IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-3747 & 01-3824

WILLIAM M. BELITSKUS; THOMAS ALAN LINZEY; BARBARA KNOX; JOHN STITH; ERIC PRINDLE; JENNARO PULLANO; RALPH NADER; NADER 2000 PRIMARY COMMITTEE; PENNSYLVANIA GREEN PARTY; WILL DONOVAN, III,

v.

KIM PIZZINGRILLI, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF PENNSYLVANIA; RICHARD FILLING, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OVERSEEING PENNSYLVANIA'S BUREAU OF COMMISSIONS, ELECTIONS AND LEGISLATION,

APPELLANTS IN NO. 01-3747

THOMAS ALAN LINZEY, PENNSYLVANIA GREEN PARTY AND WILL DONOVAN, III
CROSS-APPELLANTS IN NO. 01-3824

BRIEF FOR APPELLEES/CROSS-APPELLANTS

APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA ENTERED AUGUST 20, 2001

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STATEMENT OF JURISDICTION

This action was brought pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the U.S. Constitution. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. An order was entered granting injunctive relief on August 20, 2001. The appellants in no. 01-3747 filed a notice of appeal on September 18, 2001 and the cross-appellants filed their notice of appeal in no. 01-3824 on October 1, 2001. The court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292.

STATEMENT OF ISSUES

On appeal:

1. Whether appellee John Stith had standing to challenge Pennsylvania's mandatory filing fee requirement, where Stith was a candidate for office and the uncontroverted evidence showed him to be unable to pay the fee.

2. Whether the district court correctly granted summary judgment in favor of John Stith, and correctly held that a filing fee with no waiver for those unable to pay violates the Fourteenth Amendment right to participate in elections on an equal basis, following controlling U.S. Supreme Court authority in *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974).

3. Whether an order enjoining appellants from enforcing the mandatory filing fee as to all candidates unable to pay the fee was impermissibly broad or vague, where the state had complied with an identical order issued as a preliminary injunction.

The second question was raised in the parties' cross-motions for summary judgment. App. 4a-12a (opinion), App. 30a (docket nos. 26, 37, 39, 40, 46, 47, 49). The appellants did not raise the first or third issues in their summary judgment papers, App. 30a (docket nos. 36, 37, 46), so these questions were not explicitly addressed in the district court's opinion.

On cross appeal:

1. Whether the district court erred in granting summary judgment to the Defendants as to the claims of Thomas Alan Linzey, based on the mistaken assumption that there was no evidence regarding his inability to pay the fee.

2. Whether the district court erred in granting summary judgment to the Defendants as to the claims of Will Donovan III, based on the mistaken assumption that Donovan was a candidate, rather than a voter plaintiff.

3. Whether the district court erred in failing to explicitly address the claims of the Pennsylvania Green Party.

These issues were raised in the parties' cross-motions for summary judgment and in the plaintiffs' motion to alter or amend the judgment of August 20, 2001. App. 30a (docket nos. 26, 37, 39, 40, 46, 47, 49, 57). The district court ruled on the first two questions but did not explicitly address the third question. App. 4a-12a (opinion).

STATEMENT OF THE CASE

The plaintiff-appellees in this case sued during the 2000 political campaign to enjoin enforcement of Pennsylvania's candidate filing fees, which provide no alternative means of qualifying for the ballot for those who cannot afford to pay the fee. The plaintiff-appellees include candidates John Stith and Thomas Alan Linzey,[1] voter Will Donovan III, and the Green Party of Pennsylvania. The complaint alleged that the mandatory filing fees discriminate against low-income voters, candidates, and political parties, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The district court denied the plaintiffs' request for a temporary restraining order, but shortly thereafter granted the plaintiffs' request for a preliminary injunction. On July 27, 2000 the court ordered the defendant-appellants, the Secretary of the Commonwealth and Commissioner of Elections, to "provide plaintiff John Stith, and to any otherwise qualified candidate who is unable to pay the cost of the fee, an alternative measure or measures for gaining access to the ballot prior to or at the time of the August 1, 2000 deadline." App. 28a (docket no. 11). In compliance with this

[1] Additional candidate plaintiffs were dismissed by stipulation pursuant to Fed. R. Civ. Pr. 41. App. 29a (docket entry no. 19).

ruling, the defendants then made available an affidavit for candidates to sign in lieu of payment, stating under penalty of perjury that they were unable to pay the fee without financial hardship.[2] Plaintiffs Stith and Linzey signed the affidavit and qualified for the ballot without paying the filing fee.[3]

After discovery, the parties filed cross-motions for summary judgment. App. 30a (docket nos. 36, 39). The defendants did not challenge Stith's standing, and neither did they argue that relief in the form that had been ordered in the preliminary injunction would be unduly broad or vague. App. 30a (docket nos. 36, 37, 46).

On August 20, 2001 the district court held Pennsylvania's filing fee statute unconstitutional. App. 4a (opinion). "Mandatory filing fees, which preclude some candidates from appearing on the ballot, deprive certain portions of the electorate of the right to vote for their preferred candidate and thus violate the Equal Protection Clause." App. 9a (opinion). The court permanently enjoined the Commonwealth from (a) applying its mandatory fee requirements to Stith "or other candidates who cannot afford to pay the

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[2] This affidavit was not made part of the record, but there is no dispute that the defendants made such an affidavit available.

[3] Plaintiff Stith paid the $100 security that the court required as a condition of his making use of the preliminary injunction. The district court clerk failed to docket the payment but Stith retained his receipt, "Receipt No. 111 131801, D0 Code 4667, Acct. 604700."

filing fee," or (b) "otherwise requiring candidates to pay a filing fee they cannot afford in order to appear on the ballot." App. 1a-3a (order); App. 4a–12a (opinion). While granting summary judgment to Stith, the court nevertheless granted summary judgment to the defendants as to the claims of Linzey and Donovan, failing to explicitly address the claims of the Pennsylvania Green Party. App. 1-2a (order), App. 4-12a (opinion).

The plaintiffs filed a motion to amend the court's order pursuant to Fed. R. Civ. P. 59, arguing that the court's ruling on Linzey's claims was in error, and that the court's statement that Linzey "did not present evidence" of his inability to pay the fee, App. 7a, ignored evidence in the record. App. 264a (motion to alter or amend). The district court denied the plaintiffs' motion on October 26, 2001. App. 270a (opinion and order). In so doing, the court did not question the veracity or adequacy of the evidence supporting Linzey and Donovans' claims, but rather stated that it was relying solely on the testimony presented in court, which came from Stith alone. The court saw no reason to amend its judgment because under the terms of the injunction Linzey and Donovan "are not foreclosed from later demonstrating that each is unable to pay the fee." App. 271a.

During the period that the motion to alter or amend was pending, the defendants appealed the court's order on September 18, 2001. The plaintiffs cross-appealed on October 1, 2001.[4]

[4] Stith was erroneously included in the cross-appeal. His motion to withdraw from the cross-appeal was granted on November 29, 2001.

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 Pa. St. Ann., §§ 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. Pa. St. Ann., tit. 25, § 2873 (Purdon 1994).

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.[5] Since 1990, defendants have

[5] Pennsylvania law distinguishes between "political parties" eligible to participate in the Pennsylvania primary and other "political bodies". Pa. St. Ann., tit. 25, § 2831 (Purdon 1994). Candidates of political parties seeking a place on the primary ballot must file nomination petitions and filing fees, Pa. St. Ann., tit. 25, § 2873 (Purdon 1994), 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. Pa. St. Ann., tit. 25, §§ 2911, 2913, 2914 (Purdon 1994). The Pennsylvania Green Party is a "political body" as defined by § 2831.

received several inquiries from prospective candidates seeking fee waivers. App. 158a (Defendants' Supplemental Response to Plaintiffs' Interrogatories).

In addition to paying 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 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. Pa. St. Ann., tit. 25, § 2911 (c). For statewide candidates in the 2000 election the number of required signatures was 21,739.

Monies collected in filing fees are placed into the Commonwealth's General Fund and commingled with other revenues. App. 156a (Defendants' Responses to Plaintiffs' Requests for Admission). The fees charged do not correlate to the cost of processing ballot applications. The Commonwealth estimates that it spends approximately $46,000 in even-numbered years, and half as much in odd-numbered years, to process the applications, including wages, printing, and postage costs . *See* App. Br. at 8; *see also,* App. 166a-168a (memorandum of Commissioner Filling). The

Commonwealth collects approximately $70-80,000 in filing fees in even-numbered years, and approximately $22-23,000 in odd-numbered years. App. 152a (Defendants' Response to Interrogatories). Thus while the Commonwealth receives from $90,000 to $103,000 in fees over a two-year period, it spends only about $69,000 during this period to process the fee applications.

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. State Senate and State Representative candidates in various districts are all charged the same $100 fee, even though applications in some districts require many more signatures.[6] App. 157a (Defendants' Admission No. 5). 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. Pa. St. Ann., tit. 25, § 2873; App. 72a (testimony of Mona Accurti); App. 156a (Defendants' Admission No. 4). A greater number of signatures takes more staff time and resources to verify than a smaller number. App. 72a-73a

[6] For example, each political body or minor party candidate for State Senator in Pennsylvania's District 15 would need to gather 765 signatures to qualify for the ballot, while each candidate for the same office in District 47 would have to gather 1,679, yet all pay the same $100 fee. App. 78a (Instructions for Filing as a Political Body Candidate: 2000 General Election).

(Accurti testimony). Each signature is reviewed to make sure it is complete, that it contains an address, an occupation, and a date within the window period for signing. App. 68a (testimony of Mona Accurti).

The district court correctly found that plaintiff-appellee John Stith's monthly expenses exceeded his monthly income. App.6a (opinion). His gross adjusted income for 2000 was $11,168. App. 105a (Stith 2001 IRS 1040). Mr. Stith testified shortly before the filing fees were due[7] that he was going without basic expenses such as dental care or a new prescription for his eyeglasses. App. 52a, 57a (Stith testimony). He had some $40,000 in student loan debt, $3,500 in credit card debt, and only $1,500 in his bank account. App. 51a (Stith testimony). His personal financial circumstances were the same in the fall of 2000, when he lent his own campaign $1,000. App. 97a – 98a (Stith dep.). In fact, at that time he was without health insurance because he could not afford it. *Id.*

At the time that the filing fee was due, Stith had only $50 in his campaign fund. App. 54a (Stith testimony); App. 96a (Stith dep.). While the Stith campaign eventually raised $4,800, Stith could not have raised

[7] The deadline for filing nominating papers and paying the filing fee was August 1, 2000, under the terms of a consent decree entered into by the Secretary of the Commonwealth in the U.S. District Court for the Eastern District of Pennsylvania on June 15, 1984 in the case *Hall v. Davis*, Civ. No. 84-1057 (E.D. Pa. 1984).

these funds before he had filed his nominating papers and secured a place on the ballot. He was new in his district, and "[f]or me to ask them for a donation when it's the first time they've met me would be considered outrageous in my town. So I would – I would certainly not do that." Supp. App. 1sa – 2sa (Stith testimony).[8]

Plaintiff-Appellee Thomas Alan Linzey was similarly unable to pay Pennsylvania's filing fee without substantial financial hardship. *See* App. 146a-147a (Linzey declaration). His total gross income for 2000 was approximately $5,000. App. 131a (Linzey dep.); App. 135a (Linzey 2000 IRS Form 1040). The facts regarding Linzey's income were documented in the plaintiffs' statement of material facts, App. 30a, and the defendants did not contest them.

