alternative method whereby a candidate who is unable to pay the filing fee can get on the ballot either by nominating petition, primary election or pauper's affidavit. The court further noted that the statute did not even tie the filing fee to election costs or the cost of filing but arbitrarily to the salary of the office sought. The court below found the same discrimination against indigents as in Bullock and ventured that all state filing fees had to be governed by a compelling state interest test used in Harper (the poll tax case) and not by a milder rational basis test.

California disputes the majorities approach. Petrs note that there is language in Bullock which emphasizes that "nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." The above language was the basis for Judge Hamlin's dissent which noted that no showing had been made that the Cal. fee was unreasonable.

The unfortunate thing is that Bullock is an ambiguous decision which leaves room for differing interpretations on state filing fees

the validity of state filing fees which of course happened in the court below. However, I would say that the majority's interpretation finds more support in Bullock than Judge Hamlin's dissent. The fact that no alternative menas of indigents getting on the ballot is provided by Cal. and the fact that Cal. filing fee is greater than some of those in Texas which Bullock struck down make Cal.'s a tough case. As a matter of precednt under Bullock, I would vote to affirm.

But I would say that state filing fees can represent quite legitimate state interests, including defraying the costs of filing and ~~xxxxxxxxxxxx~~ costs of elections as well as ~~xxxxxxxxxxxxxx~~ keeping the number of candidates on the ballot to a reasonable number. Thus, I would favor a rule which would allow state filing fees of less than outrageous amounts. But it would be unwise to rexamine Bullock so soon ~~xxxxxxxxx~~ and until the time comes to draw back on that decison, I would

AFFIRM JHW

9/5/72 - JHW

See cert. note on Brown v Chote 71-1583 - similar quest. Should be decided consistently.

Challenge to validity of $700 filing fee for candidate to Board of Supervisors.

Defer to C/J who wrote cert. calling case.

Another filing fee case - Relist to consider with 72-193 & 71-1583

DISCUSS

No. 71-6852
Lubin v. Alliason
Cert to Cal. Sup. Ct.

Petr asks that the Registrar of Los Angeles County be required to process his nomination papers for his candidacy for the Board of Supervisors without payment of the $700 ~~fee~~ filing fee. He claims indigency and that the ~~filing~~ filing fee ~~requirement~~ violates the rights of indigents under the equal protection clause. I have discussed this question at length in my cert note ~~memo~~ on Brown v. Chote, No. 71-1583. The ~~two~~ questions are substantially ~~identical~~ identical.

FOLLOW DISPOSITION IN BROWN V. CHOTE, NO. 71-1583

JHW

Conf. 10/2/72

Court	*Voted on*................, 19...	
Argued ...., 19...	*Assigned* ...., 19...	No. 71-6852
Submitted ...., 19...	*Announced* ...., 19...	

LUBIN

vs.

ALLISON

To consider with other "filing fee" cases (Fowler ✓ Culbertson 72-193

Relist to come up when 71-1583 is listed. (It awaits a response)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Await views of CJ & J White

10/12/72--LAH

Filing fee cases

RELISTS

No. 71-1583 OT 1972
Brown v. Chote
Appeal from USDC ND Calif

No. 71-1541 OT 1972
Norvell v. Apodaca
Appeal from New Mex SC

No. 71-1512 OT 1972
Brown v. Apodaca
Cert

No. 72-193 OT 1972
Fowler v. Culbertson
Appeal from USDC D South Caro

No. 71-6852 OT 1972
Lubin v. Allison
Cert to Calif SC

note

Held

DISCUSS

Attached are the cert notes in each of these filing fee cases which have been relisted for reconsideration together. These cases all grow out of the uncertainties of Bullock v. Carter, 405 U.S. 134 (1972). Two of them are state appeals from primary filing fees which were struck down by federal courts and two others are appeals by disappointed plaintiffs who unsuccessfully attacked state fee

requirements.

(1) Brown v. Chote is the decision by a federal three-judge ct striking down the California requirement that a candidate for Congress pay 1% of the salary of a Congressman ($425.00) to get on the primary ballot. There is no alternative to the fee.

(2) Norvell v. Apodaca is a decision by the New Mexico SC upholding the State primary filing fee requirement that every candidate pay in 6 % of the salary of the office he is seeking. One-half of that amount will be refunded if the candidate polls at least 15% of the voters. For a candidate for Congress this requires an initial outlay of $2550. Again, there is no alternative in New Mexico to paying the fee. (Jay has not written a note on 1512--Brown v. Apodaca but I have received a copy of the papers. I think it may be helpful to take a look at the standing issue that appears to bother Jay. As you know a federal three-judge ct held last March that New Mexico could not enforece its filing fee requirement to candidates for U.S. Senate from having their names placed on the ballot. The State AG did not appeal that judgment. Thereafter he issued a memo order to the State Sec of State ordering that she not assess filing fees under the statute. An official acting on behalf of the State then brought a mandamus action against the AG seeking an order from the N.Mex SC that his order be rescinded and thatcandidates be ordered to comply with the filing requirement. The SC of NMEx agreed and issued a mandamus order instructing the AG and Sec of State to strike the names of any candidates who would not comply with

fee requirement. The AG appeals in No 71-1511 from that judgment. Under these circumstances I do not think that there is a serious standing question: the State AG is subject to comply with an order that he thinks is unconstitutional. I have never heard of a civil case in which an injunction was entered against the defendant but he was not allowed to appeal. No 71-1512 is a cert petn filed by candidates who sought to intervene in the state ct but were refused. Their case presents an attenuated version of the case since they must first persuade the ct that it was a denial of due process for the ct below not to have allowed them to intervene. I doubt seriously whether Petrs can succeed. Therefore, although your conference notes seem to indicate a different view, I would think that the case to grant is 1511 and that 1512 should simply be held.)

(3) Fowler v. Culbertson is a three judge ct decision from South Carolina which struck down that State's filing fee requirement for party primaries. There a state senate candidate was unable to pay $500 and a state candidate for U.S. Senate was unable to pay a $4,000 fee.

(4) Lubin v. Allison is a Calif state decision upholding a $700 filing fee for candidacy in the Bd of Supervisprs race in Las Angeles County. I know nothing more about this case other than what is in Jay's cert petn.

RECOMMENDATION

It is my judgment--in agreement with Jay's--that the Ct must do something about the Norvell case. It must be either summarily reversed or granted for clarification and reversed. I lean toward the latter alternative since the raw numbers fo filing fee questions that are coming up

is indicative that the Bullock opinion needs to be explained. I would note No. 71-1511 and hold the other cases pending decision. You should, of course, await the views of both the CJ and Justice White since each has peculiar expertise in this area.

NOTE 71-1511 & HOLD OTHERS LAH

Conf. 10/13/72

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 71-6852

Submitted ....., *19*... *Announced* ....., *19*...

