No. 03-1607

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUT

STEVEN BIENER and CAROL GREENWAY,

Plaintiffs-Appellants,

v.

THE HONORABLE FRANK CALIO, IN HIS OFFICIAL CAPACITY AS STATE ELECTIONS COMMISSIONER FOR THE STATE OF DELAWARE and
THE DEMOCRATIC PARTY OF THE STATE OF DELAWARE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE (No. 02-514 GMS)

BRIEF OF *AMICUS CURIAE* NATIONAL VOTING RIGHTS INSTITUTE IN SUPPORT OF APPELLANTS STEVEN BIENER AND CAROL GREENWAY URGING REVERSAL OF THE JUDGMENT BELOW

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES **PAGE**

CONSTITUTIONAL PROVISIONS, CODES, RULES AND STATUTES

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*

Amicus National Voting Rights Institute is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to equal and meaningful participation in every phase of electoral politics. Through litigation and public education, the Institute works to ensure that those who do not have access to wealth are able to participate fully in the political process.

Exclusionary candidate filing fees constitute a wealth barrier to political participation for both candidates and the voters who support them. Because the right to vote is fundamental to democracy, the Institute respectfully urges reversal of the District Court's ruling upholding Delaware's filing fee provisions.[1]

SUMMARY OF ARGUMENT

Delaware's filing fee provisions clearly exclude otherwise qualified candidates from the ballot on the basis of wealth, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. *See Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709

[1] All parties have consented to the filing of this brief *amicus curiae.* The Institute represents Appellees/Cross-Appellants in a lawsuit challenging Pennsylvania's filing fee statute which is currently pending before the U.S. Court of Appeals for the Third Circuit, *Belitskus v. Pizzingrilli*, Nos. 01-3747 and 01-3824.

(1974). Any person wishing to run for Congress in Delaware must pay a candidate filing fee set by each political party, which the Democratic Party has currently set at $3,000 for House candidates and $9,000 for Senate candidates. *See Biener v. Calio*, No. C.A. 02-514 GMS, 2003 WL 151232, at *2 (D. Del. Jan. 21, 2003). This fee is mandatory, regardless of the financial hardship a prospective candidate may suffer, unless the candidate meets a stringent definition of indigency – currently non-earned income less than $6,450 or earned income less than $13,080 – in which case a petition alternative is available. *See* 15 DEL. CODE ANN. §§ 3103(d) and 3103(e); 42 U.S.C. § 1382(a). Thus, a person earning $14,000 a year is required to pay over 20 percent of her annual income to run for the House, and over 60 percent of her income to run for the Senate, or else forgo her place on the ballot. Even a person earning significantly more could be unduly burdened by Delaware's substantial filing fees.

Thus Delaware's filing fee excludes candidates from the ballot on the basis of wealth, in violation of *Bullock*, 405 U.S. 134, and *Lubin*, 415 U.S. 709. Subsequent decisions have upheld filing fees when a petition alternative was available to all, *Green v. Mortham*, 155 F.3d 1332, 1334, 1337-38 (11th Cir. 1998); *Little v. Florida Department of State*, 19 F.3d 4, 5 (11th Cir. 1994); *Andress v. Reed*, 880 F. 2d. 239, 242 (9th Cir. 1989); *Harris*

v. Iorio, 922 F.Supp. 588, 590 (M.D. Fla. 1996); *Cross v. Fong Eu*, 430 F.Supp. 1036, 1040-41 (N.D. Cal. 1977), but not when a candidate burdened by the fee was denied access to the alternative.[2] As discussed below, the great majority of states with signature alternatives make them available to all candidates, or at a minimum to any candidate claiming inability to pay the fee, regardless of whether they are indigent.

It is no answer to tell a candidate to solicit donations in order to avoid the burden of a fee, for such a practice "gives the affluent the power to place on the ballot their own names or the names of persons they favor" while denying the non-wealthy an opportunity to vote for their favored candidates. *Bullock*, 405 U.S. at 144. To force a candidate to fundraise as a condition of ballot access would compel political association with donors, in violation of the First Amendment. *See Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977); *United States v. United Foods*, 533 U.S. 405 (2001); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Galda v. Rutgers*, 772 F.2d 1060, 1066 (3d Cir. 1985). It would also force the candidate to communicate to voters a willingness to accept contributions, in violation of the First

[2] While *Cassidy v. Willis*, 323 A.2d 598 (Del. 1974), upheld Delaware's filing fee, the plaintiffs in that case did not claim a financial burden but rather affirmed that they were financially able but unwilling to pay the fee. *Id*. at 601.