Plaintiff Will Donovan III is a low-income voter who favored the candidacies of Stith, Linzey and others unable to pay the Commonwealth's mandatory filing fees. Mr. Donovan was unable to make financial contributions to his preferred candidates for office that would assist them in the payment of Pennsylvania's filing fees. *See* App. 148a (Donovan declaration). Mr. Donovan's 1999 income was $5,821.68. App. 149a (Donovan 1999 W-2 form).

[8] The appellees have attached a supplemental appendix to this brief and simultaneously filed a motion for leave to file a supplemental appendix.

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. App. 53a-54a (Stith testimony).

STATEMENT OF RELATED CASES

This case has never previously been before this Court. The Appellees/Cross-Appellants are not aware of any other related proceeding.

SUMMARY OF ARGUMENT

The settled state of the law is that any candidate filing fee which lacks a waiver for those unable to pay violates the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. *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." *Bullock*, 405 U.S. at 144. "[W]e hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Lubin*, 415 U.S. at 718. 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. 102, 124 (1996)(citing *Bullock*, 405 U.S. at 144-49, and *Lubin*, 415 U.S. at 718).

Under the authority of *Bullock* and *Lubin*, numerous courts have invalidated filing fees when there was no waiver or alternative means of qualification. *See Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992); *Brown v. North Carolina State Board of Elections*, 394 F. Supp. 359 (W.D. N.C. 1975); *Dillon v. Fiorina*, 340 F. Supp. 729 (D.N.M. 1972); *Harper v.*

Vance, 342 F. Supp. 136 (N.D. Ala. 1972); *Fair v. Taylor*, 359 F. Supp. 304 (M.D. Fla. 1973), *vacated by* 416 U.S. 918 (1974)[9]**;** *West Virginia Libertarian Party v. Manchin*, 270 S.E.2d 634, 639 (1980).

Indeed, since *Lubin* and *Bullock* no court has ever upheld a candidate filing fee which lacked a waiver or an alternative means of qualifying for the ballot. Pennsylvania's mandatory fee appears to be an historical relic which the state through oversight has failed to correct. It is little short of mystifying that the Commonwealth continues to defend the constitutionality of its statute before this court. Plaintiff John Stith's standing is clearly established by undisputed facts in the record, and the scope of the injunction ordered by the district court is precise and limited to curing the constitutional violation.

The court's failure to take account of the evidence showing that candidate plaintiff Thomas Alan Linzey similarly could not pay the fee, its failure to recognize that Will Donovan was a voter rather than a candidate plaintiff, and its failure to explicitly address the claims of the Pennsylvania Green Party were erroneous. In its opinion denying the plaintiffs' motion to

[9] The state did not appeal the ruling in *Fair v. Taylor* that mandatory filing fees were unconstitutional, but rather the remedy ordered in *Fair* was codified by the legislature. Fla. Stat. Ch. 105.035 (1991). It appears that the *Fair* decision was vacated on other grounds, following *Lubin*, on the plaintiffs' appeal.

alter or amend the judgment, the court acknowledged that it had not taken into account the evidence regarding Linzey because that evidence did not come in the form of courtroom testimony. App. 271a. The uncontested documents and deposition testimony submitted to the court was more than sufficient to support Linzey's claim for purposes of summary judgment. The opinion also reaffirms the court's mistaken belief that Donovan was a candidate rather than a voter. *Id*. While the relief granted to Stith establishes the facial unconstitutionality of Pennsylvania's mandatory filing fee, the cross-appeal is taken in an abundance of caution, and to avoid confusion as to the nature of the ruling.

ARGUMENT

I. STANDARD OF REVIEW

A court of appeals exercises plenary review over an order granting summary judgment. *Gray v. York Newspapers, Inc.*, 957 F.2d 1070 (3d Cir. 1992). The appeals court applies the same summary judgment standard as a lower court, following Fed. R. Civ. P. 56(c), and upholding a grant of summary judgment if (1) there is no genuine issue of material fact and (2) the moving party is entitled to summary judgment as a matter of law. *Id.*, citing *County Floors, Inc. v. Gepner*, 930 F.2d 1056, 1060 (3d Cir. 1991).

II. JOHN STITH HAS STANDING TO CHALLENGE THE MANDATORY CANDIDATE FILING FEES.

No evidence contravenes the district court's ruling that Stith could not afford to pay the candidate filing fee.[10] App. 10a (order); App. 12a (opinion). The district court correctly noted "the evidence shows that Stith's living expenses, i.e. what he was required to pay for necessities, exceeded his income in July 2000." App. 6a (opinion). This evidence included Stith's testimony at the temporary restraining order and preliminary injunction hearings, and submissions in support of his summary judgment motion,

[10] In the summary judgment proceedings, the defendants claimed that the fees were reasonable, and therefore constitutional, because Stith could afford to pay them, but they did not allege that Stith lacked standing to challenge the fees.

including excerpts from his deposition testimony and his tax returns for 2000. *See* statement of facts, *supra* at 11 -12 .

In challenging the district court's assessment of Stith's income, the appellants commit several errors. First, the defendants state that Stith's 2000 income was nearly $14,000, or $1,200 a month. App. Br. at 8, 15. Even this low figure overstates the uncontested facts regarding his actual income. While his gross income was $13,868, after $1,905 in federal taxes he was left with only $11,963 or $997 per month. App. 105a (Stith 2001 IRS 1040). His gross *adjusted* income for 2000, $11,168, minus his $1,905 in federal taxes, was only $9,263, or $772 per month. *Id.* The appellants do not challenge the veracity of Stith's testimony itemizing living expenses totaling $1,073 per month. App. Br. at 9.

Stith's uncontroverted testimony was that at the time the fees were due he had only $1,500 in his bank account and carried student loan and credit card debt of about $43,500. App. 51a (Stith testimony).
Finally, the defendants claim that the district court ignored $4,800 in campaign contributions Stith received, and therefore he had "over $6,000 in personal and campaign resources with which to pay [the fee]." App. Br. at 15, 23. However, the defendants have never questioned Stith's testimony that all of this money except for $50 was raised during Stith's campaign,

after the filing fees were due. App. 96a (Stith dep.). There is no material dispute as to the assets Stith held at the time the fee was required.

The state did not establish any triable issue of fact regarding Stith's inability to pay the fee, given the uncontroverted evidence demonstrating that Stith could not have paid the filing fee without either forgoing basic living expenses or accumulating greater credit card debt at high interest rates. App. 51a-52a and 57a (Stith testimony); App. 98a (Stith dep.).

Stith's injury does not, and should not, turn on whether he utterly lacks any funds whatsoever. "[O]ne need not show complete lack of funds to prove that he is unable to pay a fee." *Harper v. Vance*, 342 F. Supp. 136, 140 (N.D. Ala. 1972)(plaintiff has standing to challenge $850 filing fee despite the fact that he has life insurance valued at $1,700 and personal belongings, "assets sufficient to permit compliance with the filing fee requirement.") Even candidates who have actually managed to pay fees have been granted standing to challenge them. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 191 (1996)(plaintiff who paid fee to be certified as delegate to state Republican Party convention successfully challenged fee); *Fulani v. Krivanek*, 973 F.2d 1539, 1541 (11th Cir. 1992)(minor party candidate had standing to challenge minor party exclusion from fee waiver, even though candidate paid fee); *Green v.*

Mortham, 155 F.3d 1332, 1334 (11th Cir. 1998)(plaintiff timely paid the filing fee under protest, yet court reached merits of claim).

The appellants suggest that the court would have denied Stith standing if it had applied the standard for proceeding *in forma pauperis.* [11] App. Br. at 15-16. But even permission to proceed *in forma pauperis* does not require absolute inability to pay court fees. "To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948); *see also*, *Jones v. Zimmerman*, 752 F.2d 76 (3d Cir. 1985)(abuse of discretion to require prisoner to pay $5 filing fee where prisoner had a

[11] Although they deposed Stith, appellants cite no evidence that he possesses income or assets not considered by the Court. Most of the *in forma pauperis* factors that defendants cite were tacitly or explicitly taken into account: Stith testified directly as to his cash assets, net worth, and income, and disclosed his tax returns for the previous year. App. 50a-51a, 98a, 105a. While the defendants did not inquire about his real estate or other property of value, they acknowledge that he lived in a rented apartment. App. Br. at 9. He also testified that his car was eleven years old. App. 51a. The appellants suggest that all of his 1999 income would have been considered, but under the very standard they cite only income from August 1999 through July 2000 would have been taken into account. *See* "Affidavit / Declaration in Support of Request to Proceed *In Forma Pauperis*," at http:/www.pamd.uscourts.gov/docs/pauperis.htm.

balance of $17.39 in his account and had a monthly wage of $15.00; prisoner should not be required to sacrifice amenities such as TV and cable in order to institute suit); *Bullock v. Suomela*, 710 F.2d 102 (3d Cir. 1983)(abuse of discretion to require prisoner to pay $4.00 fee where he had $4.76 in cash and $17.48 monthly income); *Souder v. McGuire*, 516 F.2d 820, 823-24 (3d Cir. 1975)(district court erred in refusing leave to proceed *in forma pauperis* to prisoner with $50.07 in his account and received $15 every two weeks).[12]

Because the evidence in this case shows that Stith did not possess the resources to pay the fee, his standing is clearly established.

III. STITH WAS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM

A. Mandatory filing fees are subject to close scrutiny.

The appellants would apply a deferential standard of review, upholding the fees because they place only a "minimal burden" on candidates, App. Br. at 18-19 and are justified by "important regulatory interests." App. Br. at 21. In doing so, they incorrectly apply the standard of review set forth by the U.S. Supreme Court: "The rigorousness of our

[12] The appellants cite the fact that Stith did not seek leave to proceed *in forma pauperis*, App. Br. at 16, despite the fact that this option was not available to him. Stith filed as part of a group of plaintiffs paying a single court filing fee, which included two members, Ralph Nader and Barbara Knox, who did not claim financial hardship from the fees, leaving the group ineligible to proceed *in forma pauperis*.

inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Because the case law uniformly holds that any mandatory filing fee, no matter how low, severely burdens the voting rights of low-income voters and candidates, Pennsylvania's fees must be subject to strict scrutiny.

Finding that "the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise," the court in *Bullock* determined that the filing fees must be "closely scrutinized." 405 U.S. at 144, quoting *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966). Nowhere does any court state that the burden of a discriminatory fee is diminished if the fee is low. In fact, the *Bullock* decision arrives at close scrutiny after it compares Texas' candidate filing fees to the $1.50 poll tax struck in *Harper*. *Bullock*, 405 U.S. at 142-44. Holding that the filing fee, like the poll tax, "falls with unequal weight on voters, as well as candidates, according to their economic status," the Court applied the same "strict standard of review" to filing fees that it had applied to the $1.50 poll tax. *Id*. at 144. Clearly, then, the injury was not linked to the size of the fee.

The Court's subsequent opinion in *Lubin v. Panish*, 415 U.S. 709 (1974), makes clear that lower filing fees are subject to the same close

scrutiny. *Lubin* notes that the Texas fees considered earlier in *Bullock* "were so patently exclusionary as to violate traditional equal protection concepts," 415 U.S. 715 n.4, [13] but nevertheless holds California's lower fees to be equally discriminatory. Even a more "moderate" filing fee may prevent "impecunious but serious candidates" from running. 415 U.S. at 717. In fact, the Court observed that a fee of $1, $100 or $700 would have the same exclusionary effect. 415 U.S. at 714.