LUBIN RELIST

vs.

ALLISON

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Notes on No. 71-1583
Brown v. Chote
WCK
February 21, 1973

The question posed by this case is whether California's requirement that a candidate for the United States Congress must pay a $425 filing fee to enter a party primary election is constitutional. The central precedent is of course Bullock v. Carter, 405 U.S. 134(1972), although our discussions of voting in Rodriguez and Rosario are at least tangentially relevant.

Unfortunately, the opinion in Bullock is hardly a model of clarity. The language is a potpourri of everyone's views on equal protection. Perhaps the best place to start is with the facts of that case. The filing fees there ranged from $150 to $8900, depending upon the office for which the candidate was running. There, as here, the fees were levied on all who wished to run in the primary. Texas afforded no alternative avenue to the paying of the filing fee--that is, Texas did not allow a cnadidate to place his name on the ballot by amassing some number of signatures on a nominating petition.

In striking down the Texas scheme, the Court identified as possible state interests the raising of revenue(or saving of expenses) and the elimination of frivolous candidacies. As to the first, the Court found that the state could not constitutionally finance the primary elections through filing fees.

> "Appellants seem to place reliance on the self-evident fact that if the State must assume the cost, the voters, as taxpayers, will ultimately be burdened with the expense of the primaries. But it is far too late to make out a case that the party primary is such a lesser part of the democratic process that its cost must be shifted away from the taxpayers generally. The financial burden for general elections is carried by all taxpayers and appellants have not demonstrated a valid basis for distinguishing betweenthese two legitimate costs of the democratic process." at 148.

At the same time, the Court did not go the whole route, compare Harper, to say that the state had no financial interest.

> "It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees . . . ." at 149.

This passage is illuminted by footnote 29, at 148:

> This would be a different case if the fees approximated the cost of processing a candidate's application for a place on the ballot, a cost resulting from the candidate's decision to enter a primary. The term filing fee has long been thought to cover the cost of filing, that is, the cost of placing a particular document on the public record."

In sum, as I read Bullock, the dictum in that case allows the state to vindicate it financial interest only to the extent of covering minor administrative costs, perhaps a few dollars or even up to, say, $40 or $50.

The state's other interest in Bullock was the more complicated one of protecting "the integrity of its political processes from frivolous or fraudulent

candidacies." at 145. While recognizing that of course high filing fees have some deterrent effect, the Court found that the state's means were insufficiently well tailored to its ends. The means were both overinclusive, in the sense of precluding poor but serious candidates from running, and underinclusive, in that "even assuming that every person paying the large fees required by Texas law takes his own candidacy seriously, that does not make him a 'serious candidate' in the popular sense." at 146.

I think that Bullock could well be read to stand for the proposition that a state may simply not use financial deterrence as a means of eliminating frivolous candidacies. Indeed, I do not think that there is support in the text of the opinion for any other reading. However, the Court did note that Texas afforded no other means of access to the primary ballot, presumably leaving open the question whether the state could force those unable to pay a filing fee to submit a petition with signatures.

In the present case, I do not think that the fee charged by California, here $425, is a filing fee as defined in footnote 29 of the Chief's opinion in Bullock, see supra. $425 is surely more than the "cost of placing a particular document on the public record."

Nor, for the reasons sketched above, do I think that the filing fee may be used as a deterrent. Apart from the fact that it may be an absolute bar to some, it is bound to have a differential effect on prospective candidates according to their wealth. The fee here, [redacted] $425, is greater than the [redacted] lowest fee held unconstitutional in Bullock, $150.

It is no answer, I think, that the prospects for a successful candidacy are powerfully influenced by one's personal wealth and that of his friends and associates. This is a pervasive fact of our economic and political system, but not one directly decreed by government. The filing fee, on the other hand, is directly prescribed by California and augments the disparity of resources between the wealthy and the poor. And while of course the poor or middle income candidate may benefit from the support of a party or union or association, this is more likely to be true in a general election than in a primary. If the right to vote for a candidate of one's choice is indeed preservative of other rights, then a state ought not to erect an irrelevant barrier to the opportunity to run for public office. I would affirm, leaving open what would happen if a state afforded an alternative means for obtaining a place on the ballot.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 19, 1973

Re: No. 71-1583 - Brown v. Chote and "Hold" cases

MEMORANDUM TO THE CONFERENCE:

We have all been aware that our "hold" cases on Brown v. Chote, may include a case to treat the basic question sought to be raised relating to election filing fees. Here is a summary of each case we are presently holding for Brown v. Chote:

(1) No. 71-1511 -- Norvell v. Apodaca -- Appeal to the New Mexico Supreme Court. Under the New Mexico filing fee system, a candidate must pay 6% of the first year salary of the office which he seeks in order to gain entrance to the primary election. For example, the fee for United States Senator is $2,550. If the candidate receives 15% of the electoral vote, one-half of the fee is refunded. The fees not refunded pay for part of the costs of the election. (This is much like the British system that has worked so well.)

After a decision of a Three-Judge Court, District Court for the District of New Mexico, holding part of the filing fee system unconstitutional, the New Mexico Secretary of State issued an opinion, stating that all New Mexico filing fees were unconstitutional. A candidate for office then filed a petition for a "Writ of Mandate" in the New Mexico Supreme Court, asking that the Secretary of State be required to strike the names of all primary candidates who had not paid the fees. Defining a serious candidate as one who could gain 15% of the electoral vote, the New Mexico Supreme Court found as a fact that no serious candidate had ever been prevented by the fees charged from running for office. Since the fees were thus reasonable, and were related to legitimate state purposes (eleiminating overcrowded ballots and frivolous candidates), the Court held that they were constitutional.

The name party in the above case was the Secretary of State. She did not appeal to this Court but this appeal was filed by the Attorney General of New Mexico, who had represented the Secretary of State and who had specifically been enjoined by the New Mexico Supreme Court from issuing an advisory opinion which conflicted with the New Mexico Supreme Court decision.

(2) No. 71-1512 -- Brown v. Apodaca -- Certiorari to New Mexico Supreme Court. Petitioners wished to become candidates in a New Mexico primary election. When the New Mexico Supreme Court accepted jurisdiction in Norvell v. Apodaca, petitioners moved to intervene. The New Mexico Supreme Court denied them leave to intervene without opinion. Petitioners ask this Court to determine (a) whether they were denied due process when they were denied leave to intervene; (b) whether petitioners now have standing to appeal from the decision in Norvell v. Apodaca; and (c) whether the New Mexico filing fee system is unconstitutional.

