IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS ALAN LINZEY, JOHN STITH, PENNSYLVANIA GREEN PARTY, and WILL DONOVAN III, Plaintiffs, v. KIM PIZZINGRILLI, in her official capacity as Secretary of State of Pennsylvania, and RICHARD FILLING, in his official capacity as the Commissioner overseeing Pennsylvania's Bureau of Commissions, Elections and Legislation, Defendants.	)	CIVIL ACTION NO. 3:CV-00-1300 JUDGE CAPUTO

REPLY IN SUPPORT OF PLAINTIFFS'
RENEWED MOTION FOR SUMMARY JUDGMENT

The arguments made by defendants in opposition to plaintiffs' motion for summary judgment are generally addressed in plaintiffs' memorandum in opposition to defendants' motion for summary judgment ("Plaintiffs' Opposition"). To avoid repetition, Plaintiffs hereby incorporate the

arguments of their previous briefs, but also briefly address each of defendants' arguments in turn.

1. The cases cited by Defendants in support of deferential review, *Burdick v. Takushi*, 504 U.S. 428 (1969), and *Anderson v. Celebreeze*, 460 U.S. 780 (1983), instead affirm the need for close scrutiny in this case.

As discussed in Plaintiffs' Opposition, these cases establish that the degree of scrutiny depends on the extent to which the challenged regulation burdens voting rights, *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789, but neither case considers filing fees and neither supports deferential review in this case. *See* Plaintiffs' Opposition at pp. 6-7. Rather, *Burdick* grants deferential review precisely because "any burden imposed by Hawaii's write-in vote prohibition is a very limited one," 504 U.S. at 437, and *Anderson* applies close scrutiny in striking a challenged statute. 460 U.S. at 806.

While *Anderson* notes that "the state's important regulatory interests are generally sufficient to justify *reasonable, nondiscriminatory* regulations," *id*. at 788 (emphasis added), that case refuses to grant such deference to Ohio's early filing deadline for independent candidates. Far from reversing the close scrutiny applied in *Bullock* and in *Lubin v. Panish*, 415 U.S.709 (1974), the *Anderson* decision repeatedly cites those decisions

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 793, citing *Bullock*, 405 U.S. at 856 and 858. "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 v. Panish*, 415 U.S. 709*,* the *Anderson* Court frames the inquiry as, "whether the challenged restriction unfairly or *unnecessarily* burdens 'the availability of political opportunity.'" 460 U.S. at 793, quoting *Clements v. Flashing,* 457 U.S. 957, 102 S.Ct. 2836 (1982), quoting *Lubin*, 414 U.S. at 716 (emphasis added). This requirement that the law be no more restrictive than necessary is consistent with strict scrutiny.

After examining Ohio's asserted justifications, the *Anderson* Court finds 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).

Relevantly to this case, *Anderson* rejects the State's justification that the early filing deadline is facially nondiscriminatory in that it treats all candidates alike. While "[t]he early filing deadline for a candidate in a party's primary election is adequately justified by administrative concerns," the Court found that "[n]either the administrative justification nor the benefit of an early filing deadline is applicable to an independent candidate." *Id*. at 800. Instead, the court looked to the discriminatory effect. "As we have written, '[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Id*. at 801, quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Thus mandatory filing fees, which by their nature discriminate against non-wealthy 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*.[1]

[1] The other cases that defendants cite as supporting deferential review do not consider voting rights or electoral participation, and have no bearing on the level of scrutiny in this case. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955)(upholding state's regulation of visual care); *Pace Resources, Inc. v Shrewbury Township*, 808 F.2d 1023 (denying claims of property owner for restrictions on land use); *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980)(upholding zoning amendments).

2. Plaintiffs do not argue that the fees must "reimburse the state dollar for dollar" for its administrative expenses, as characterized by defendants. Rather, the *dictum* in *Bullock* upon which defendants rely suggests that an interest in recovering administrative expenses might be valid if the fees "approximated" the state's costs. *Bullock* 405 U.S. at 148 n. 29. As the evidence documents, the filing fees in this case do not approximate the state's administrative costs of processing nominating papers and petitions, nor is there any evidence that they were ever intended to do so. *See* Memorandum in Support of Plaintiffs Renewed Motion for Summary Judgment ("Plaintiffs' Opening Memorandum") pp. 5-7 and 13-14.

To the extent that recovering the costs of processing ballot applications is a valid state objective, it still does not justify Pennsylvania's failure to offer a fee waiver. There is no showing that a waiver would impair the state's interest in this regard. Rather, the evidence suggests that the fees collected far outstrip administrative costs, and that even if an exceptional number of candidates were eligible for a waiver the Commonwealth's costs would still be met. *See* Plaintiffs' Opening Memorandum pp. 5-7 and 13-14; Memorandum from Commissioner Filling

to Louis Lawrence Boyle (at Tab L); Defendants' Response to Plaintiffs' Interrogatory No. 2 (at Tab I).

Thus even under deferential review, this interest could not justify the exclusion from the ballot of low-income candidates.

3. In criticizing "plaintiffs' resort to platitudes about the value of the right to vote," defendants fail to appreciate the manner in which mandatory filing fees restrict core political expression. Such fees have a "real and appreciable impact on the exercise of the franchise," and serve as an "exclusionary mechanism" whose effect on less affluent voters "is neither incidental nor remote." *Bullock*, 405 U.S. at 144.

The fact that the Commonwealth's fees were enacted by its legislature does not insulate them from constitutional challenge. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (U.S. 1803). The U.S. Constitution is the supreme law of this country, superior to any legislative act:

> Those, then who controvert the principle that the constitution is to be considered, in court, as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions…. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits.

Id. at 178.

CONCLUSION

For the reasons set forth above, the Court should grant plaintiffs' renewed motion for summary judgment.

Respectfully submitted,

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