Small fees have been found to substantially burden voting rights even in contexts far more removed from the actual franchise than candidate filing fees. For example, in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), plaintiffs challenged a registration fee of $35 or $45 required to participate as a delegate in the Republican Party state convention. The Court found that the fee of $35 or $45 was a potentially discriminatory practice covered by pre-clearance requirements of the Voting Rights Act. "By limiting the opportunity for voters to participate in the Party's convention, the fee undercuts their influence on the field of candidates whose names will appear on the ballot, and thus weakens the 'effectiveness' of their votes cast in the general election itself." 517 U.S. at 205.

[13] The Texas filing fees considered in *Bullock* were as low as $150 for State Representative in some counties, comparable to the fees at issue in this case, though they did range far higher.

The *Burdick* decision, which defendants rely upon, applied a more deferential rational basis review explicitly because the regulation challenged in that case – a ban on write-in voting – did not restrict ballot access and only minimally burdened the rights of voters:

> Although Hawaii makes no provision for write in voting…the system outlined above provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary. Consequently, any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate until days before the primary. But in *Storer v. Brown*, we gave little weight to 'the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.'…We think the same reasoning applies here, and therefore conclude that *any burden imposed by Hawaii's write-in vote prohibition is a very limited one.*"

504 U.S. at 436-37 (internal cites omitted)(emphasis added).

Precisely because the degree of scrutiny in election law cases "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," *Burdick*, 504 U.S. at 434, strict scrutiny must be applied to mandatory filing fees, which have "a real and appreciable impact on the exercise of the franchise," *Bullock,* 405 U.S. at 144, and are "inevitably…exclusionary as to some aspirants." *Lubin,* 415 U.S. at 718.

The Supreme Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), reaffirmed the need to apply strict scrutiny to statutes which have a discriminatory effect on voters. The court applied strict scrutiny to Ohio's

early filing deadline, repeatedly citing *Bullock* and in *Lubin* with approval: "As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." 460 U.S. at 792-93, citing *Bullock*, 405 U.S. at 144, 149. "We rely…on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment." 460 U.S. at 787 n.7, citing *Bullock*, *Lubin* and other cases.

Borrowing language originally in *Lubin,* the *Anderson* Court framed the inquiry as, "whether the challenged restriction unfairly or *unnecessarily* burdens 'the availability of political opportunity.'" 460 U.S. at 793, quoting *Clements v. Fashing,* 457 U.S. 957 (1982), quoting *Lubin*, 414 U.S. at 716 (emphasis added). After examining Ohio's asserted justifications, the *Anderson* Court found them inadequate to meet close scrutiny:

> For even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutional liberty. 'Precision of regulation must be the touchstone in an area so closely touching on our most precious freedoms.' If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

460 U.S. at 806, quoting *Kusper v. Pontikes*, 414 U.S. 51 (1973)(internal cites omitted). The subsequent *Burdick* decision, far from overturning

Anderson, relied on the same standard of scrutiny. *Burdick,* 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788).

Thus mandatory filing fees, which by their nature place a discriminatory burden on low-income voters and their candidates, *Bullock*, 405 U.S. at 144, *Lubin*, 415 U.S. at 718, remain subject to close scrutiny under the very standard set forth in *Burdick* and *Anderson*.

B. Pennsylvania's filing fees fail even the most deferential review.

Under the most deferential scrutiny, a law which imposes only "reasonable, nondiscriminatory restrictions" on voters' rights will be upheld if it is justified by "important regulatory interests." *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebreeze*, 460 U.S. at 788). Pennsylvania's failure to provide a fee waiver burdens plaintiffs and other voters and candidates in a manner that is neither reasonable nor nondiscriminatory, and does not serve any important regulatory interest. Thus the mandatory filing fees fail even deferential review.

The appellants' argument that Pennylvania's fees are reasonable because they place only a "minimal burden" on candidates, App. Br. at 18-19, is rejected by the cases discussed above, which uniformly hold mandatory fees to be exclusionary regardless of their size. *See Lubin*, 415 U.S. at 714 (a filing fee of $1, $100 or $700 would have the same

exclusionary effect) and 717 ("if the filing fee is more moderate, as here, impecunious but serious candidates may be prevented from running."); *Harper,* 383 U.S. 663 (striking poll tax of $1.50); *Morse,* 517 U.S. at 205 (convention registration fee of $35 is discriminatory).

Following *Bullock* and *Lubin*, courts have without exception struck mandatory fees as discriminatory, even when the fee was reasonable in amount. *See Fulani*, 973 F.2d 1539 (fee struck is "not impermissibly burdensome as to cost")(quoting *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983)); *Brown*, 394 F. Supp. at 361 (fee struck "is reasonable and would not, in these times of inflation, exclude any serious and qualified candidate"); *Harper*, 342 F. Supp. at 143 n.8 (fees struck "are not inherently unreasonable"); *Fair*, 359 F. Supp. at 306 (fee struck "is reasonable in amount").

The regulatory interests claimed by the appellants include regulating the number of candidates in the ballot, protecting the integrity of the political process from frivolous candidacies, and defraying the costs of elections. App. Br. at 20, citing *Bullock*, 405 U.S. at 145-47. However, *Bullock* itself explicitly rejects these interests as a justification for filing fees.

Bullock recognized that "the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and

assure that the winner is the choice of a majority, or at least a strong plurality, of those voting…. Moreover, a State has an interest, if not a duty to protect the integrity of its political processes from frivolous or fraudulent candidacies." 405 U.S. at 145 (citation omitted). But the Court specifically held that filing fees may not be used for these purposes.

> It is uncontested that the filing fees exclude legitimate as well as frivolous candidacies…If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; other means to protect those valid interests are available.

Lubin affirmed this holding: "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 pubic office." 415 U.S. at 717; *see also Fulani*, 973 F.2d at 1547.

Any interest the Commonwealth has in regulating access to its ballot is fully served by Pennsylvania's stringent signature requirements. Pa. St. Ann., tit. 25, § 2911 (c). *See* Statement of Facts, *supra*, at 9. The defendants have never even asserted that the signature requirements are inadequate to protect the integrity of the Commonwealth's ballot.

Bullock also explicitly rejects the asserted interest of defraying election costs as a justification for mandatory filing fees:

> 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.

Even if defendants were right that a "nondiscriminatory" fee could be used for this purpose, a mandatory fee, which discriminates on the basis of wealth, is not a valid way of financing elections. *Bullock*, 405 U.S. at 147-48; *see also Fulani*, 973 F.2d at 1547 ("A state might permissibly charge a *nondiscriminatory* fee that advances the regulatory interest of reimbursing the state for its election expenses, *particularly if it offers alternative avenues of ballot access*, but it cannot use the fee to decide who deserves to be on the ballot")(striking filing fee where major party candidates, but not minor party candidates, were given a fee waiver option) (emphasis added).[14]

[14] While 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, this *dicta* was clearly superseded by *Lubin*, which held that even a $1 mandatory fee -- far too little to cover costs -- could be exclusionary. 415 U.S. at 714.

In any event, the evidence in this case establishes that the Commonwealth's filing fees do *not* approximate processing costs, and were not intended to do so. The fees are not dedicated to paying election costs but co-mingled with the General Fund; the revenues received are far greater than the Commonwealth's actual costs of administering ballot papers; and the size of the fee charged to a candidate does not correspond to the costs of processing the particular candidate's petition or papers. *See* Statement of Facts, *supra*, at 9-11; App. Br. at 7-8, 21.

Because the total revenue generated by the fees far exceeds the administrative costs, the availability of a waiver could not jeopardize the state's interest in being reimbursed for its costs. Thus to the extent that the filing fees serve a valid state interest in covering administrative costs, the absence of a waiver is not reasonably calculated to serve that interest. *See Fulani*, 973 F.2d at 1546 (cost of validating petition signatures is "merely a justification for the fee," and does not justify failure to provide a fee waiver).

C. Because Stith was unable to pay the filing fee he was deprived of his constitutional rights.

The appellants argue that "even if Stith has standing to challenge the filing fee, it is clearly constitutional as applied to him." App. Br. at 17. This argument fails to apprehend that an injury sufficient to give Stith standing– his inability to pay the fees – by definition establishes a constitutional

violation. "[A] state may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Lubin*, 415 U.S. at 718.

IV. THE INJUNCTION ORDERED WAS NO BROADER THAN NECESSARY TO CURE THE CONSTITUTIONAL VIOLATION, AND WAS NOT VAGUE.

The appellants argue that relief should only have extended to Stith. However, the appellants never questioned the facial nature of Stith's claims before the district court, and never suggested that an injunction could properly apply only to named plaintiffs in this case. Rather, in opposing the plaintiffs' motion to alter or amend the judgment by granting summary judgment to Linzey as well as Stith, the defendants stated that relief granted to Stith was sufficient to protect all candidates and voters, and that "[t]he breadth of the Court's order makes this requested relief [for Linzey] unnecessary and, we suggest, an unwarranted expenditure of judicial resources." Supp. App. 9sa.[15] The appellants should therefore be barred from challenging the facial nature of Stith's claim on appeal.

It would be inconsistent with the district court's constitutional ruling, to limit relief to Stith alone. Summary judgment is appropriate for Stith only because he cannot pay the fees without undue hardship, and the district court

[15] The district court failed to docket this brief.

properly considered the statute's effects on *all* candidates unable to pay the fee. "[G]iven *Lubin's* clear holding that absent a reasonable alternative, a filing fee which an indigent candidate cannot afford violates the Fourteenth Amendment…I conclude that [Pennsylvania's filing fee provision] is unconstitutional as applied to indigent candidates such as Stith." App. 12a (opinion). Although the words "as applied" are used, the court clearly holds the statute discriminatory against *all* candidates unable to pay the fee, as reflected in the lengthy analysis of the *Bullock* and *Lubin* precedents. App. 7a – 12a. The words "as applied to" are used in their colloquial, rather than legal, sense, to mean "in its effects on" Stith and other indigent candidates, and not to limit the facial nature of the claims.

It defies logic to argue the Commonwealth could be enjoined from applying its mandatory fee to Stith, but would be free to discriminate against other candidates on the basis of wealth. The defendants have cited no case where a filing fee or any other statute has been held facially unconstitutional but enjoined only as to named plaintiffs. There is no requirement that a class be certified, and cases filed on behalf of individual plaintiffs routinely strike fees as to any candidate unable to pay, starting with *Bullock* itself. 405 U.S. at 136. *See also*, *e.g. Dillon*, 340 F. Supp. at 731; *Brown,* 394 F. Supp. at 362; *Harper,* 342 F. Supp. at 144. Once a mandatory fee has been held

unconstitutional as to one set of plaintiffs it is unconstitutional as to all similarly situated candidates. *See Gallagher v. Evans*, 536 F.2d 899, 902 (10th Cir. 1976) ("The defendant Secretary of State would have us enforce a law as to several classes of persons when that law had been declared unconstitutional as to another class of persons. This discriminatory treatment would deny the plaintiffs equal protection of the laws in violation of the Fourteenth Amendment.").