(3) No. 71-6852 -- Lubin v. Allison (Registrar of Los Angeles County) -- Cert. to California Supreme Court. The filing fee system challenged here is precisely the same statutory system challenged in Brown v. Chote. However, whereas Brown v. Chote covered only statewide offices, this suit challenged the validity of the fees as applied to lesser state offices. The fees charged in California are either 1% or 2% of the first year salary of the office sought. grant

Petitioner, who is indigent, wished to run for the Board of Supervisors of Los Angeles County. Respondent refused to issue to petitioner a set of blank registration forms unless petitioner first presented a check for $701.60. Petitioner filed a petition for a Writ of Mandate in California Superior Court, asking that he and members of his class be allowed to register without paying the required fees. On demurrer, the Superior Court held that the State had a legitimate objective in preventing fraudulent or frivolous candidates from running for office and that the amount of the fees charged was reasonable "as a matter of law." Since the fees were reasonable, the court held that the State need not provide an alternative means of gaining access to the ballot. Subsequent petitions for a Writ of Mandate to the California Court of Appeals and Supreme Court were denied.

(4) No. 72-193 -- Fowler (South Carolina Democratic Party) v. Culbertson -- Appeal to Three-Judge Court, District Court for the District of South Carolina (Craven, Russell, Simons). Under South Carolina law, a candidate who wishes to run in a primary election must file a declaration of candidacy. At that time, he must pay a fee of $500. The candidate may also be assessed by the political party in whose primary he wishes to run. The amount of the assessment is left to the discretion of the political party; according to the District Court, the total fees charged range from $500 to $5,000. The fees are paid to the political parties, to be used as they wish. This is closer to Bullock than other cases. Hold for Lubin

Appellee, who wished to be a primary candidate for United States Senator, filed this action, challenging the South Carolina filing fee system. The District Court ruled that $850 was the maximum permissible fee which could be charged under the Constitution. Appellant was ordered to adjust other fees downward, so as not to exceed 2% of the annual salary of the office sought. The District Court also ruled that indigents could become candidates without paying any fee and that excess fees paid to political parties had to be returned. Having determined that an injunction should issue, the Three-Judge Court dissolved itself and returned jurisdiction to a single district court for further proceedings.

Appellant argues that the District Court acted improperly in granting relief before evidence was taken or an answer to the complaint filed. He further contends that the court did not know the range of fees charged in South Carolina.

(5) No. 72-455 -- Bush v. Sebesta (Fla.) -- Appeal to Three-Judge Court, District Court for the Middle District of Florida (Roney, Krentzman, Hodges). Florida requires candidates in primary elections for state salaried offices to pay 5% of the first year salary of the office to have their names placed on the ballot. Approximately 80% of the fees charged are paid by the State to the political parties, to be spent as the parties wish. The remainder is paid into the state treasury. Hold

This class action, challenging the Florida filing fee system, was filed by Miranda. Appellant Bush, who is indigent, intervened. To run for the office he sought, appellant would have had to pay $600.

The District Court held that a filing fee of 5% was reasonable. However, it also ruled that the State had to provide some alternative means by which indigent candidates could gain access to the ballot. Since an election was about to take place, the District Court established "interim standards" for the qualification of indigent candidates: (a) those who wished to run for state-wide offices had to secure 10,000 signatures from qualified voters; (b) those running for other offices had to secure the signatures of 1% of the qualified voters, but not more than 3,000 nor less than 100 signatures.[1] The summary order of the District Court notes that a full opinion will follow.[2]

Appellant contends that the District Court should have struck down the entire Florida filing fee system, rather than provide an alternative means for indigents to gain access to the ballot. Apparently, part of appellant's argument relates to the fact that fees collected in Florida go to the political parties for whatever use they choose.

(6) No. 72-5187 -- Fair v. Taylor -- (Three-Judge Court, District Court for the Middle District of Florida). This case was consolidated by the District Court with Bush v. Sebesta. Appellant is well known in the Clerk's office in our Court since he has filed some 31 previous pro se petitions and appeals. His petition is difficult to decipher. The Clerk's office informs me that appellant is presently confined to a mental institution in Florida.

Hold for briefs

Although in most cases above, it is clear that the courts acted on "11th hour" cases and had to respond quickly in the face of approaching deadlines, it is not at all clear that relief granted was intended to be of a strictly interim nature. If we can find a case in this motley collection we should probably drop a note in Brown that we are taking a case on this subject.

Regards,

WEB

1/ This alternative plan was suggested by appellee (the State).

2/ To date, the District Court has filed no opinion. The Clerk's office has been advised that an opinion may be filed shortly.

the District Court's swift action is understandable in view of the deadline which it faced, the resulting record was simply insufficient to allow that court to consider fully the grave, far-reaching constitutional questions presented.

The specific deadline which led the District Court to grant equitable relief has now passed.[4] Nothing precludes appellee from seeking a trial on the merits, if he chooses to proceed. The case is therefore remanded to the District Court for further proceedings consistent with this opinion.[5]

Remanded for further proceedings.

[4] Although the June 6 primary election has passed, the question raised is one "capable of repitition, yet evading review." Consequently, the case is not moot. *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911); *Roe* v. *Wade,* No. 70–18, slip opinion, at 10 (1973).

[5] We have granted certiorari in No. 71–6852, *Lubin* v. *Allison,* in order to consider conflicts in holdings regarding the constitutionality of state filing fee statutes.

SUPREME COURT OF THE UNITED STATES

Syllabus

BROWN, SECRETARY OF STATE OF CALIFORNIA *v.* CHOTE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 71–1583. Argued February 22, 1973—Decided May 7, 1973

Appellee, who sought to run for Congress but asserted that he was unable to pay California's statutory filing fee, filed a class action in District Court, challenging the constitutionality of the filing-fee statutes. In the face of an impending filing deadline, the District Court granted appellee's motion for a preliminary injunction. *Held:* Given the possibility that appellee would prevail on the merits and the fact that appellee's opportunity to be a candidate would have been foreclosed absent interim relief, the District Court did not abuse its discretion in granting a preliminary injunction. Pp. 4–6.

342 F. Supp. 1353, affirmed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 71–1583

Edmund G. Brown, Jr., Secretary of State of California, Appellant, *v.* Raymond G. Chote. | On Appeal from the United States District Court for the Northern District of California.

[May 7, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case arises under 28 U. S. C. § 1253 on direct appeal from a three-judge district court in the Northern District of California. The court was convened pursuant to 28 U. S. C. § 2281 when appellee called into question the constitutionality of those provisions of the California Elections Code which require candidates in a primary election to pay a filing fee prior to having their names listed on the primary ballot. Calif. Elections Code §§ 6552 and 6553. Under these provisions, candidates for the federal House of Representatives must pay $425 (1% of the annual salary of the office); candidates for the federal Senate must pay $850 (2% of the salary of the office). Those wishing to run for statewide offices must pay similar fees ranging in amount from $192 for State Assemblyman (1% of the annual salary) to $982 for Governor (2% of the annual salary). Other portions of the California Elections Code, not challenged in the present suit, require prospective candidates to file with appropriate state officials a declaration of candidacy and sponsor certificates. Calif. Elections Code §§ 6490–6491, 6494–6495.