Amendment's protection against compelled speech. *See Wooley v. Maynard*, 430 U.S. 705 (1977).

Because Delaware's filing fee excludes candidates from the ballot based on wealth, it constitutes an unlawful qualification for federal office. The Supreme Court has held that a state may not impose de-facto qualifications for office in the guise of a ballot regulation, when the regulation "has the likely effect of handicapping a class of candidates" for federal office. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 836 (1995). The framers of the Constitution were particularly concerned that wealth and property not be made qualifications for federal office, *id.* at 819-820, which is precisely the effect of Delaware's exclusionary filing fee requirement.

ARGUMENT

A. Delaware's Filing Fee Provisions Violate the Equal Protection Clause.

1. Delaware's filing fee unconstitutionally burdens non-indigent candidates and their voter supporters.

A state may not make the ability to pay a filing fee a condition of ballot access, for such a system "falls with unequal weight on voters, as well as candidates, according to their economic status." *Bullock v. Carter*, 405 U.S. 134, 144 (1972). Neither *Bullock* nor the later *Lubin v. Panish*, 415 U.S. 709 (1974), reached the question of how the inability to pay may be

defined, but neither limited its reach to indigent persons. There is no indication that the candidate plaintiffs in *Bullock* claimed to be indigent; rather, the parties merely stipulated that the plaintiffs could not pay fees ranging from $1,424 to $6,300, which was sufficient for the plaintiffs to prevail. *See Carter v. Dies*, 32 F. Supp. 1358, 1360 (N.D. Tex. 1970) (three-judge district court) *aff'd sub nom. Bullock v. Carter*, 405 U.S. 134 (1972). The candidate plaintiff in *Lubin* was indigent, 415 U.S. at 710, and so the court did not there consider the plight of non-indigent candidates unable to pay filing fees.

Subsequent cases have made it clear that it is not only the indigent who may be unconstitutionally burdened by a mandatory fee. The U.S. Court of Appeals for the Eleventh Circuit held that a candidate was entitled to a fee-waiver where she was "able to qualify by paying the $5,631.20 fee" but had asserted that the fee "would impose an undue burden by diverting funds from her party's attempt to identify, reach, and communicate with potential supporters." *Fulani v. Krivanek*, 973 F.2d 1539, 1544 (11th Cir. 1992). The "undue burden" standard used in *Fulani* is commonly employed. *See, e.g., Fair v. Taylor*, 359 F. Supp. 304, 307 (M.D. Fla. 1973) (three-judge district court), *vacated on other grounds sub nom. Bush v. Sevesta*,

416 U.S. 918 (1974)[3] (alternative ordered for candidates **"**unable to pay the required filing fee without an *undue burden* on financial resources") (emphasis added); *cf. Adams v. Askew*, 511 F.2d 700, 701 (5th Cir. 1975) (filing fee upheld where state provided alternative access and the plaintiffs "were able to pay and did pay the filing fees *without any asserted undue burden* on their financial resources") (emphasis added).

Nevertheless, Delaware provides no alternative to filing fees for its citizens who do not meet a restrictive definition of indigency, currently requiring maximum earned income of less than $13,080 a year or non-earned income of less than $6,540. *See* 15 DEL. CODE §§ 3103(d) and 3103(e); 42 U.S.C. § 1382(a). A person earning $14,000 would be required to pay over 20 percent of her income to pay the $3,000 fee that the Democratic Party has currently set for House candidates, *Biener*, 2003 WL 151232 at *2, and would be left with only $11,000 for rent, food, clothing, utilities, and other living expenses. Such a person would have to sacrifice over three-fifths of her income to pay the $9,000 filing fee for the Senate, *id*., and would be left with only $5,000 annual income. It is equally true that a person with far greater income could be unduly burdened by the fees,

[3] The state did not appeal the three-judge district court's 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. ANN. tit. 9 § 105.035 (West, WESTLAW through 2003 Reg. Sess.).