The case which plaintiffs do cite, *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), did not so limit an injunction. Rather, while acknowledging that "(f)ederal courts may not order states…to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated," the opinion upholds a consent decree which went further than the constitutional violation in question. *Id.* at 389. In this case, as discussed above, the injunction was limited to the adjudicated constitutional violation.

The appellants also claim that the injunction was vague because it does not specify which candidates cannot "afford" the fee. However, the final injunction is the same as the preliminary injunction with which the Appellants complied, which required that the Commonwealth provide a an alternative for "any otherwise qualified candidate who is unable to pay the

cost of the fee." App. 28a (Docket No. 11). At no time in preliminary injunction proceedings or subsequently, in summary judgment proceedings, did the defendants express concern about the form of the relief or suggest that similar relief would be inappropriate in a final injunction.

By enjoining the unconstitutional application of the filing fees, rather than striking the statute altogether, the district court chose the less intrusive remedy. Striking the statute in its entirety would have left it to the Pennsylvania legislature to craft a constitutional fee provision, without direction from the court, and would have prevented the collection of any fees in the meantime. While courts have taken this path, *see, e.g. Harper*, 342 F. Supp. at 144 (declaring filing fee system unconstitutional and leaving the design of alternative means of ballot access to the defendants), the court clearly does not prejudice the Commonwealth by taking a less drastic step, leaving the Commonwealth with the option of charging the filing fee to those candidates who are able to pay. *See, e.g., Georgia Socialist Workers' Party v. Fortson*, 315 F. Supp. 1035, 1041 (N.D. Ga. 1970), *aff'd on other grounds sub nom Jenness v. Fortson*, 403 U.S. 431 (1971)(permanently enjoining Georgia from enforcing its filing fees against candidates unable to pay).

In providing an alternative for those "unable to pay" the filing fee, the Commonwealth will hardly be sailing in uncharted waters. Many states permit candidates unable to pay filing fees to gain ballot access by signing an affidavit. [16] Other states require additional proof of indigency beyond a sworn statement.[17] Several states require that candidates unable to pay the

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[16] *See* ALASKA STAT. § 15.25.050 (West, WESTLAW through 2001 1st Special Session of the Twenty-Second Legislature) (Alaska); HAW. REV. STAT. ANN. § 12-6 (West, WESTLAW through 2001 Third Special Session of the Twenty-First Legislature) (Hawaii); MO. ANN. STAT. § 115.357 (LEXIS through First Extraordinary Session of 91st General Assembly) (Missouri); MONT. CODE ANN. § 13-10-203 (LEXIS through 2001 Legislation) (Montana); N.M. STAT. ANN. § 1-8-42 (LEXIS through Second Special Session of 45th Legislature) (New Mexico); UTAH CODE ANN. § 20A-9-201 (West, WESTLAW through 2001 Supplement, 2001 First Special Session) (Utah); VT. STAT. ANN. tit. 17, § 2702 (LEXIS through September 2001) (Vermont); W. VA. CODE § 3-5-8a (LEXIS through 2001 Regular and Sixth Extraordinary Session of the Legislature) (West Virginia). Alaska and Montana require a "statement" of indigency, but do not specify whether such a statement must be given under oath. New Hampshire and Washington waive the fee for those unable to pay with no statutory requirement of any statement. N.H. REV. STAT. ANN. § 655:20 (West, WESTLAW through Chapter 297 of 2001 Reg. Sess.); WASH. REV. CODE ANN. § 29.15.050 (West, WESTLAW through Chapter 3 of 2002 Regular Session).

[17] *See* DEL. CODE ANN. tit. 15, § 3103 (LEXIS through 2001 Regular Session of the 141st General Assembly) (Delaware); GA. CODE ANN. § 21-2-132 (LEXIS through 2001 Extraordinary Session of the General Assembly) (Georgia); MD. ANN. CODE of 1957 art. 33, § 5-401 (LEXIS through 2001 Supplement, 2001 Regular Session) (Maryland); and NEB. REV. STAT. § 32-608 (LEXIS through 2001 Legislation) (Nebraska).

fee submit petition signatures in order to waive the filing fee.[18] Other states permit the submission of signatures in lieu of a fee, regardless of income.[19] Counsel for Appellees know of no successful challenge to any such fee

[18] *See* DEL. CODE ANN. tit. 15, § 3103 (LEXIS through 2001 Regular Session of the 141st General Assembly) (Delaware); GA. CODE ANN. § 21-2-132 (LEXIS through 2001 Extraordinary Session of the General Assembly) (Georgia); HAW. REV. STAT. ANN. § 12-6 (West, WESTLAW through 2001 Third Special Session of the Twenty-First Legislature) (Hawaii); MO. ANN. STAT. § 115.357 (LEXIS through First Extraordinary Session of 91st General Assembly) (Missouri); MONT. CODE ANN. § 13-10-203 (LEXIS through 2001 Legislation) (Montana); N.H. REV. STAT. ANN. § 655:20 (West, WESTLAW through Chapter 297 of 2001 Reg. Sess.); WASH. REV. CODE ANN. § 29.15.050 (West, WESTLAW through Chapter 3 of 2002 Regular Session); W. VA. CODE § 3-5-8a (LEXIS through 2001 Regular and Sixth Extraordinary Session of the Legislature) (West Virginia).

[19] *See* CAL. ELEC. CODE § 8106 (West, WESTLAW through ch. 10 of 2002 Reg. Sess. Urgency Legislation & ch. 2 of 3rd Ex. Sess.) (California); COLO. REV. STAT. ANN. §§1-4-303, 1-4-1203 (LEXIS through 2001 Special Supplement) (Colorado); FLA. STAT. ANN. ch. 99.095 (West, WESTLAW through 2001 1st Reg. Sess.) (Florida); IDAHO CODE § 34-626 (LEXIS through 2001 Cumulative Supplement, 1st Regular Session of the 56th Legislature) (Idaho); KAN. STAT. ANN. § 25-205 (LEXIS through 2001 Supplement) (Kansas); LA. REV. STAT. ANN. § 461 (LEXIS through 2002 Supplement, 2001 Sessions) (Louisiana); ME. REV. STAT. ANN. tit. 21-A, § 412 (LEXIS through 2001 Supplement) (Maine); MICH. COMP. LAWS ANN. § 168.163 (LEXIS through 2001 Legislation) (Michigan); MINN. STAT. ANN. § 204B.11 (West, WESTLAW through 2001 1st Sp. Sess.) (Minnesota); N.C. GEN. STAT. § 163-107.1 (West, WESTLAW through 2001 Regular Session) (North Carolina); OKLA. STAT. tit. 26, § 5-112 (West, WESTLAW through Chapter 5 of 2001 1st Ex. Sess.) (Oklahoma); OR. REV. STAT. § 249.020 (West, WESTLAW through 2001 Reg. Sess., 2001 Cumulative Supp.) (Oregon); TEX. ELEC. CODE ANN. § 172.021 (West, WESTLAW through 2001 Reg. Sess.) (Texas).

waiver. Given this extensive record, it is hard to credit the appellants' claim that they need further guidance as to who "cannot afford" to pay the fee.

The cases that appellants cite where injunctions were vacated for vagueness both involved prohibitions on conduct far less concrete and specific than in the instant case. In *Schmidt v. Lessard*, 414 U.S. 473 (1974), a three-judge panel had issued a lengthy opinion holding Wisconsin's civil commitment procedure in violation of constitutional due process requirements and had later issued a judgment which merely ordered relief "in accordance with the Opinion heretofore entered." 414 U.S. at 474. In refusing to give effect to this judgment, the Supreme Court observed,

> Neither the brief judgment order nor the accompanying opinion is 'specific' in outlining the 'terms' of the injunctive relief granted; nor can it be said that the order describes 'in reasonable detail…the act or acts sought to be restrained.' Rather, the defendants are simply told not enforce the 'present Wisconsin scheme' against those in the appellee's class.

414 U.S. at 476, quoting Fed. R. Civ. P. 65(d). In *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762 (3d Cir. 1994), an injunction preventing the defendant from "otherwise violating any of the terms" of an easement failed to give fair notice of what traffic devices the defendant could and could not erect within the terms of the easement. *Id*. at 771.

In contrast to both of these cases, the proscribed conduct in this case is extremely clear-cut. There can be no doubt what it means to charge a

mandatory filing fee. The Appellants' claim that it is difficult to determine who is unable to afford the fee is belied by the examples of other states that routinely administer such provisions.

V. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AS TO LINZEY AND DONOVAN'S CLAIMS, AND FAILING TO EXPLICITLY ADDRESS THE CLAIMS OF THE PENNSYLVANIA GREEN PARTY.

The district court held the mandatory filing fee to be facially unconstitutional. However, in an abundance of caution, the plaintiffs cross-appealed the grant of summary judgment for the defendants as to Linzey and Donovan, and its failure to rule explicitly on the Green Party's claims.

The District court stated, "Plaintiffs Linzey and Donovan did not present evidence establishing that they could not afford to pay the filing fee. Accordingly, the Commonwealth's motion for summary judgment will be granted as to them." App. 7a (opinion, n.4). This wording suggests that the court overlooked evidence regarding Linzey's inability to pay the filing fee, and misapprehended the nature of Donovan's claim as a voter. This is confirmed by the district court's opinion denying the plaintiffs' motion to alter or amend the judgment, which acknowledges that the court did not consider evidence as to Linzey and Donovan because they did not testify in court. (Linzey did provide deposition testimony, and both provided

supporting documents which were part of the summary judgment record.) The court believed it was not necessary to decide Linzey and Donovan's claims because of the breadth of the relief granted to Stith:

> Suffice it to say, at the hearing, Mr. Stith established his inability to pay the filing fee; the other Plaintiffs did not testify. I do not diminish their summary judgment evidence, but I did not hear evidence of their inability to pay at the hearing and given the Defendants' contention that it is challenged and the breadth of the Order of August 20, 2001 to include anyone who cannot afford the fee, Plaintiffs Linzey and Donovan are not foreclosed from later demonstrating that each is unable to afford the filing fee.

App. 271a. This language demonstrates that the court had not made any determination about Linzey's ability to pay the fee, and continued to ignore the fact that Donovan was a voter rather than a plaintiff.

Linzey's total income for 2000 was under $4,925 and he owned no real estate or other property. App. 130a-13a (Linzey dep.); App. 143a (Linzey 2000 IRS form 1040). He did not have any campaign funds from which to pay the fee. Supp. App. 3sa-5sa. (Linzey dep.). These facts were documented in the plaintiffs' statement of material facts, App. 30a, and the defendants' failure to challenge these facts deemed them admitted under Local Rule 56.1 of the U.S. District Court for the Middle District of Pennsylvania. Because Linzey was unable to pay the candidate filing fees

without substantial hardship, he was entitled to summary judgment as a matter of law.

Donovan was a non-affluent voter who supported Stith and Linzey and wished to see them appear on the ballot. App. 148a-149a. His asserted injury was not, as suggested by the district court, an inability to pay the fee himself; rather, the fee prevented his preferred candidates from appearing on the ballot. App. 40a (complaint). This injury is at the core of the constitutional rulings in *Bullock* and *Lubin*. "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, whose favorites may be unable to pay the large costs required by the Texas system." *Bullock,* 405 U.S. at 143-44; *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*, 460 U.S. at 786-787. Therefore, Donovan was also entitled to judgment as a matter of law.

The district court did not directly address the claims of the Pennsylvania Green Party, which represents non-affluent voters and candidates. App. 37a (complaint); App. 52a-54a (Stith dep.). Given the

court's ruling that the mandatory fees discriminate on the basis of wealth, the party was also entitled to judgment as a matter of law.