Appellee commenced this class action on March 3, 1972. He moved and was granted permission by a single district judge to proceed *in forma pauperis* and as his own attorney. In his complaint, appellee asserted that he wished to become a candidate for the federal House of Representatives from the 17th District of California, and had taken the following steps to place his name in nomination in the June 6, 1972, California primary election. On February 17, 1972, appellee called the Registrar of Voters of Santa Clara County, an official designated by state law to dispense those forms necessary to place a name in nomination. Appellee was purportedly told by the Registrar or a member of his office that he was required to pay $425 in advance in order to secure blank copies of the necessary papers. According to appellee, the Registrar's Office also advised him that the papers would be delivered in exchange for a worthless check.[1]

Appellee proceeded immediately to the Registrar's Office where he presented a personal check for $425 and requested copies of the necessary forms. Across the face of the check, appellee had typed "Written under protest for filing fee." [2] The Registrar issued the requisite papers to appellee and informed him that his check would be forwarded to the California Secretary of State when his completed papers were submitted. Subsequently, a Deputy Secretary of State informed appellee that his name would not be placed on the ballot if his check was not honored.[3]

[1] The State denies that such advice was ever communicated to appellee. In an affidavit submitted to the District Court, the Registrar of Voters of Santa Clara County stated that it was the policy of his office not to distribute the required forms to anyone who represented to the Registrar that the check submitted was worthless. The Registrar further stated that, to his knowledge, neither he nor anyone in his office had ever informed appellee that forms would be issued upon presentation of a worthless check.

[2] When the case was argued before the District Court, appellee claimed that he had also told the Registrar or a member of his office that the account on which the check was drawn did not contain sufficient funds to cover it. However, this fact is not alleged in the complaint.

Citing *Bullock* v. *Carter*, 405 U. S. 134 (1972), appellee asserted that California's filing fee system was unconstitutional since it barred indigents, such as himself, from seeking elective office and from voting for the candidate of his or her choice. In addition to requesting declaratory and permanent injunctive relief, appellee moved the District Court to issue a preliminary injunction so as to allow him to participate as a candidate in the upcoming primary. Under state law, the final date on which appellee could submit nominating papers for that primary was March 10, 1972, one week away.

Because of the impending filing deadline, the District Court proceeded quickly to set the case for argument. On March 3, 1972, the same date on which the suit was filed, the single District Judge to whom the case was assigned entered an order requiring appellant to show cause why interlocutory relief should not be granted. The State was given five days in which to respond. It was not until March 7 that the Chief Judge of the Ninth Circuit was notified of the application for a three judge court. On March 8, he designated the judges who were to comprise the panel. On the same day, the court convened and heard oral argument. Because of the speed with which the case had developed, neither the court nor appellee had an opportunity prior to the hearing to consider appellant's return to the order to show cause, the only paper which the State had been able to prepare.

On March 9, 1972, one day after oral argument and one day before the deadline for filing nomination papers,

[3] Appellant submitted to the District Court an affidavit from the Deputy Secretary of State to whom appellee had spoken, disputing appellee's claim that he had been informed that his name would not be placed on the ballot if his check was not honored.

the District Court granted appellee's motion for a preliminary injunction, stating:

> "Since no . . . showing has been made by the state concerning either the necessity, the purpose of the reasonableness of the filing fee statutes in question, we conclude that within the rationale of *Bullock* [v. *Carter*, 405 U. S. 134 (1972)], *plaintiff may prevail on the merits* and that, absent a preliminary injunction, his constitutional right may be irreparably lost." (Emphasis added.)

Under the terms of the preliminary injunction, the State was required to allow appellee and others similarly situated to place their names on the ballot without paying the required fee, so long as they were otherwise eligible for the applicable state or federal office and had deposited with an appropriate state official an affidavit attesting to their indigency.

The State appealed directly to this Court under 28 U. S. C. § 1253. Its Jurisdictional Statement posed two questions:

> "Under the decision of this Court in *Bullock* v. *Carter*, 405 U. S. 134 (1972), when a state statute requiring a candidate's filing fee of one per cent (1%) of the first years salary for the office is challenged on Equal Protection grounds does the 'rational basis' or 'close scrutiny' standard of judicial review apply?
>
> "Do California Election Code sections 6552 and 6553 deny voters or indigent prospective candidates equal protection of the laws?"

Thus, the State of California, for reasons not clear to us in light of the limited record, asked the Court to address itself to the ultimate merits of appellee's constitutional claim, a question which the District Court did not reach.

In the present posture of the case, there is no occasion to consider any issues beyond those addressed by the District Court.

The issuance of the requested preliminary injunction was the only action taken by the District Court. In determining whether such relief was required, that court properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted absent interlocutory relief. As the District Court opinion clearly evidences, issuance of the injunction reflected the balance which that court reached in weighing these factors and was not in any sense intended as a final decision as to the constitutionality of the challenged statute. In the exigent circumstances, the grant of extraordinary interim relief was a permissible choice; but on the very limited record before the District Court a decision on the merits would not have been appropriate.

In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. *State of Alabama* v. *United States*, 279 U. S. 229 (1929); *United States* v. *Corrick*, 298 U. S. 435 (1936); *United Fuel Gas Co.* v. *Public Service Commission of West Virginia*, 278 U. S. 322 (1929); *National Fire Insurance Co. of Hartford* v. *Thompson*, 281 U. S. 331 (1930). In light of the arguments presented by appellee and the fact that appellee's opportunity to be a candidate would have been foreclosed absent some relief, we cannot conclude that the court's action was an abuse of discretion. We therefore affirm the action taken by the District Court in granting interim relief.

In doing so, we intimate no view as to the ultimate merits of appellee's contentions. The record in this case clearly reflects the limited time which the parties had to assemble evidence and prepare their arguments. While

[RE 8/20/73]

Calif #-701 plug fee cord.
State concedes "compelling
state interest test" applies.
If so it is difficult
to sustain this law.
~~This~~ await Cf. discussion

Jenness v Fortson
Wyman v Rhodes
Bullock

lfp/ss 8/20/73

No. 71-6852 Lubin v. Panish, Registrar-Recorder, County of Los Angeles

Summer Memorandum

This is a brief memorandum dictated after having read most of the briefs. It is entirely preliminary and, in large degree superficial. Further study is indicated.

Statement of the Case

This is the case we granted last spring at the time we handed down Brown v. Chote - May 7, 1973. We took the case in order to reach the substantive issues raised in Chote.