depending on the person's living expenses; for example, he or she might have several children to support or a spouse with high medical bills.[4]

Indeed, a candidate's ability to pay a filing fee must take into account the size of the fee as well as the funds available to the candidate. While perhaps any non-indigent person might afford a minimal fee of $10, for example, when the fees in question are sizeable, as here, the test must be an individualized one. And it is clear that a state may not require a candidate to impoverish himself in order to gain ballot access.[5] "[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 successfully challenged $850 filing fee despite the fact that he had life insurance valued

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[4] A good portion of Delaware's population would not qualify for the signature alternative but could have difficulty paying the large fees. According to U.S. Census Bureau data, nine percent of Delaware's families have income between $15,000 and $24,999, and another 11 percent between $25,000 and $34,999. *See* U.S. Census Bureau, American Fact Finder, Quick Tables, Geographic Area: Delaware, *at* http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF3_U_DP3_geo_id=04000US10.html.

[5] 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); *Bullock v. Suomela*, 710 F.2d 102 (3d Cir. 1983); *Souder v. McGuire*, 516 F.2d 820, 823-24 (3d Cir. 1975).

at $1,700 and "assets sufficient to permit compliance with the filing fee requirement"). In fact, candidates who have actually paid filing fees have successfully challenged 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*, 973 F.2d at 1541 (11th Cir. 1992) (minor party candidate successfully challenged exclusion from fee waiver, even though candidate paid fee); *cf. Green v. Mortham*, 155 F.3d 1332, 1334 and 1337-38 (11th Cir. 1998) (plaintiff candidate timely paid the filing fee of $10,020 under protest, yet court reached merits of claim, ultimately finding fee valid because signature alternative was available to plaintiff). While courts have denied relief to plaintiffs "able to pay…the filing fees without any asserted undue burden on their financial resources," *Adams*, 511 F. 2d at 701; *see also Cassidy v. Willis*, 323 A.2d 598, 599 (Del. 1974), that is not the case here, where the plaintiff represents that the filing fee forces him to seek campaign contributions against his will or else bear a financial burden. Affidavit of Steven. L. Biener, para. 11, Joint Appendix ("JA") 47a. Regardless of Mr. Biener's personal financial circumstances, the district court clearly erred in assuming that any non-indigent person who manages to pay the fee is unwilling rather than unable to pay. *Biener*, 2003 WL 151232 at *3.

While the existence of a signature alternative has been held to render filing fees constitutional in Florida and California, *see Green*, 155 F.3d at 1338; *Little v. Florida Department of State*, 19 F.3d 4, 5 (11th Cir. 1994); *Andress v. Reed*, 880 F. 2d. 239, 242 (9th Cir. 1989); *Harris v. Iorio*, 922 F.Supp. 588, 590 (M.D. Fla. 1996); *Cross v. Fong Eu*, 430 F.Supp. 1036, 1040-41 (N.D. Cal. 1977), in none of these cases was the signature alternative denied to the plaintiff or restricted to indigents. Unlike Delaware, the Florida and California statutes permit any candidate to submit a nominating petition in lieu of filing fee. *See* FLA. STAT. ANN. tit. 9 § 99.095 (West, WESTLAW through 2003 Reg. Sess.); (Florida) CAL. ELEC. CODE § 8106 (West, WESTLAW through ch. 3 of 2003-04 Reg. Sess. Urgency Legislation, ch. 4 of 1st Ex. Sess. Urgency Legislation, and ch. 1 of 2nd Ex. Sess.) (California).

Indeed, while there are seven states besides Delaware which limit the availability of a signature alternative to candidates unable to pay the filing fee,[6] of those seven only Georgia and Hawaii restrict the petition alternative

[6] Georgia, GA. CODE ANN. § 21-2-132 (West, WESTLAW through 2002 Reg. Sess.); Hawaii, HAW. REV. STAT. ANN. § 12-6 (West, WESTLAW through 2002 Reg. Sess. of the 21st Legislature); Missouri, MO. ANN. STAT. tit. 9 § 115.357 (West, WESTLAW through 2002 2nd Reg. Sess.); Montana, MONT. CODE ANN. § 13-10-203 (West, WESTLAW through September 13, 2002 Spec. Sess.); New Hampshire, N.H. REV. STAT. ANN. tit. 63 § 655:20 (West, WESTLAW through 2002 Reg. Sess.); Washington, WASH. REV.