CONCLUSION

For the reasons stated above, the district court's grant of summary judgment to Stith should be upheld, its grant of summary judgment to the defendants as to Linzey and Donovan should be reversed, and the case should be remanded for entry of summary judgment in favor of Linzey, Donovan and the Pennsylvania Green Party.

Respectfully submitted,

_____ Date:

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STATEMENT OF JURISDICTION

This action was brought pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the U.S. Constitution. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. An order was entered granting injunctive relief on August 20, 2001. The appellants in no. 01-3747 filed a notice of appeal on September 18, 2001 and the cross-appellants filed their notice of appeal in no. 01-3824 on October 1, 2001. The court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292.

STATEMENT OF ISSUES

On appeal:

4. Whether appellee John Stith had standing to challenge Pennsylvania's mandatory filing fee requirement, where Stith was a candidate for office and the uncontroverted evidence showed him to be unable to pay the fee.

5. Whether the district court correctly granted summary judgment in favor of John Stith, and correctly held that a filing fee with no waiver for those unable to pay violates the Fourteenth Amendment right to participate in elections on an equal basis, following controlling U.S. Supreme Court authority in *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974).

6. Whether an order enjoining appellants from enforcing the mandatory filing fee as to all candidates unable to pay the fee was impermissibly broad or vague, where the state had complied with an identical order issued as a preliminary injunction.

The second question was raised in the parties' cross-motions for summary judgment. App. 4a-12a (opinion), App. 30a (docket nos. 26, 37, 39, 40, 46, 47, 49). The appellants did not raise the first or third issues in their summary judgment papers, App. 30a (docket nos. 36, 37, 46), so these questions were not explicitly addressed in the district court's opinion.

On cross appeal:

4. Whether the district court erred in granting summary judgment to the Defendants as to the claims of Thomas Alan Linzey, based on the mistaken assumption that there was no evidence regarding his inability to pay the fee.

5. Whether the district court erred in granting summary judgment to the Defendants as to the claims of Will Donovan III, based on the mistaken assumption that Donovan was a candidate, rather than a voter plaintiff.

6. Whether the district court erred in failing to explicitly address the claims of the Pennsylvania Green Party.

These issues were raised in the parties' cross-motions for summary judgment and in the plaintiffs' motion to alter or amend the judgment of August 20, 2001. App. 30a (docket nos. 26, 37, 39, 40, 46, 47, 49, 57). The district court ruled on the first two questions but did not explicitly address the third question. App. 4a-12a (opinion).

STATEMENT OF THE CASE

The plaintiff-appellees in this case sued during the 2000 political campaign to enjoin enforcement of Pennsylvania's candidate filing fees, which provide no alternative means of qualifying for the ballot for those who cannot afford to pay the fee. The plaintiff-appellees include candidates John Stith and Thomas Alan Linzey,[20] voter Will Donovan III, and the Green Party of Pennsylvania. The complaint alleged that the mandatory filing fees discriminate against low-income voters, candidates, and political parties, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The district court denied the plaintiffs' request for a temporary restraining order, but shortly thereafter granted the plaintiffs' request for a preliminary injunction. On July 27, 2000 the court ordered the defendant-appellants, the Secretary of the Commonwealth and Commissioner of Elections, to "provide plaintiff John Stith, and to any otherwise qualified candidate who is unable to pay the cost of the fee, an alternative measure or measures for gaining access to the ballot prior to or at the time of the August 1, 2000 deadline." App. 28a (docket no. 11). In compliance with this

[20] Additional candidate plaintiffs were dismissed by stipulation pursuant to Fed. R. Civ. Pr. 41. App. 29a (docket entry no. 19).

ruling, the defendants then made available an affidavit for candidates to sign in lieu of payment, stating under penalty of perjury that they were unable to pay the fee without financial hardship.[21] Plaintiffs Stith and Linzey signed the affidavit and qualified for the ballot without paying the filing fee.[22]

After discovery, the parties filed cross-motions for summary judgment. App. 30a (docket nos. 36, 39). The defendants did not challenge Stith's standing, and neither did they argue that relief in the form that had been ordered in the preliminary injunction would be unduly broad or vague. App. 30a (docket nos. 36, 37, 46).

On August 20, 2001 the district court held Pennsylvania's filing fee statute unconstitutional. App. 4a (opinion). "Mandatory filing fees, which preclude some candidates from appearing on the ballot, deprive certain portions of the electorate of the right to vote for their preferred candidate and thus violate the Equal Protection Clause." App. 9a (opinion). The court permanently enjoined the Commonwealth from (a) applying its mandatory fee requirements to Stith "or other candidates who cannot afford to pay the

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[21] This affidavit was not made part of the record, but there is no dispute that the defendants made such an affidavit available.

[22] Plaintiff Stith paid the $100 security that the court required as a condition of his making use of the preliminary injunction. The district court clerk failed to docket the payment but Stith retained his receipt, "Receipt No. 111 131801, D0 Code 4667, Acct. 604700."

filing fee," or (b) "otherwise requiring candidates to pay a filing fee they cannot afford in order to appear on the ballot." App. 1a-3a (order); App. 4a–12a (opinion). While granting summary judgment to Stith, the court nevertheless granted summary judgment to the defendants as to the claims of Linzey and Donovan, failing to explicitly address the claims of the Pennsylvania Green Party. App. 1-2a (order), App. 4-12a (opinion).

The plaintiffs filed a motion to amend the court's order pursuant to Fed. R. Civ. P. 59, arguing that the court's ruling on Linzey's claims was in error, and that the court's statement that Linzey "did not present evidence" of his inability to pay the fee, App. 7a, ignored evidence in the record. App. 264a (motion to alter or amend). The district court denied the plaintiffs' motion on October 26, 2001. App. 270a (opinion and order). In so doing, the court did not question the veracity or adequacy of the evidence supporting Linzey and Donovans' claims, but rather stated that it was relying solely on the testimony presented in court, which came from Stith alone. The court saw no reason to amend its judgment because under the terms of the injunction Linzey and Donovan "are not foreclosed from later demonstrating that each is unable to pay the fee." App. 271a.

During the period that the motion to alter or amend was pending, the defendants appealed the court's order on September 18, 2001. The plaintiffs cross-appealed on October 1, 2001.[23]

[23] Stith was erroneously included in the cross-appeal. His motion to withdraw from the cross-appeal was granted on November 29, 2001.

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 Pa. St. Ann., §§ 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. Pa. St. Ann., tit. 25, § 2873 (Purdon 1994).

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.[24] Since 1990, defendants have

[24] Pennsylvania law distinguishes between "political parties" eligible to participate in the Pennsylvania primary and other "political bodies". Pa. St. Ann., tit. 25, § 2831 (Purdon 1994). Candidates of political parties seeking a place on the primary ballot must file nomination petitions and filing fees, Pa. St. Ann., tit. 25, § 2873 (Purdon 1994), 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. Pa. St. Ann., tit. 25, §§ 2911, 2913, 2914 (Purdon 1994). The Pennsylvania Green Party is a "political body" as defined by § 2831.

received several inquiries from prospective candidates seeking fee waivers. App. 158a (Defendants' Supplemental Response to Plaintiffs' Interrogatories).

In addition to paying 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 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. Pa. St. Ann., tit. 25, § 2911 (c). For statewide candidates in the 2000 election the number of required signatures was 21,739.

Monies collected in filing fees are placed into the Commonwealth's General Fund and commingled with other revenues. App. 156a (Defendants' Responses to Plaintiffs' Requests for Admission). The fees charged do not correlate to the cost of processing ballot applications. The Commonwealth estimates that it spends approximately $46,000 in even-numbered years, and half as much in odd-numbered years, to process the applications, including wages, printing, and postage costs . *See* App. Br. at 8; *see also,* App. 166a-168a (memorandum of Commissioner Filling). The

Commonwealth collects approximately $70-80,000 in filing fees in even-numbered years, and approximately $22-23,000 in odd-numbered years. App. 152a (Defendants' Response to Interrogatories). Thus while the Commonwealth receives from $90,000 to $103,000 in fees over a two-year period, it spends only about $69,000 during this period to process the fee applications.

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. State Senate and State Representative candidates in various districts are all charged the same $100 fee, even though applications in some districts require many more signatures.[25] App. 157a (Defendants' Admission No. 5). 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. Pa. St. Ann., tit. 25, § 2873; App. 72a (testimony of Mona Accurti); App. 156a (Defendants' Admission No. 4). A greater number of signatures takes

[25] For example, each political body or minor party candidate for State Senator in Pennsylvania's District 15 would need to gather 765 signatures to qualify for the ballot, while each candidate for the same office in District 47 would have to gather 1,679, yet all pay the same $100 fee. App. 78a (Instructions for Filing as a Political Body Candidate: 2000 General Election).

more staff time and resources to verify than a smaller number. App. 72a-73a (Accurti testimony). Each signature is reviewed to make sure it is complete, that it contains an address, an occupation, and a date within the window period for signing. App. 68a (testimony of Mona Accurti).

The district court correctly found that plaintiff-appellee John Stith's monthly expenses exceeded his monthly income. App.6a (opinion). His gross adjusted income for 2000 was $11,168. App. 105a (Stith 2001 IRS 1040). Mr. Stith testified shortly before the filing fees were due[26] that he was going without basic expenses such as dental care or a new prescription for his eyeglasses. App. 52a, 57a (Stith testimony). He had some $40,000 in student loan debt, $3,500 in credit card debt, and only $1,500 in his bank account. App. 51a (Stith testimony). His personal financial circumstances were the same in the fall of 2000, when he lent his own campaign $1,000. App. 97a – 98a (Stith dep.). In fact, at that time he was without health insurance because he could not afford it. *Id.*

At the time that the filing fee was due, Stith had only $50 in his campaign fund. App. 54a (Stith testimony); App. 96a (Stith dep.). While

[26] The deadline for filing nominating papers and paying the filing fee was August 1, 2000, under the terms of a consent decree entered into by the Secretary of the Commonwealth in the U.S. District Court for the Eastern District of Pennsylvania on June 15, 1984 in the case *Hall v. Davis*, Civ. No. 84-1057 (E.D. Pa. 1984).

the Stith campaign eventually raised $4,800, Stith could not have raised these funds before he had filed his nominating papers and secured a place on the ballot. He was new in his district, and "[f]or me to ask them for a donation when it's the first time they've met me would be considered outrageous in my town. So I would – I would certainly not do that." Supp. App. 1sa – 2sa (Stith testimony).[27]

Plaintiff-Appellee Thomas Alan Linzey was similarly unable to pay Pennsylvania's filing fee without substantial financial hardship. *See* App. 146a-147a (Linzey declaration). His total gross income for 2000 was approximately $5,000. App. 131a (Linzey dep.); App. 135a (Linzey 2000 IRS Form 1040). The facts regarding Linzey's income were documented in the plaintiffs' statement of material facts, App. 30a, and the defendants did not contest them.

Plaintiff Will Donovan III is a low-income voter who favored the candidacies of Stith, Linzey and others unable to pay the Commonwealth's mandatory filing fees. Mr. Donovan was unable to make financial contributions to his preferred candidates for office that would assist them in the payment of Pennsylvania's filing fees. *See* App. 148a (Donovan

[27] The appellees have attached a supplemental appendix to this brief and simultaneously filed a motion for leave to file a supplemental appendix.

declaration). Mr. Donovan's 1999 income was $5,821.68. App. 149a (Donovan 1999 W-2 form).