These issues relate to the validity of California election laws which require the payment by all candidates for federal state and local offices of filing fees (ranging from 1 to 2% of the salary of the office sought). This petitioner, Lubin, sought to run for the Board of Supervisors of Los Angeles County, and claimed he was unable to pay the filing fee of $701.60. He then filed this class action, attacking the California system as being invalid because it created a classification based on wealth (denying "poor people the right to seek public office solely because of their economic station"), denies petitions and members of his class the opportunity to vote for candidates of their choice.

In arguing these points, petitioner relies heavily on his contention that California "provides no alternative to

the filing fee requirement" (p. 5, 12, 13 of petitioner's brief). In this connection, petitioner relies on Bullock v. Carter in which the Court referred to the absence under Texas law of an alternative means of qualifying, for example, "by way of petitioning voters and write-in votes" - neither of which was permitted in Texas.

The state does not contest the holding in Bullock that the compelling state interest test is applicable. Rather, it asserts that California does have a compelling interest, that the fee is a modest requirement to demonstrate the good faith of the candidate and also that he has a modicum of support.

Comment

As these questions were argued and considered - but did not form the basis of our opinion - in Chote, no further elaboration is necessary in this memorandum.

I am asking Sally - by this reference - to put the Chote file and the file on this case is a single large red folder so that I will have both files before me.

JCJjr/gg 9-25-73

Separate out the "right" to vote.
Focus on right to run for office
Can apply Rodriguez as to "wealth".

White v. Rhoads, 393 U.S. 23
Gruner v. Fortson 403 US 431
"totality of circumstances test".

MEMORANDUM

No. 71-6852 Lubin v. Panish

I find this a confusing case. The difficulty largely stems from Bullock v. Carter, 405 U.S. 134 (1972). There the Court purportedly decided whether filing fee restrictions on aspirants to public office must be subjected to strict scrutiny. In a baffling passage, the Court said that the Texas scheme implicated the "right to vote" as well as the "right to be a candidate":

> "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to condidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have some theoretical correlative, effect on voters. Id., at 142-43."

If right to vote is equated with freedom of choice, it may well be that restrictions on candidacy burden that right. A voter may wish to cast his ballot for an indigent who cannot pay the filing fees, or for an illiterate who cannot qualify to stand, or for an alien.* These factors and others that have nothing to do with governmental regulation, e.g., who chooses to run, may limit a voter's range of choice. To my mind,

* Or for one under 18 or who just moved into State

I am inclined to agree.

these restrictions on candidacy do not sufficiently implicate the right to vote to justify the strict scrutiny usually associated with state classifications that burden a fundamental right.

One may also argue that the filing-fee restrictions on candidates involve a wealth classification among voters. This argument is founded on the hypothetical case of an utterly indigent candidate with equally destitute supporters. The aspirant cannot run, and his supporters are thus denied the opportunity to vote for the candidate of their choice because they cannot afford to pay his fees for him. I think this is an unreal case. The class of voters who cannot afford to pay the fees of their candidate need not be composed entirely of poor persons. A non-indigent but not wealthy voter may be unable to pay the entire fee required by a would-be candidate without other solvent backers. In any event, there is no way to establish the indigency of a candidate's supporters. True Realistically, aspirants to local office may have no supporting group in advance of formal candidacy. Therefore, I do not believe that filing fee restrictions on candidacy can be said to establish a wealth classification among voters. The determinative criterion must be the indigency of the would-be candidate rather than the financial position of his supporters.

I agree

Bullock v. Carter dealt with the Texas system in terms of strict review:

> "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. Id., at 144"

In addition to the unusual phrasing of the test ("reasonably necessary"), this pronouncement is hedged by confusing qualifications. I would not treat Bullock as establishing that a citizen's interest in becoming a candidate for public office is a fundamental one for purposes of equal protection analysis. The state's interest in restricting access to the ballot so that the real choices are not obscured by a long list of frivolous candidates seems to me perfectly legitimate. It would be unwise to subject the myriad restrictions surrounding candidacy to the exacting scrutiny that would follow if the right to be a candidate were announced as fundamental.

Yes

Finally, I come to the way I think you should view this case. I think the question is whether California's scheme creates an invidious wealth classification among aspirants for office. In Rodriguez, you

stated the two distinguishing characteristics:

> "because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." 411 U.S. 1, 20."

Whether the California scheme meets these requirements is a close question. Clearly the second half of the test is satisfied. The aspirant to public office who cannot raise the necessary funds is absolutely denied the opportunity to appear on the primary ballot. The first condition is more difficult. A would-be candidate without significant support has no legitimate interest in appearing on the ballot. If you are willing to add that any serious candidate could raise $701, then this is not a suspect wealth classification. On the other hand, one could argue that a serious candidate could be unable to raise the fees required in California. This seems especially plausible in the context of local elections in which supporting groups do not normally coalesce in advance of formal candidacy. Thus an indigent aspirant could be completely unable to pay. While this is not clear one way or another, I incline to the latter view.

In a local election

If you conclude that no suspect classification is involved, then the matter is at an end. If, however, you decide that the California scheme does discriminate among would-be candidates on the basis of

wealth, you must confront some subsidiary issues. California could save its system by allowing an alternative route to the ballot for indigents. The poor candidate who is allowed to get on the ballot by presenting signed petitions does not suffer "absolute deprivation of a meaningful opportunity" under Rodriguez. Therefore, no suspect wealth classification is involved. A write-in alternative would not suffice since it does not provide an opportunity to get on the primary ballot. That is the benefit denied.

The hypothetical scheme -- fairly substantial filing fees with a petition alternative -- would be judged under a rational basis test. Although I think it could survive that relaxed review, the issue not free from doubt. One might argue, for example, that the state scheme is irrational because it allows any kook with money in his pocket to get on to the ballot and therefore does not further the legitimate state interest of keeping frivolous candidates, i.e., those without support, from appearing.

JCJjr

No. 71-6852 LUBIN v. PANISH

Argued 10/9/73

Miss Buckley (for Petr.)

Petr. candidate for Bd of Supervisors of L/Angeles

Write-ins no effective alternative (I agree)

Right to seek office is a fundamental right (Pet Br 9 & 10)

Admits that must be some way of screening candidates — e.g. "nominating petitions" (She cited N.Y. law as a good example).

Gaylord (for Los Angeles ~~Calif.~~)

Makes no objection to our jurisdiction.

Candidates have won in Calif. ~~on~~ write-in votes.

The salary of L/A supervisor is $35,000

A candidate for this "sup. ~~court~~ post" has no real support if he can't raise $701.

Her brief accepts the "compelling state interest" test as applicable (See Br p 1)

Miss Buckley

Objects to any fee except to cover actual costs of filing papers.

No. 71-6852, LUBIN v. PANISH 10/12/73

Reverse

The Chief Justice Reverse (tentative)

Does not think Bullock controls or indeed is directly relevant — there the magnitude of fees & the delegating of fixing & expending Texas fees to private political parties.