to indigents. GA. CODE ANN. § 21-2-132(g); HAW. REV. STAT. ANN. § 12-6(e). We are aware of no decision explicitly approving of such a limitation,[7] and while these states limit the signature alternative to indigents, neither proscribes specific income limitations. The remaining five states – Missouri, Montana, New Hampshire, Washington, and West Virginia – permit the signature alterative for any candidate who is, or declares herself to be, unable to pay the fee. MO. ANN. STAT. tit 9 § 115.357(3); MONT. CODE ANN. § 13-10-203(1); N.H. REV. STAT. ANN. tit. 63 § 655:20(I); WASH. REV. CODE ANN. § 29.15.050; W. VA. CODE § 3-5-8. The far more common practice (in 13 states) is to permit any candidate to submit a nominating petition in lieu of filing fee.[8]

CODE ANN. § 29.15.050 (West, WESTLAW through 2003 Reg. Sess. effective through March 31, 2003); West Virginia, W. VA. CODE § 3-5-8a (West, WESTLAW through 2002 3rd Ex. Sess.).

[7] The Delaware Supreme Court in *Cassidy v. Willis*, reviewing Delaware's filing fee, did not face this question as the plaintiffs affirmatively stated that they were financially able but unwilling to pay the fees. *Cassidy v. Willis*, 323 A.2d 598, 601 (Del. 1974).

[8] These include California, CAL. ELEC. CODE § 8106 (2003); Colorado, COLO. REV. STAT. §§ 1-4-303, 1-4-1203, 1-4-1205 (West, WESTLAW through 2002 2nd Reg. and 3rd Ex. Sess. of the 63rd General Assembly); Florida, FLA. STAT. tit 9 § 99.095 (2003); Idaho, IDAHO CODE § 34-626 (West, WESTLAW through 2002 Cumulative Supp., 2nd Reg. Sess. of the 56th Legislature); Kansas, KAN. STAT. ANN. § 25-205 (West, WESTLAW through 2002 Reg. Sess.); Louisiana, LA. REV. STAT. ANN. § 18:461 (West, WESTLAW through 2002 1st Ex. and Reg. Sess. Acts); Maine, ME. REV.

A candidate who is unduly burdened by a filing fee may not be told to raise the necessary funds from donors. As *Bullock* recognized, such a fundraising requirement "would fall more heavily on the less affluent segment of the community," who are more likely to support non-wealthy candidates:

> To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments…it tends to deny some voters the opportunity to vote for the candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor….We would ignore reality were we not to recognize that this system falls with unequal weight on votes, as well as candidates, according to their economic status.

405 U.S. at 144. Thus the Supreme Court has forbidden the state from shifting the burden of an exclusionary filing fee onto voters, observing that the right of candidates to ballot access is "intertwined with the rights of voters." *Lubin*, 415 U.S. at 716. While a candidate with two wealthy donors might pay a $3,000 fee with ease, a candidate whose supporters are able to

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STAT. ANN. tit. 21A, § 412 (West, WESTLAW through legislation effective February 19, 2003); Michigan, MICH. COMP. LAWS § 168.163 (West, WESTLAW through P.A.2003, No. 1); Minnesota, MINN. STAT. § 204B.11 (West, WESTLAW through 2002 1st Spec. Sess.); North Carolina, N.C. GEN. STAT. § 163-107.1 (West, WESTLAW through 2003 Reg. Sess.); Oklahoma, OKLA. STAT. tit. 26, § 5-112 (West, WESTLAW through 2002 Reg. Sess.); Oregon, OR. REV. STAT. tit. 23 § 249.020 (West, WESTLAW through 2001 Reg. Sess. and Cumulative Supp.); Texas, TEX. ELEC. CODE ANN. § 172.021, 172.025 (West, WESTLAW through 2001 Reg. Sess.).

give only in $5 or $10 increments, or not at all, would face a formidable hurdle. For this reason, to require that filing fees be raised through contributions "gives the affluent the power to place on the ballot their own names or the names of persons they favor." *Bullock*, 405 U.S. at 144.