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. App. 53a-54a (Stith testimony).

STATEMENT OF RELATED CASES

This case has never previously been before this Court. The Appellees/Cross-Appellants are not aware of any other related proceeding.

SUMMARY OF ARGUMENT

The settled state of the law is that any candidate filing fee which lacks a waiver for those unable to pay violates the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. *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." *Bullock*, 405 U.S. at 144. "[W]e hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Lubin*, 415 U.S. at 718. 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. 102, 124 (1996)(citing *Bullock*, 405 U.S. at 144-49, and *Lubin*, 415 U.S. at 718).

Under the authority of *Bullock* and *Lubin*, numerous courts have invalidated filing fees when there was no waiver or alternative means of qualification. *See Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992); *Brown v. North Carolina State Board of Elections*, 394 F. Supp. 359 (W.D. N.C. 1975); *Dillon v. Fiorina*, 340 F. Supp. 729 (D.N.M. 1972); *Harper v.*

Vance, 342 F. Supp. 136 (N.D. Ala. 1972); *Fair v. Taylor*, 359 F. Supp. 304 (M.D. Fla. 1973), *vacated by* 416 U.S. 918 (1974)[28]**;** *West Virginia Libertarian Party v. Manchin*, 270 S.E.2d 634, 639 (1980).

Indeed, since *Lubin* and *Bullock* no court has ever upheld a candidate filing fee which lacked a waiver or an alternative means of qualifying for the ballot. Pennsylvania's mandatory fee appears to be an historical relic which the state through oversight has failed to correct. It is little short of mystifying that the Commonwealth continues to defend the constitutionality of its statute before this court. Plaintiff John Stith's standing is clearly established by undisputed facts in the record, and the scope of the injunction ordered by the district court is precise and limited to curing the constitutional violation.

The court's failure to take account of the evidence showing that candidate plaintiff Thomas Alan Linzey similarly could not pay the fee, its failure to recognize that Will Donovan was a voter rather than a candidate plaintiff, and its failure to explicitly address the claims of the Pennsylvania Green Party were erroneous. In its opinion denying the plaintiffs' motion to

[28] The state did not appeal the ruling in *Fair v. Taylor* that mandatory filing fees were unconstitutional, but rather the remedy ordered in *Fair* was codified by the legislature. Fla. Stat. Ch. 105.035 (1991). It appears that the *Fair* decision was vacated on other grounds, following *Lubin*, on the plaintiffs' appeal.

alter or amend the judgment, the court acknowledged that it had not taken into account the evidence regarding Linzey because that evidence did not come in the form of courtroom testimony. App. 271a. The uncontested documents and deposition testimony submitted to the court was more than sufficient to support Linzey's claim for purposes of summary judgment. The opinion also reaffirms the court's mistaken belief that Donovan was a candidate rather than a voter. *Id*. While the relief granted to Stith establishes the facial unconstitutionality of Pennsylvania's mandatory filing fee, the cross-appeal is taken in an abundance of caution, and to avoid confusion as to the nature of the ruling.

ARGUMENT

I. STANDARD OF REVIEW

A court of appeals exercises plenary review over an order granting summary judgment. *Gray v. York Newspapers, Inc.*, 957 F.2d 1070 (3d Cir. 1992). The appeals court applies the same summary judgment standard as a lower court, following Fed. R. Civ. P. 56(c), and upholding a grant of summary judgment if (1) there is no genuine issue of material fact and (2) the moving party is entitled to summary judgment as a matter of law. *Id.*, citing *County Floors, Inc. v. Gepner*, 930 F.2d 1056, 1060 (3d Cir. 1991).

II. JOHN STITH HAS STANDING TO CHALLENGE THE MANDATORY CANDIDATE FILING FEES.

No evidence contravenes the district court's ruling that Stith could not afford to pay the candidate filing fee.[29] App. 10a (order); App. 12a (opinion). The district court correctly noted "the evidence shows that Stith's living expenses, i.e. what he was required to pay for necessities, exceeded his income in July 2000." App. 6a (opinion). This evidence included Stith's testimony at the temporary restraining order and preliminary injunction hearings, and submissions in support of his summary judgment motion,

[29] In the summary judgment proceedings, the defendants claimed that the fees were reasonable, and therefore constitutional, because Stith could afford to pay them, but they did not allege that Stith lacked standing to challenge the fees.

including excerpts from his deposition testimony and his tax returns for 2000. *See* statement of facts, *supra* at 11 -12 .

In challenging the district court's assessment of Stith's income, the appellants commit several errors. First, the defendants state that Stith's 2000 income was nearly $14,000, or $1,200 a month. App. Br. at 8, 15. Even this low figure overstates the uncontested facts regarding his actual income. While his gross income was $13,868, after $1,905 in federal taxes he was left with only $11,963 or $997 per month. App. 105a (Stith 2001 IRS 1040). His gross *adjusted* income for 2000, $11,168, minus his $1,905 in federal taxes, was only $9,263, or $772 per month. *Id.* The appellants do not challenge the veracity of Stith's testimony itemizing living expenses totaling $1,073 per month. App. Br. at 9.

Stith's uncontroverted testimony was that at the time the fees were due he had only $1,500 in his bank account and carried student loan and credit card debt of about $43,500. App. 51a (Stith testimony).
Finally, the defendants claim that the district court ignored $4,800 in campaign contributions Stith received, and therefore he had "over $6,000 in personal and campaign resources with which to pay [the fee]." App. Br. at 15, 23. However, the defendants have never questioned Stith's testimony that all of this money except for $50 was raised during Stith's campaign,

after the filing fees were due. App. 96a (Stith dep.). There is no material dispute as to the assets Stith held at the time the fee was required.

The state did not establish any triable issue of fact regarding Stith's inability to pay the fee, given the uncontroverted evidence demonstrating that Stith could not have paid the filing fee without either forgoing basic living expenses or accumulating greater credit card debt at high interest rates. App. 51a-52a and 57a (Stith testimony); App. 98a (Stith dep.).

Stith's injury does not, and should not, turn on whether he utterly lacks any funds whatsoever. "[O]ne need not show complete lack of funds to prove that he is unable to pay a fee." *Harper v. Vance*, 342 F. Supp. 136, 140 (N.D. Ala. 1972)(plaintiff has standing to challenge $850 filing fee despite the fact that he has life insurance valued at $1,700 and personal belongings, "assets sufficient to permit compliance with the filing fee requirement.") Even candidates who have actually managed to pay fees have been granted standing to challenge them. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 191 (1996)(plaintiff who paid fee to be certified as delegate to state Republican Party convention successfully challenged fee); *Fulani v. Krivanek*, 973 F.2d 1539, 1541 (11th Cir. 1992)(minor party candidate had standing to challenge minor party exclusion from fee waiver, even though candidate paid fee); *Green v.*

Mortham, 155 F.3d 1332, 1334 (11th Cir. 1998)(plaintiff timely paid the filing fee under protest, yet court reached merits of claim).

The appellants suggest that the court would have denied Stith standing if it had applied the standard for proceeding *in forma pauperis.* [30] App. Br. at 15-16. But even permission to proceed *in forma pauperis* does not require absolute inability to pay court fees. "To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948); *see also*, *Jones v. Zimmerman*, 752 F.2d 76 (3d Cir. 1985)(abuse of discretion to require prisoner to pay $5 filing fee where prisoner had a

[30] Although they deposed Stith, appellants cite no evidence that he possesses income or assets not considered by the Court. Most of the *in forma pauperis* factors that defendants cite were tacitly or explicitly taken into account: Stith testified directly as to his cash assets, net worth, and income, and disclosed his tax returns for the previous year. App. 50a-51a, 98a, 105a. While the defendants did not inquire about his real estate or other property of value, they acknowledge that he lived in a rented apartment. App. Br. at 9. He also testified that his car was eleven years old. App. 51a. The appellants suggest that all of his 1999 income would have been considered, but under the very standard they cite only income from August 1999 through July 2000 would have been taken into account. *See* "Affidavit / Declaration in Support of Request to Proceed *In Forma Pauperis*," at http:/www.pamd.uscourts.gov/docs/pauperis.htm.

balance of $17.39 in his account and had a monthly wage of $15.00; prisoner should not be required to sacrifice amenities such as TV and cable in order to institute suit); *Bullock v. Suomela*, 710 F.2d 102 (3d Cir. 1983)(abuse of discretion to require prisoner to pay $4.00 fee where he had $4.76 in cash and $17.48 monthly income); *Souder v. McGuire*, 516 F.2d 820, 823-24 (3d Cir. 1975)(district court erred in refusing leave to proceed *in forma pauperis* to prisoner with $50.07 in his account and received $15 every two weeks).[31]

Because the evidence in this case shows that Stith did not possess the resources to pay the fee, his standing is clearly established.

IV. STITH WAS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM

A. Mandatory filing fees are subject to close scrutiny.

The appellants would apply a deferential standard of review, upholding the fees because they place only a "minimal burden" on candidates, App. Br. at 18-19 and are justified by "important regulatory interests." App. Br. at 21. In doing so, they incorrectly apply the standard of review set forth by the U.S. Supreme Court: "The rigorousness of our

[31] The appellants cite the fact that Stith did not seek leave to proceed *in forma pauperis*, App. Br. at 16, despite the fact that this option was not available to him. Stith filed as part of a group of plaintiffs paying a single court filing fee, which included two members, Ralph Nader and Barbara Knox, who did not claim financial hardship from the fees, leaving the group ineligible to proceed *in forma pauperis*.

inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Because the case law uniformly holds that any mandatory filing fee, no matter how low, severely burdens the voting rights of low-income voters and candidates, Pennsylvania's fees must be subject to strict scrutiny.

Finding that "the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise," the court in *Bullock* determined that the filing fees must be "closely scrutinized." 405 U.S. at 144, quoting *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966). Nowhere does any court state that the burden of a discriminatory fee is diminished if the fee is low. In fact, the *Bullock* decision arrives at close scrutiny after it compares Texas' candidate filing fees to the $1.50 poll tax struck in *Harper*. *Bullock*, 405 U.S. at 142-44. Holding that the filing fee, like the poll tax, "falls with unequal weight on voters, as well as candidates, according to their economic status," the Court applied the same "strict standard of review" to filing fees that it had applied to the $1.50 poll tax. *Id*. at 144. Clearly, then, the injury was not linked to the size of the fee.

The Court's subsequent opinion in *Lubin v. Panish*, 415 U.S. 709 (1974), makes clear that lower filing fees are subject to the same close

scrutiny. *Lubin* notes that the Texas fees considered earlier in *Bullock* "were so patently exclusionary as to violate traditional equal protection concepts," 415 U.S. 715 n.4, [32] but nevertheless holds California's lower fees to be equally discriminatory. Even a more "moderate" filing fee may prevent "impecunious but serious candidates" from running. 415 U.S. at 717. In fact, the Court observed that a fee of $1, $100 or $700 would have the same exclusionary effect. 415 U.S. at 714.