Then is different case. Where does one draw line?

One way to solve problem is to go to "petitions"

x x x x

Chief passed until others had voted. Then he voted tentatively to Reverse. But must be written narrowly in view of Kras

Douglas, J. Reverse

A close case but on balance

Brennan, J. Reverse

Vice in this case is that if one does not have money, he can't get on ballot — as there are no alternatives. Then is absolute bar of indigents

Then is a classic E/P case.

Stewart, J. Reverse

Agree with Brennan. E/P case.

State has important interest but alternatives must be provided.

White, J. Reverse

But we should emphasize that state has strong & important interest.

Marshall, J. Reverse

Can't put any price tag on, not even $1.

No qualification can be put on right to run for office.

(So far no one has mentioned "right to vote" — all have spoken to "right to run for office" which

Blackmun, J. Affirm

Bullock is startling result & is difficult to distinguish — yet there is a reasonable fee.

Write-in may be adequate alternate.

Powell, J. Reverse

The parties concede that test is "compelling state interest": Jenness v. Fortson, Williams v Rhodes, Bullock ("close scrutiny")

I agree with Brennan.

No satisfactory answer, but I would not try to draw line based on amount of fee.

Best answer is the nominating petition.

Rehnquist, J. Affirm

Can't write this as an E/P case without casting doubt on Knox & on various types of licenses — hunting, marriage, etc.

I hear Mr. Justice Blackmun is writing a concurrence. I would wait and see what he says. JEBJr

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: The Chief Justice

Circulated: MAR 7 1974

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 71-6852

Joined by White

Stewart has made some suggestions that look good

Donald Paul Lubin, Etc., Petitioner, *v.* Leonard Panish, Registrar-Recorder, County of Los Angeles. | On Writ of Certiorari to the Supreme Court of California.

[March —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

See my letter to C/J of 3/11

We granted certiorari to consider petitioner's claim that the California statute requiring payment of a filing fee of $701.60 in order to be placed on the ballot in the primary election for nomination to the position of County Supervisor, while providing no alternative means of access to the ballot, deprived him, as an indigent person unable to pay the fee, of the equal protection guaranteed by the Fourteenth Amendment and rights of expression and association guaranteed by the First Amendment.

The California Election Code provides that forms required for nomination and election to congressional, state, and county offices are to be issued to candidates only upon prepayment of a nonrefundable filing fee. Cal. Elections Code § 6551. Generally, the required fees are fixed at a percentage of the salary for the office sought. The fee for candidates for United States Senator, Governor, and other state offices and some county offices, is 2% of the annual salary. Candidates for

Representative to Congress, State Senator or Assemblyman, or for judicial office or district attorney, must pay 1%. No filing fee is required of candidates in the presidential primary, or for offices which pay either no fixed salary or not more than $600 annually. Cal. Elections Code §§ 6551, 6552, and 6554.

Under the California statutes in effect at the time this suit was commenced, the required candidate filing fees ranged from $192 for State Assembly, $425 for Congress, $701.60 for Los Angeles County Board of Supervisors, $850 for United States Senator, to $982 for Governor.

The California statute provides for the counting of write-in votes subject to certain conditions. Cal. Elections Code § 18602 *et seq.* Write-in votes are not counted, however, unless the person desiring to be a write-in candidate files a statement to that effect with the Registrar-Recorder at least eight days prior to the election, Cal. Elections Code § 18602, and pays the requisite filing fee, Cal. Elections Code § 18603. The latter section provides that "No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless . . . the fee required by Section 6555 is paid when the declaration of write-in candidacy is filed . . . ." Cal. Elections Code § 18603. Thus, the contested filing fees must be satisfied even under the write-in nomination procedures.

Petitioner with others commenced this class action on February 17, 1972, by petitioning the Los Angeles Superior Court for a writ of mandate against the Secretary of State and the Los Angeles County Registrar-Recorder. The suit was filed on behalf of petitioner and all those similarly situated persons who were unable to pay the filing fees and who desired to be nominated for public office. In his complaint, petitioner maintained that he was a citizen and a voter and that he had sought

nomination as a candidate for membership on the Board of Supervisors for Los Angeles County.[1] Petitioner asserted that on February 15, 1972, he had appeared at the office of James S. Allison, then Registrar-Recorder of the County of Los Angeles, to apply for and secure all necessary nomination papers requisite to his proposed candidacy. Petitioner was denied the requested nomination papers orally and in writing solely because he was unable to pay the $701.60 filing fee required of all would-be candidates for the office of Board of Supervisors.

The Los Angeles Superior Court denied the requested writ of mandate on March 6, 1972. Petitioner alleged that he was a serious candidate, that he was indigent and that he was unable to pay the $701.60 filing fee; no evidence was taken during the hearing. The superior court found the fees to be "reasonable, as a matter of law." Accordingly, the court made no attempt to determine whether the fees charged were necessary to the State's purpose, or whether the fees, in addition to deterring some frivolous candidates, also prohibited serious but indigent candidates from entering their names on the ballot. The superior court also rejected the argument that the State was required by *Bullock* v. *Carter,* 405 U. S. (1972), to provide an alternative means of access to the ballot which did not discriminate on the basis of economic factors.

On March 22, 1972, a second petition for writ of mandate was denied by the Court of Appeals, Second Dist., and on March 22, 1972, after the deadline for filing nomination papers had passed, the California Supreme Court denied petitioner's third application for a writ of mandate.

---

[1] The Board of Supervisors for Los Angeles County is the governing body for Los Angeles County, California. The term is four years, the annual salary $35,080.

Historically, since the Progressive movement of the early 20th Century, there has been a steady trend toward limiting the size of the ballot in "order to concentrate the attention of the electorate on the selection of a much smaller number of officials and so afford to the voters the opportunity of exercising more discrimination in their use of the franchise." [2] This desire to limit the size of the ballot has been variously phrased as a desire to minimize voter confusion, *Thomas* v. *Mims*, 317 F. Supp. 179, 181 (SD Ala. 1970), to limit the number of runoff elections, *Spillers* v. *Slaughter*, 325 F. Supp. 550, 553 (MD Fla. 1970), to curb "ballot flooding." *Jenness* v. *Little*, 306 F. Supp. 925, 927 (ND Ga. 1969), appeal dismissed *sub nom. Matthews* v. *Little*, 397 U. S. 94 (1970), and to prevent the overwhelming of voting machines—the modern counterpart of ballot flooding, *Wetherington* v. *Adams*, 309 F. Supp. 318, 321 (MD Fla. 1970). A majority of States have long required the payment of some form of filing fee,[3] in part to limit the ballot and in part to have candidates pay some of the administrative costs.