In addition, to force Biener to solicit and accept campaign contributions would constitute compelled association with donors, in violation of the First Amendment.[9] The Supreme Court has held that precisely because political contributions involve associational interests protected by the First Amendment, the government may not compel contributions for ideological purposes. *See Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234 (1977) (citing *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976)) (provision requiring teachers to contribute to support of ideological activities of union violates First Amendment). "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." *Id. See also United States v. United Foods*, 533 U.S. 405 (2001) (assessment requiring mushroom handlers to fund advertisements promoting mushroom sales violates First Amendment);

[9] Mr. Biener did not challenge the filing fee provisions on First Amendment grounds, but to the extent that the Defendants-Appellants attempt to argue that the fee can be met by fundraising, such a solution would infringe First Amendment freedoms of association and speech as discussed here.

Keller v. State Bar of California, 496 U.S. 1 (1990) (State Bar's use of compulsory dues to fund political and ideological activities violates First Amendment); *Galda v. Rutgers*, 772 F.2d 1060, 1066 (3d Cir. 1985) (use of compulsory university fee to fund activities of political group violates First Amendment).

There is no principled distinction between the right of a person to refuse to make political contributions, and the right to refuse to solicit or accept political contributions; both are equally deserving of protection under the First Amendment's guarantee of freedom of association. To impose a fundraising requirement on a candidate such as Biener, who wishes to convince voters that he will not be beholden to any donor, would undermine the message of his campaign and likely weaken the campaign. It is well established that large campaign contributions create the reality or appearance of unfair donor influence. *See Nixon v. Shrink Missouri Government PAC*, 520 U.S. 377, 391 (2000) ("the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible").

Forcing Biener to accept contributions, in addition to compelling unwanted association with donors, compels Biener to communicate to voters an acceptance of fundraising practices that he abhors, and undermines his

campaign message that low-cost campaigning is possible by means of methods such as the worldwide web. Such compelled speech violates the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (government may not force individual to display ideological message on license plate).

2. Because Delaware's filing fee substantially burdens voting rights, it must be subjected to strict scrutiny.

The Delaware fee, like the fees in *Bullock* and *Lubin*, has "a real and appreciable impact on the exercise of the franchise," *Bullock*, 405 U.S. at 144, and will be "inevitably…exclusionary as to some aspirants." *Lubin*, 415 U.S. at 718. Therefore, like the fees in *Bullock* and *Lubin*, it must be subjected to rigorous review.

In *Bullock*, the court considered whether to apply deferential review or to employ the "strict standard of review" that it had used when striking a $1.50 poll tax. *Bullock*, 405 U.S. at 142, citing *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Finding that "the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise," the court held that it merited the same "close" scrutiny as *Harper*. *Bullock*, 405 U.S. at 144. The *Lubin* decision applies this same review, using the language of strict scrutiny to ask whether the filing fee in question unfairly or "unnecessarily" burdened candidates and voters. 415 U.S. at 716.

Nothing in subsequent case law changes this analysis. The Supreme Court has held that "[t]he rigorousness of our 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). It is precisely for this reason that 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. In fact, the Court has explicitly reaffirmed the heightened scrutiny applicable to mandatory filing fees. *See Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983) ("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") (citing *Bullock*, 405 U.S. at 144); *Clements v. Fashing*, 457 U.S. 957, 963-64 (1982) (citing *Bullock* and *Lubin* as cases where "'scrutiny' more vigorous than that which the traditional principles would require" was justified, due to the burden on voting rights based on economic status).

With the *Anderson* decision, the court spelled out the high hurdle an electoral regulation must clear in order to pass strict 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 citations omitted). This is the standard applicable to Delaware's filing fee.

3. Because Delaware's imposition of a filing fee on all non-indigent candidates serves no legitimate state interest, it fails even deferential review.

Delaware's failure to provide an alternative means of ballot access to non-indigent candidates who are unable to pay filing fees without an undue burden does not serve any legitimate state interest and therefore fails even 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*, 460 U.S. at 788.