Small fees have been found to substantially burden voting rights even in contexts far more removed from the actual franchise than candidate filing fees. For example, in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), plaintiffs challenged a registration fee of $35 or $45 required to participate as a delegate in the Republican Party state convention. The Court found that the fee of $35 or $45 was a potentially discriminatory practice covered by pre-clearance requirements of the Voting Rights Act. "By limiting the opportunity for voters to participate in the Party's convention, the fee undercuts their influence on the field of candidates whose names will appear on the ballot, and thus weakens the 'effectiveness' of their votes cast in the general election itself." 517 U.S. at 205.

[32] The Texas filing fees considered in *Bullock* were as low as $150 for State Representative in some counties, comparable to the fees at issue in this case, though they did range far higher.

The *Burdick* decision, which defendants rely upon, applied a more deferential rational basis review explicitly because the regulation challenged in that case – a ban on write-in voting – did not restrict ballot access and only minimally burdened the rights of voters:

> Although Hawaii makes no provision for write in voting…the system outlined above provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary. Consequently, any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate until days before the primary. But in *Storer v. Brown*, we gave little weight to 'the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.'…We think the same reasoning applies here, and therefore conclude that *any burden imposed by Hawaii's write-in vote prohibition is a very limited one.*"

504 U.S. at 436-37 (internal cites omitted)(emphasis added).

Precisely because the degree of scrutiny in election law cases "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," *Burdick*, 504 U.S. at 434, strict scrutiny must be applied to mandatory filing fees, which have "a real and appreciable impact on the exercise of the franchise," *Bullock,* 405 U.S. at 144, and are "inevitably…exclusionary as to some aspirants." *Lubin,* 415 U.S. at 718.

The Supreme Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), reaffirmed the need to apply strict scrutiny to statutes which have a discriminatory effect on voters. The court applied strict scrutiny to Ohio's

early filing deadline, repeatedly citing *Bullock* and in *Lubin* with approval: "As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." 460 U.S. at 792-93, citing *Bullock*, 405 U.S. at 144, 149. "We rely…on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment." 460 U.S. at 787 n.7, citing *Bullock*, *Lubin* and other cases.

Borrowing language originally in *Lubin,* the *Anderson* Court framed the inquiry as, "whether the challenged restriction unfairly or *unnecessarily* burdens 'the availability of political opportunity.'" 460 U.S. at 793, quoting *Clements v. Fashing,* 457 U.S. 957 (1982), quoting *Lubin*, 414 U.S. at 716 (emphasis added). After examining Ohio's asserted justifications, the *Anderson* Court found them inadequate to meet close scrutiny:

> For even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutional liberty. 'Precision of regulation must be the touchstone in an area so closely touching on our most precious freedoms.' If the state has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

460 U.S. at 806, quoting *Kusper v. Pontikes*, 414 U.S. 51 (1973)(internal cites omitted). The subsequent *Burdick* decision, far from overturning

Anderson, relied on the same standard of scrutiny. *Burdick,* 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788).

Thus mandatory filing fees, which by their nature place a discriminatory burden on low-income voters and their candidates, *Bullock*, 405 U.S. at 144, *Lubin*, 415 U.S. at 718, remain subject to close scrutiny under the very standard set forth in *Burdick* and *Anderson*.

D. Pennsylvania's filing fees fail even the most deferential review.

Under the most deferential scrutiny, a law which imposes only "reasonable, nondiscriminatory restrictions" on voters' rights will be upheld if it is justified by "important regulatory interests." *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebreeze*, 460 U.S. at 788). Pennsylvania's failure to provide a fee waiver burdens plaintiffs and other voters and candidates in a manner that is neither reasonable nor nondiscriminatory, and does not serve any important regulatory interest. Thus the mandatory filing fees fail even deferential review.

The appellants' argument that Pennylvania's fees are reasonable because they place only a "minimal burden" on candidates, App. Br. at 18-19, is rejected by the cases discussed above, which uniformly hold mandatory fees to be exclusionary regardless of their size. *See Lubin*, 415 U.S. at 714 (a filing fee of $1, $100 or $700 would have the same

exclusionary effect) and 717 ("if the filing fee is more moderate, as here, impecunious but serious candidates may be prevented from running."); *Harper,* 383 U.S. 663 (striking poll tax of $1.50); *Morse,* 517 U.S. at 205 (convention registration fee of $35 is discriminatory).

Following *Bullock* and *Lubin*, courts have without exception struck mandatory fees as discriminatory, even when the fee was reasonable in amount. *See Fulani*, 973 F.2d 1539 (fee struck is "not impermissibly burdensome as to cost")(quoting *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983)); *Brown*, 394 F. Supp. at 361 (fee struck "is reasonable and would not, in these times of inflation, exclude any serious and qualified candidate"); *Harper*, 342 F. Supp. at 143 n.8 (fees struck "are not inherently unreasonable"); *Fair*, 359 F. Supp. at 306 (fee struck "is reasonable in amount").

The regulatory interests claimed by the appellants include regulating the number of candidates in the ballot, protecting the integrity of the political process from frivolous candidacies, and defraying the costs of elections. App. Br. at 20, citing *Bullock*, 405 U.S. at 145-47. However, *Bullock* itself explicitly rejects these interests as a justification for filing fees.

Bullock recognized that "the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and

assure that the winner is the choice of a majority, or at least a strong plurality, of those voting…. Moreover, a State has an interest, if not a duty to protect the integrity of its political processes from frivolous or fraudulent candidacies." 405 U.S. at 145 (citation omitted). But the Court specifically held that filing fees may not be used for these purposes.

> It is uncontested that the filing fees exclude legitimate as well as frivolous candidacies…If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; other means to protect those valid interests are available.

Lubin affirmed this holding: "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 pubic office." 415 U.S. at 717; *see also Fulani*, 973 F.2d at 1547.

Any interest the Commonwealth has in regulating access to its ballot is fully served by Pennsylvania's stringent signature requirements. Pa. St. Ann., tit. 25, § 2911 (c). *See* Statement of Facts, *supra*, at 9. The defendants have never even asserted that the signature requirements are inadequate to protect the integrity of the Commonwealth's ballot.

Bullock also explicitly rejects the asserted interest of defraying election costs as a justification for mandatory filing fees:

> 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.

Even if defendants were right that a "nondiscriminatory" fee could be used for this purpose, a mandatory fee, which discriminates on the basis of wealth, is not a valid way of financing elections. *Bullock*, 405 U.S. at 147-48; *see also Fulani*, 973 F.2d at 1547 ("A state might permissibly charge a *nondiscriminatory* fee that advances the regulatory interest of reimbursing the state for its election expenses, *particularly if it offers alternative avenues of ballot access*, but it cannot use the fee to decide who deserves to be on the ballot")(striking filing fee where major party candidates, but not minor party candidates, were given a fee waiver option) (emphasis added).[33]

[33] While 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, this *dicta* was clearly superseded by *Lubin*, which held that even a $1 mandatory fee -- far too little to cover costs -- could be exclusionary. 415 U.S. at 714.

In any event, the evidence in this case establishes that the Commonwealth's filing fees do *not* approximate processing costs, and were not intended to do so. The fees are not dedicated to paying election costs but co-mingled with the General Fund; the revenues received are far greater than the Commonwealth's actual costs of administering ballot papers; and the size of the fee charged to a candidate does not correspond to the costs of processing the particular candidate's petition or papers. *See* Statement of Facts, *supra*, at 9-11; App. Br. at 7-8, 21.

Because the total revenue generated by the fees far exceeds the administrative costs, the availability of a waiver could not jeopardize the state's interest in being reimbursed for its costs. Thus to the extent that the filing fees serve a valid state interest in covering administrative costs, the absence of a waiver is not reasonably calculated to serve that interest. *See Fulani*, 973 F.2d at 1546 (cost of validating petition signatures is "merely a justification for the fee," and does not justify failure to provide a fee waiver).

E. Because Stith was unable to pay the filing fee he was deprived of his constitutional rights.

The appellants argue that "even if Stith has standing to challenge the filing fee, it is clearly constitutional as applied to him." App. Br. at 17. This argument fails to apprehend that an injury sufficient to give Stith standing– his inability to pay the fees – by definition establishes a constitutional

violation. "[A] state may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Lubin*, 415 U.S. at 718.

IV. THE INJUNCTION ORDERED WAS NO BROADER THAN NECESSARY TO CURE THE CONSTITUTIONAL VIOLATION, AND WAS NOT VAGUE.

The appellants argue that relief should only have extended to Stith. However, the appellants never questioned the facial nature of Stith's claims before the district court, and never suggested that an injunction could properly apply only to named plaintiffs in this case. Rather, in opposing the plaintiffs' motion to alter or amend the judgment by granting summary judgment to Linzey as well as Stith, the defendants stated that relief granted to Stith was sufficient to protect all candidates and voters, and that "[t]he breadth of the Court's order makes this requested relief [for Linzey] unnecessary and, we suggest, an unwarranted expenditure of judicial resources." Supp. App. 8sa.[34] The appellants should therefore be barred from challenging the facial nature of Stith's claim on appeal.

It would be inconsistent with the district court's constitutional ruling, to limit relief to Stith alone. Summary judgment is appropriate for Stith only because he cannot pay the fees without undue hardship, and the district court

[34] The district court failed to docket this brief.

properly considered the statute's effects on *all* candidates unable to pay the fee. "[G]iven *Lubin's* clear holding that absent a reasonable alternative, a filing fee which an indigent candidate cannot afford violates the Fourteenth Amendment…I conclude that [Pennsylvania's filing fee provision] is unconstitutional as applied to indigent candidates such as Stith." App. 12a (opinion). Although the words "as applied" are used, the court clearly holds the statute discriminatory against *all* candidates unable to pay the fee, as reflected in the lengthy analysis of the *Bullock* and *Lubin* precedents. App. 7a – 12a. The words "as applied to" are used in their colloquial, rather than legal, sense, to mean "in its effects on" Stith and other indigent candidates, and not to limit the facial nature of the claims.

It defies logic to argue the Commonwealth could be enjoined from applying its mandatory fee to Stith, but would be free to discriminate against other candidates on the basis of wealth. The defendants have cited no case where a filing fee or any other statute has been held facially unconstitutional but enjoined only as to named plaintiffs. There is no requirement that a class be certified, and cases filed on behalf of individual plaintiffs routinely strike fees as to any candidate unable to pay, starting with *Bullock* itself. 405 U.S. at 136. *See also*, *e.g. Dillon*, 340 F. Supp. at 731; *Brown,* 394 F. Supp. at 362; *Harper,* 342 F. Supp. at 144. Once a mandatory fee has been held

unconstitutional as to one set of plaintiffs it is unconstitutional as to all similarly situated candidates. *See Gallagher v. Evans*, 536 F.2d 899, 902 (10th Cir. 1976) ("The defendant Secretary of State would have us enforce a law as to several classes of persons when that law had been declared unconstitutional as to another class of persons. This discriminatory treatment would deny the plaintiffs equal protection of the laws in violation of the Fourteenth Amendment.").

The case which plaintiffs do cite, *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), did not so limit an injunction. Rather, while acknowledging that "(f)ederal courts may not order states…to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated," the opinion upholds a consent decree which went further than the constitutional violation in question. *Id.* at 389. In this case, as discussed above, the injunction was limited to the adjudicated constitutional violation.

The appellants also claim that the injunction was vague because it does not specify which candidates cannot "afford" the fee. However, the final injunction is the same as the preliminary injunction with which the Appellants complied, which required that the Commonwealth provide a an alternative for "any otherwise qualified candidate who is unable to pay the

cost of the fee." App. 28a (Docket No. 11). At no time in preliminary injunction proceedings or subsequently, in summary judgment proceedings, did the defendants express concern about the form of the relief or suggest that similar relief would be inappropriate in a final injunction.