In sharp contrast to this fear of an unduly lengthy ballot is an increasing pressure for broader access to the ballot. Thus, while progressive thought in the first half of the century was concerned with restricting the ballot to achieve voting rationality, recent decades brought an enlarged demand for an expansion of political opportunity. The Twenty-fifth Amendment, the Twenty-sixth Amendment, and the Voting Rights Act of 1965, 42 U. S. C. § 1973 (1970), reflect this shift in emphasis. There has also been a gradual enlargement of the Fourteenth Amendment's equal protection provisions in the

---

[2] H. Croly, Progressive Democracy 289 (1914).

[3] See 120 U. Pa. L. Rev. 109 (1971), for a detailed description of each State's filing fee requirements.

area of voting rights. Although there is no explicit provision for a right to vote within the text of the Constitution itself,

> "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533; *Kramer* v. *Union School District*, 395 U. S. 621; *Dunn* v. *Blumstein*, 405 U. S. 330, 336." *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 59 n. 2 (1973) (Stewart, J., concurring).

This principle flows naturally from our recognition that

> "legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964) (Warren, C. J.).

The present case draws these two means of achieving an effective, representative political system into apparent conflict. The petitioner stated on oath that he is without assets or income and cannot pay the $701.60 filing fee although he is otherwise legally eligible to be a candidate on the primary ballot. Since his affidavit of indigency states that he has no resources and earned no income whatever in 1972, it would appear that he would make the same claim whether the filing fee had been fixed at $1.00, $100.00, or $700.00. The State accepts this as true but defends the statutory fee as necessary to keep

the ballot from being overwhelmed with frivolous or non-serious candidates, arguing that as to indigents the filing fee is not intended as a test of his pocketbook but the extent of his political support and hence the seriousness of his candidacy.

In *Bullock* v. *Carter*, 405 U. S. 134 (1972) [4] we recognized that the State's interest in keeping its ballots within manageable, understandable limits is of the highest order. 405 U. S., at 144–145. The Supreme Court of California has noted that

> "The role of the primary election process in California is underscored by its importance as a component of the total electoral process and its special function to assure that fragmentation of voter choice is minimized. That function is served, not frustrated, by a procedure that tends to regulate the filing of frivolous candidates. A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence tend to impede the electoral process. That no device can be conjured to eliminate every frivolous candidacy does not undermine the state's effort to eliminate as

[4] *Bullock*, of course, does not completely resolve the present attack upon the California election statutes because it involved filing fees that were so patently exclusionary as to violate even traditional equal protection notions of reasonableness. Cf. *Rosario* v. *Rockefeller*, 410 U. S. 752, 760 (1973); *James* v. *Strange*, 407 U. S. 128; *Rinaldi* v. *Yeager*, 384 U. S. 305. Under attack in *Bullock* was a Texas statute that required candidates to pay a flat fee of fifty dollars plus their pro rata share of the costs of the election in order to get on the primary ballot. C. 492, § 186 (1951) Tex. Laws 1168–1169 (Tex. Election Code Art. 13.07 (Supp. 1971). The assessment of costs involved sums as high as $8,900.

many such as possible." *In re McGee,* 36 Cal. 2d 592, 226 P. 2d —— (1951).

This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. 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.

> "The right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968).

This must also mean that the right to vote is "heavily burdened" if that vote may be cast only for one of two *candidates* in a primary election at a time when other candidates are clamoring for a place on the ballot. It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may not constitutionally be solely measured in dollars.

In *Bullock, supra,* we expressly rejected the validity of filing fees as the sole means of determining a candidate's "seriousness":

> "To say that the filing fee requirement tends to limit the ballot to the more serious candidates is not

> enough. There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, [footnote omitted] but the candidates in this case affirmatively alleged that they were *unable,* not simply *unwilling,* to pay the assessed fees and there was no contrary evidence. It is uncontested that the filing fees exclude legitimate as well as frivolous candidates . . . . If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; [footnote omitted] other means to protect those valid interests are available." 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 large filing fee may serve the legitimate function of keeping ballots manageable, but standing alone it is not a certain test of whether the candidacy is serious or spurious. A wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check. Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public. 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, inpecunious but sincere candidates may be prevented from running. Even in this day of high budget political campaigns some candidates have demonstrated that direct contact with thousands of voters by "walking tours" is a route to success. Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candi-

dates without regard to their economic status. Cf. *Thomas* v. *Mims*, 317 Supp. 179 (SD Ala. 1970).

The exclusionary nature of the California system is compounded by the absence of any alternative means of gaining access to the ballot. As we have noted, the payment of a fee is an absolute not an alternative condition, and failure to meet it is a disqualification from running for office. Thus, California has chosen to achieve the legitimate interest of maintaining the integrity of elections by means which operate to exclude poor but potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters. Selection of candidates solely on the basis of ability to pay a fixed filing fee without providing any alternative means is not reasonably necessary to the acomplishment of the State's legitimate election interests. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with equal protection requirements, impose candidate filing fees.

In so holding, we note that there are obvious and well known means of testing the "seriousness" of a candidacy which do not measure the probability of attracting significant voter support solely by the neutral fact of payment of a filing fee. States may, for example, impose on minor political parties the burden of demonstrating the existence of voter support by requiring such parties to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election. See *American Party of Texas* v. *White*, No. 72–887 (decided March 5, 1974). Similarly, a candidate who establishes that he cannot pay the filing fee required for a place on the primary ballot may be required to demonstrate the "seriousness" of his candidacy by persuading a substantial number of voters to sign a petition in his behalf.

The point, of course, is that ballot access must be genuinely open to all subject to reasonable requirements. *Jennes* v. *Fortson*, 402 U. S. 431, 439 (1971). California's present system has not met this standard.

Reversed and remanded for further consideration not inconsistent with this opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 8, 1974

Re: No. 71-6852 - Lubin v. Panish

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 8, 1974

Re: No. 71-6852, Lubin v. Panish

Dear Chief,

My view in this case would require a slightly narrower holding than that stated in your circulation of yesterday. Specifically, I would change the final sentence of the first full paragraph on page 9 along the following lines:

> Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with the Constitution, impose upon an indigent a filing fee requirement which, by definition, he cannot possibly satisfy. Cf. Boddie v. Connecticut, 401 U.S. 371.

If this view is not acceptable to you and/or to a majority of the Brethren, I shall simply file a concurring statement along these lines.

I have one other problem with your circulation -- a very minor one. Since I do not think that "reasonableness" is an appropriate measure of validity under the Equal Protection Clause, and because that word is for me too reminiscent of old-fashioned substantive due process, I would change the closing words of the first sentence of footnote 4 on page 6 along the following lines:

. . . so patently exclusionary as to violate even traditional concepts of equal protection of the law.

Sincerely yours,

P.S.
I.