The court below determined that Delaware's fee was justified by a legitimate interest in regulating the number of candidates on the ballot, and in preventing frivolous or fraudulent candidacies. *Biener*, 2003 WL 151232 at *4. While the district court correctly observed that *Bullock* rejected these interests as a justification for mandatory filing fees, *id*. at *5, it held that a

fee which applies only to non-indigents may be used to serve such ends, because non-indigents are "unwilling" rather than unable to pay the fee. *Id.*

The first flaw in this logic is that many non-indigent candidates may suffer a substantial burden from the fee, rather than a mere unwillingness to pay, as discussed *supra*. Indigency does not describe the threshold beyond which a person can comfortably pay a fee currently set at $3,000 for U.S. House candidates and $9,000 for U.S. Senate candidates.

Secondly, the court misreads *Bullock* and *Lubin* on this point; neither opinion implies that a filing fee may be used to weed out candidates from the ballot based on their willingness (rather than ability) to pay. It is true that the candidates in *Bullock* were unable rather than unwilling to pay the filing fee, and *Bullock* did concede that "there may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy." 405 U.S. at 145-46. But the court immediately goes on to reject the willingness to pay a fee as a barometer of a merit for the ballot. "[E]ven assuming that every person paying the large fees required by Texas law takes his own candidacy seriously, that does not make him a 'serious' candidate in the popular sense." *Id*. at 146. *Lubin* expands on this point:

> 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…A wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check. Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public.

415 U.S. at 717. As this passage indicates, candidates who are willing to pay the fee are not necessarily the most ballot-worthy. Filing fees do not reasonably control ballot access, even as between candidates able to pay a fee with no hardship at all.

Thus the defendant-appellees have failed to articulate a legitimate state interest served by limiting the signature alternative to indigents.[10] Any undue burden on non-indigent candidates imposed by the fees is unjustified. Even under the most deferential review it is clear that the fees violate the Equal Protection Clause.

B. Delaware's Filing Fees Violate the Qualifications Clause by Imposing a Wealth Qualification on Non-Indigent Candidates.

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[10] A Delaware candidate's filing fee is made payable and turned over to the state committee of the candidate's political party, 15 DEL. CODE § 3106(a)(1), and is not used to defray election costs. *See* 15 DEL. CODE § 3111. Regardless, that justification is rejected by *Bullock*:

> 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.

A law which requires all non-indigents to pay a fee for ballot access, regardless of their ability to pay, effectively makes possession of wealth a condition of office, in violation of the Qualifications Clause of the United States Constitution, U.S. CONST., art. I, § 2, cl. 2. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (provision denying ballot access to congressional candidates who have served certain number of terms in office violates Qualifications Clause). The District Court appears to have dismissed Biener's Qualifications Clause claim out of the mistaken assumption that non-indigents cannot suffer effective exclusion from the ballot on the basis of wealth. *See Biener,* 2003 WL 151232 at *3 (noting that Biener did not allege indigence and that the Delaware statute allows exceptions for indigent individuals). However, as discussed *supra*, this reasoning ignores the hardship that the statute imposes on non-indigent candidates who are unable to pay the fee without an undue burden. The court's failure to perceive the potential burden on non-indigent candidates led it to erroneously conclude that Biener "has failed to explain…how the present state law imposing a procedural fee requirement is, in fact, a substantive wealth qualification 'dressed in ballot access clothing.'" *Id*. at 7.

The *U.S. Term Limits* decision holds unconstitutional any ballot regulation which "has the likely effect of handicapping a class of

candidates" for federal office. 514 U.S. at 836. "The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office." *Id*. at 832-33. The decision notes that electoral regulations upheld in previous cases "were…constitutional because they regulated election *procedures* and did *not even arguably* impose any substantive qualification rendering a class of potential candidates ineligible for ballot position." 514 U.S. at 835 (first emphasis in the original, second emphasis added). Delaware's filing fee statute has precisely such an exclusionary effect, as discussed *supra*. After *Bullock* and *Lubin*, it is not open to the defendant-appellees to argue that a discriminatory filing fee constitutes a reasonable ballot regulation.