By enjoining the unconstitutional application of the filing fees, rather than striking the statute altogether, the district court chose the less intrusive remedy. Striking the statute in its entirety would have left it to the Pennsylvania legislature to craft a constitutional fee provision, without direction from the court, and would have prevented the collection of any fees in the meantime. While courts have taken this path, *see, e.g. Harper*, 342 F. Supp. at 144 (declaring filing fee system unconstitutional and leaving the design of alternative means of ballot access to the defendants), the court clearly does not prejudice the Commonwealth by taking a less drastic step, leaving the Commonwealth with the option of charging the filing fee to those candidates who are able to pay. *See, e.g., Georgia Socialist Workers' Party v. Fortson*, 315 F. Supp. 1035, 1041 (N.D. Ga. 1970), *aff'd on other grounds sub nom Jenness v. Fortson*, 403 U.S. 431 (1971)(permanently enjoining Georgia from enforcing its filing fees against candidates unable to pay).

In providing an alternative for those "unable to pay" the filing fee, the Commonwealth will hardly be sailing in uncharted waters. Many states permit candidates unable to pay filing fees to gain ballot access by signing an affidavit. [35] Other states require additional proof of indigency beyond a sworn statement.[36] Several states require that candidates unable to pay the

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[35] *See* ALASKA STAT. § 15.25.050 (West, WESTLAW through 2001 1st Special Session of the Twenty-Second Legislature) (Alaska); HAW. REV. STAT. ANN. § 12-6 (West, WESTLAW through 2001 Third Special Session of the Twenty-First Legislature) (Hawaii); MO. ANN. STAT. § 115.357 (LEXIS through First Extraordinary Session of 91st General Assembly) (Missouri); MONT. CODE ANN. § 13-10-203 (LEXIS through 2001 Legislation) (Montana); N.M. STAT. ANN. § 1-8-42 (LEXIS through Second Special Session of 45th Legislature) (New Mexico); UTAH CODE ANN. § 20A-9-201 (West, WESTLAW through 2001 Supplement, 2001 First Special Session) (Utah); VT. STAT. ANN. tit. 17, § 2702 (LEXIS through September 2001) (Vermont); W. VA. CODE § 3-5-8a (LEXIS through 2001 Regular and Sixth Extraordinary Session of the Legislature) (West Virginia). Alaska and Montana require a "statement" of indigency, but do not specify whether such a statement must be given under oath. New Hampshire and Washington waive the fee for those unable to pay with no statutory requirement of any statement. N.H. REV. STAT. ANN. § 655:20 (West, WESTLAW through Chapter 297 of 2001 Reg. Sess.); WASH. REV. CODE ANN. § 29.15.050 (West, WESTLAW through Chapter 3 of 2002 Regular Session).

[36] *See* DEL. CODE ANN. tit. 15, § 3103 (LEXIS through 2001 Regular Session of the 141st General Assembly) (Delaware); GA. CODE ANN. § 21-2-132 (LEXIS through 2001 Extraordinary Session of the General Assembly) (Georgia); MD. ANN. CODE of 1957 art. 33, § 5-401 (LEXIS through 2001 Supplement, 2001 Regular Session) (Maryland); and NEB. REV. STAT. § 32-608 (LEXIS through 2001 Legislation) (Nebraska).

fee submit petition signatures in order to waive the filing fee.[37] Other states permit the submission of signatures in lieu of a fee, regardless of income.[38] Counsel for Appellees know of no successful challenge to any such fee

[37] *See* DEL. CODE ANN. tit. 15, § 3103 (LEXIS through 2001 Regular Session of the 141st General Assembly) (Delaware); GA. CODE ANN. § 21-2-132 (LEXIS through 2001 Extraordinary Session of the General Assembly) (Georgia); HAW. REV. STAT. ANN. § 12-6 (West, WESTLAW through 2001 Third Special Session of the Twenty-First Legislature) (Hawaii); MO. ANN. STAT. § 115.357 (LEXIS through First Extraordinary Session of 91st General Assembly) (Missouri); MONT. CODE ANN. § 13-10-203 (LEXIS through 2001 Legislation) (Montana); N.H. REV. STAT. ANN. § 655:20 (West, WESTLAW through Chapter 297 of 2001 Reg. Sess.); WASH. REV. CODE ANN. § 29.15.050 (West, WESTLAW through Chapter 3 of 2002 Regular Session); W. VA. CODE § 3-5-8a (LEXIS through 2001 Regular and Sixth Extraordinary Session of the Legislature) (West Virginia).

[38] *See* CAL. ELEC. CODE § 8106 (West, WESTLAW through ch. 10 of 2002 Reg. Sess. Urgency Legislation & ch. 2 of 3rd Ex. Sess.) (California); COLO. REV. STAT. ANN. §§1-4-303, 1-4-1203 (LEXIS through 2001 Special Supplement) (Colorado); FLA. STAT. ANN. ch. 99.095 (West, WESTLAW through 2001 1st Reg. Sess.) (Florida); IDAHO CODE § 34-626 (LEXIS through 2001 Cumulative Supplement, 1st Regular Session of the 56th Legislature) (Idaho); KAN. STAT. ANN. § 25-205 (LEXIS through 2001 Supplement) (Kansas); LA. REV. STAT. ANN. § 461 (LEXIS through 2002 Supplement, 2001 Sessions) (Louisiana); ME. REV. STAT. ANN. tit. 21-A, § 412 (LEXIS through 2001 Supplement) (Maine); MICH. COMP. LAWS ANN. § 168.163 (LEXIS through 2001 Legislation) (Michigan); MINN. STAT. ANN. § 204B.11 (West, WESTLAW through 2001 1st Sp. Sess.) (Minnesota); N.C. GEN. STAT. § 163-107.1 (West, WESTLAW through 2001 Regular Session) (North Carolina); OKLA. STAT. tit. 26, § 5-112 (West, WESTLAW through Chapter 5 of 2001 1st Ex. Sess.) (Oklahoma); OR. REV. STAT. § 249.020 (West, WESTLAW through 2001 Reg. Sess., 2001 Cumulative Supp.) (Oregon); TEX. ELEC. CODE ANN. § 172.021 (West, WESTLAW through 2001 Reg. Sess.) (Texas).

waiver. Given this extensive record, it is hard to credit the appellants' claim that they need further guidance as to who "cannot afford" to pay the fee.

The cases that appellants cite where injunctions were vacated for vagueness both involved prohibitions on conduct far less concrete and specific than in the instant case. In *Schmidt v. Lessard*, 414 U.S. 473 (1974), a three-judge panel had issued a lengthy opinion holding Wisconsin's civil commitment procedure in violation of constitutional due process requirements and had later issued a judgment which merely ordered relief "in accordance with the Opinion heretofore entered." 414 U.S. at 474. In refusing to give effect to this judgment, the Supreme Court observed,

> Neither the brief judgment order nor the accompanying opinion is 'specific' in outlining the 'terms' of the injunctive relief granted; nor can it be said that the order describes 'in reasonable detail…the act or acts sought to be restrained.' Rather, the defendants are simply told not enforce the 'present Wisconsin scheme' against those in the appellee's class.

414 U.S. at 476, quoting Fed. R. Civ. P. 65(d). In *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762 (3d Cir. 1994), an injunction preventing the defendant from "otherwise violating any of the terms" of an easement failed to give fair notice of what traffic devices the defendant could and could not erect within the terms of the easement. *Id*. at 771.

In contrast to both of these cases, the proscribed conduct in this case is extremely clear-cut. There can be no doubt what it means to charge a

mandatory filing fee. The Appellants' claim that it is difficult to determine who is unable to afford the fee is belied by the examples of other states that routinely administer such provisions.

V. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AS TO LINZEY AND DONOVAN'S CLAIMS, AND FAILING TO EXPLICITLY ADDRESS THE CLAIMS OF THE PENNSYLVANIA GREEN PARTY.

The district court held the mandatory filing fee to be facially unconstitutional. However, in an abundance of caution, the plaintiffs cross-appealed the grant of summary judgment for the defendants as to Linzey and Donovan, and its failure to rule explicitly on the Green Party's claims.

The District court stated, "Plaintiffs Linzey and Donovan did not present evidence establishing that they could not afford to pay the filing fee. Accordingly, the Commonwealth's motion for summary judgment will be granted as to them." App. 7a (opinion, n.4). This wording suggests that the court overlooked evidence regarding Linzey's inability to pay the filing fee, and misapprehended the nature of Donovan's claim as a voter. This is confirmed by the district court's opinion denying the plaintiffs' motion to alter or amend the judgment, which acknowledges that the court did not consider evidence as to Linzey and Donovan because they did not testify in court. (Linzey did provide deposition testimony, and both provided

supporting documents which were part of the summary judgment record.) The court believed it was not necessary to decide Linzey and Donovan's claims because of the breadth of the relief granted to Stith:

> Suffice it to say, at the hearing, Mr. Stith established his inability to pay the filing fee; the other Plaintiffs did not testify. I do not diminish their summary judgment evidence, but I did not hear evidence of their inability to pay at the hearing and given the Defendants' contention that it is challenged and the breadth of the Order of August 20, 2001 to include anyone who cannot afford the fee, Plaintiffs Linzey and Donovan are not foreclosed from later demonstrating that each is unable to afford the filing fee.

App. 271a. This language demonstrates that the court had not made any determination about Linzey's ability to pay the fee, and continued to ignore the fact that Donovan was a voter rather than a plaintiff.

Linzey's total income for 2000 was under $4,925 and he owned no real estate or other property. App. 130a-13a (Linzey dep.); App. 143a (Linzey 2000 IRS form 1040). He did not have any campaign funds from which to pay the fee. Supp. App. 3sa-4sa. (Linzey dep.). These facts were documented in the plaintiffs' statement of material facts, App. 30a, and the defendants' failure to challenge these facts deemed them admitted under Local Rule 56.1 of the U.S. District Court for the Middle District of Pennsylvania. Because Linzey was unable to pay the candidate filing fees

without substantial hardship, he was entitled to summary judgment as a matter of law.

Donovan was a non-affluent voter who supported Stith and Linzey and wished to see them appear on the ballot. App. 148a-149a. His asserted injury was not, as suggested by the district court, an inability to pay the fee himself; rather, the fee prevented his preferred candidates from appearing on the ballot. App. 40a (complaint). This injury is at the core of the constitutional rulings in *Bullock* and *Lubin*. "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, whose favorites may be unable to pay the large costs required by the Texas system." *Bullock,* 405 U.S. at 143-44; *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*, 460 U.S. at 786-787. Therefore, Donovan was also entitled to judgment as a matter of law.

The district court did not directly address the claims of the Pennsylvania Green Party, which represents non-affluent voters and candidates. App. 37a (complaint); App. 52a-54a (Stith dep.). Given the

court's ruling that the mandatory fees discriminate on the basis of wealth, the party was also entitled to judgment as a matter of law.

CONCLUSION

For the reasons stated above, the district court's grant of summary judgment to Stith should be upheld, its grant of summary judgment to the defendants as to Linzey and Donovan should be reversed, and the case should be remanded for entry of summary judgment in favor of Linzey, Donovan and the Pennsylvania Green Party.

Respectfully submitted,

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