The Chief Justice

Copies to the Conference

March 11, 1974

No. 71-6852 Lubin v. Panish

Dear Chief:

I am certainly with you in the result, and also most of your opinion circulated March 7.

It does seem to me, however, that the opinion would be strengthened by greater emphasis on the importance - not merely the legitimacy - of the state interests involved. Speaking broadly, the great strength of democracy in America (certainly until recently) has been the predominance of the two party system. The fragmentation of political parties has almost destroyed the capacity of many democracies to govern responsibly. The current impass and stagnation in Italy is one conspicuous example. France has been severely weakened by a similar problem. Some of this has now cropped up in England, and the pattern in many of the other smaller, so-called democracies is of "coalition government" too weak and irresponsible to govern effectively. In the end, a rudderless democracy will become a totalitarian state.

A second, and related interest of genuine significance, is what you have in mind by use of the term "manageable ballot". This means, for me, a ballot which is not so cluttered with the names of unknown and non-entity candidates as to be unintelligible to the average voter. If it becomes too easy for a candidate or a party to obtain a place on the ballot, rational choice by the public will be impossible. This is a sound reason for requiring a meaningful showing of voter interest and support before one is allowed a ballot position. Small filing fees are inefficacious in furthering this interest.

If you agree generally with what I have said, perhaps - before you recirculate - you will consider making appropriate language changes

that emphasize more sharply these two related but quite fundamental state interests. I am not suggesting any major revision, but rather language changes at such places as you think appropriate. Perhaps a footnote also could be added that emphasizes the virtues of our tradition and history of party responsibility and the dangers of losing this essential quality if multiple weak parties are allowed to infiltrate the system - as in the countries mentioned above.

The next case we are likely to have presented here will involve an attack on the requirement of substantial voter interest and support, evidenced by petitions, signatures or attendance at conventions. I hope your opinion will make clear that evidence of substantial support is a valid and legitimate requirement.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

Circulated: 3/11/74

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 71-6852

Donald Paul Lubin, Etc., Petitioner, *v.* Leonard Panish, Registrar-Recorder, County of Los Angeles.

On Writ of Certiorari to the Supreme Court of California.

[March —, 1974]

MR. JUSTICE BLACKMUN, concurring in part.

For me, the difficulty with the California election system is the absence of a realistic alternative access to the ballot for the candidate whose indigency renders it impossible for him to pay the prescribed filing fee.

I would regard a write-in procedure, free of fee, as an acceptable alternative. Prior to 1968, California allowed this, and write-in votes were counted, although no prior fee had been paid. But the prior fee requirement for the write-in candidate was incorporated into the State's Election Code in that year, Laws 1968, c. 79, § 3, and is now § 18603 (b) of the Code. It is that addition, by amendment, that serves to deny the petitioner the equal protection guaranteed to him by the Fourteenth Amendment. Section 18603 (b) appears to be severable. See *Frost* v. *Corporation Comm'n*, 278 U. S. 515, 525–526 (1929); *Truax* v. *Corrigan*, 257 U. S. 312, 341–342 (1921). The Code itself provides for severability. § 48.

I would hold that the California election statutes are unconstitutional insofar as they presently deny access to the ballot. If § 18603 (b) were to be stricken, the Code, as before, would permit write-in access with no prior fee. The presence of that alternative would then serve all

that is demanded by the Equal Protection Clause. I, therefore, join the Court in reversing the order of the Supreme Court of California denying petitioner's petition for writ of mandamus.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 12, 1974

RE: No. 71-6852 Lubin v. Panish

Dear Chief:

I agree with Potter's suggestions in his note to you of March 8. May I add another? Would you consider deleting the sentence at the top of page 5 - "Although there is no explicit provision for a right to vote within the text of the Constitution itself." As I think you know, I have the view that that protection is found in the First Amendment. I think the deletion may be made without interrupting the flow of the opinion. If you decide to make Potter's changes and the deletion I suggest, I am happy to join the opinion. Otherwise, would you please record me at the foot of the opinion as concurring in the result.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 13, 1974

Re: No. 71-6852 - Lubin v. Panish

Dear Harry:

Please join me in your concurring opinion.

Sincerely,

Bill

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 14, 1974

RE: 71-6852, Lubin v. Panish

Dear Chief:

The suggestions raised by Potter Stewart in his memo to you of March 8, 1974 and the additional one raised by Bill Brennan in his memo to you of March 12, 1974 state just about my views; and if you felt free to revise your earlier circulation to meet those suggestions from Potter and Bill I would be very happy to join your opinion.

WOD by Sandra

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1974

Re: No. 71-6852 - Lubin v. Panish

MEMORANDUM TO THE CONFERENCE:

A second draft of the above will be in your hands soon. It will (?) satisfy almost everyone.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 20, 1974

Dear Chief:

In 71-6852, Lubin v. Panish please join me in your circulation of March 19, 1974.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 20, 1974

RE: No. 71-6852 Lubin v. Panish

Dear Chief:

I agree with your circulation of March 19 in the above case.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 21, 1974

Re: No. 71-6852 - Lubin v. Panish

MEMORANDUM TO THE CONFERENCE:

Since I sent the second draft of the opinion in the above case, I have discovered that there is a case pending in at least one state that involves possible constitutional challenges to a ballot which does not rotate the names of the candidates giving each one an equal chance to be listed first. In view of this and other related considerations, I think the reference to that subject should be deleted from footnote 5 on pages 10 and 11 so that the following language would be stricken from the footnote:

> "There is strong evidence, for example, that a candidate's chances of victory are significantly affected by the position his name occupies on the ballot. See Note, California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents, 45 S. Cal. L. Rev. 365 (1972). That study concluded that the candidate whose name appears first on the ballot is the beneficiary of a substantial positional advantage and that 'one can attribute at least a five percent increase in the first listed candidate's vote total to a positional basis.' It would reasonably follow that a candidate whose name appears anywhere on the ballot has a significant advantage over a candidate who must depend on write-in votes."

Regards

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 21, 1974

71-6852 - Lubin v. Panish

Dear Chief,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 21, 1974

Re: No. 71-6852 -- Lubin v. Panish

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

March 21, 1974

No. 71-6852 Lubin v. Panish

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
10-16-73								
1st draft 3/8/74 2nd draft 3/19/74	Maybe will join CJ. 3-14-74	Concur in opinion 3-12-74 Agree with CJ draft 3-20-74 Concurrence 1st draft 3-21-74	Join C J 3/21/74	Join CJ. 3-8-74	Join C.J. 3-21-74	Concurring opinion 3/11/74 2nd draft 3-12-74 3rd draft 3-13-74 4th draft 3-20-74	Letter to CJ 3/20/74 Join CJ 3/21/74	Join HAB Concurrence 3-13-74
	Join CJ 3-21-74 + Concurring 2nd draft 3-22-74							
					No. 71-6852	Lubin v. Panish		