The *Term Limits* decision notes that "[s]tates are...entitled to adopt 'generally applicable and even handed restrictions that protect the integrity and reliability of the electoral process itself," 514 U.S. at 834, quoting *Anderson*, 460 U.S. at 788, and the decision cites with approval state regulations which avoid voter confusion, ballot overcrowding, and frivolous candidacies. *Id*. However, the *Bullock* and *Lubin* decisions established that filing fees are not a legitimate means of serving these interests, as discussed

supra. *See Bullock*, 405 U.S. at 145-46; *Lubin*, 415 U.S. at 717.[11] Because Delaware's fee excludes some non-indigent candidates based on a factor bearing no relation to their electoral viability, it is not a valid ballot regulation but rather an unconstitutional qualification. *See Campbell v. Davidson*, 233 F.3d 1229, 1233 (10th Cir. 2000) (ballot requirement that candidate be registered to vote is a qualification rather than valid regulation because it "does not advance ballot housekeeping by limiting access to the ballot based on electoral support; instead it limits access based on other exclusionary measures"); *see also Schaefer v. Townsend*, 215 F.3d 1031, 1038-39 (9th Cir. 2000) (requirement that candidates reside in state at time of filing nomination papers violates Qualifications Clause).

[11] In briefing below, the defendants cited several cases approving of filing fees as a means of ballot regulation, but none are availing. Some of these decisions uphold Florida's fee statute, which has a signature alternative available to any candidate. *Green*, 155 F.3d at 1338; *Little*, 19 F.3d at 5; *Harris*, 922 F.Supp. at 590; *see also Adams*, 511 F.2d at 702-3 (denying relief to plaintiffs who were unwilling rather than unable to pay fee). Two other decisions that the defendants relied on below pre-date *Bullock*, and their approval of mandatory filing fees is not good law. *Bodner v. Gray*, 129 So.2d 419 (Fla. 1961); *Fowler v. Adams*, 315 F.Supp. 592 (M.D. Fla. 1970). *Fowler* even states, "Nor may the right to have one's name on a ballot as a candidate for public office without paying a qualifying fee be equated with the right to vote without paying a poll tax." 315 F. Supp. at 596, citing *Harper*, 383 U.S. at 666-67. This is precisely contrary to the Supreme Court's later holding in *Bullock*. 405 U.S. at 142-144

The district court also appears to have mistakenly relied on two cases interpreting state constitutions, both of which pre-date *U.S. Term Limits*. *See Biener*, 2003 WL 151232 at *3, citing *Cassidy v. Willis*, 323 A.2d 598, 602 (Del. 1974) and *Bodner v. Gray*, 129 So.2d 419 (Fla. 1961). *Cassidy*, interpreting the Delaware constitution, first concludes that the plaintiffs were not excluded from the ballot because they were able but unwilling to pay the filing fee, and had not even challenged the reasonableness of the fees. 323 A.2d at 601. The court then goes on to hold that a filing fee "does not *per se* add to the qualification for office" and that the state may "require payment of a *reasonable* filing fee and, standing alone, that is not an invalid addition to the qualification for office." *Id*. at 602 (emphasis added). This language leaves open the possibility that a plaintiff claiming to suffer a burden from the fee might prevail; indeed, in responding to a petition for reargument, the court stated, "We have emphasized that this certification involved a limited record… Unquestionably, the case points up critical weaknesses in the Delaware filing fee scheme… But, litigating for themselves…plaintiffs are not entitled to relief." *Id*. at 603. The instant case is distinguished from *Cassidy* because here the plaintiffs claim that certain non-indigent candidates may indeed be unable to pay the fee without an undue burden and therefore the fee is exclusionary. The *Bodner* decision, which pre-dates

Bullock and *Lubin* as well as *U.S. Term Limits*, altogether ignored the exclusionary effects that filing fees have when imposed on those unable to pay. 129 So.2d at 420-21.

In its discussion of the Qualifications Clause, the Supreme Court has drawn heavily upon evidence that the framers of the U.S. Constitution intended to prohibit additional requirements for office, in particular qualifications based on wealth and property. "This egalitarian theme echoes throughout the constitutional debates," wrote Justice Stevens, quoting James Madison's famous passage in The Federalist No. 57:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

U.S. Term Limits, 514 U.S. at 819, quoting The Federalist No. 57, at 351. The decision goes on to marshal further evidence that rank and property were rejected as qualifications for office. *See id*. at 819-820 an n.30. It would be entirely inconsistent with these egalitarian founding principles to admit wealth as a de-facto qualification when it was explicitly rejected as a de-jure qualification.

CONCLUSION

Amicus respectfully requests that the decision of the court below be reversed.

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Respectfully submitted,

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