In the

Supreme Court of the United States

DONALD PAUL LUBIN, et al.,
Petitioners,
v.
LEONARD PANISH,
Respondent.

No. 71-6852

Washington, D.C.
October 9, 1973

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LEONARD PANISH, Respondent	:	

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Tuesday, October 9, 1973.

The above-entitled matter came on for argument at 1:50 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES

MARGUERITE M. BUCKLEY, ESQ., 226 San Juan Avenue, Venice, California, 90291, for the Petitioners.

EDWARD H. GAYLORD, ESQ., Division Chief, 648 Hall of Administration, 500 West Temple Street, Los Angeles, California, 90012, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-6852, Lubin against Panish.

Miss Buckley.

ORAL ARGUMENT OF MARGUERITE M. BUCKLEY, ESQ.

ON BEHALF OF THE PETITIONER

MISS BUCKLEY: Mr. Chief Justice, and may it please the Court:

I am counsel for Donald Lubin, the petitioner in this case, both individually and on behalf of members of his class.

This case first began a year ago in February, at which time twenty-two people who were desirous of becoming candidates in the forthcoming elections, came to me and we all proceeded to the office of the Registrar, Recorder-Registrar, in the County of Los Angeles.

Included among these twenty-two people, were men and women, black and white, mostly Peace and Freedom Party members, but also two members of the Democratic Party, a member of the Republican Party and a member of the American Independent Party.

They had two things in common. They wanted to be candidates because they had something to say to the electorate and they could not afford to pay the filing fee.

Now there was one other distinction also. That was

that most of the people who wanted to become candidates were running for a primary position, a political office which required them to be a member of the party. But in county and city elections in California, most of the offices are non-partisan. And, therefore, Donald Lubin, who wished to run for the office of Board of Supervisors, was running in a general election, not a primary election. He was not a member of a party for purposes of ballot status.

We filed a writ of mandamus, asking both the Recorder-Registrar of the County of Los Angeles and the Secretary of State of California to issue nomination papers to these people without the necessity of paying fees.

We were granted a temporary injunction by Judge Cole of the Los Angeles Superior Court and an alternate writ was set for hearing on March 6th. At that time, Judge Wenke, sittin in the Los Angeles Superior Court, held that as a matter of law, Bullock applying, that as a matter of law, California fees were reasonable and the fact that there was no alternative did not matter under Bullock.

Thereafter, I filed another writ of mandate in the Appellate Court in California, a procedure which is alternate to an appeal.

Q Miss Buckley, would Judge Wenke's ruling have been appealable itself to the District Court of Appeal, had you chosen to go that route?

MISS BUCKLEY: Yes, but it would have been meaningless in terms of relief for our client because we could never have gotten any kind of hearing before the elections were to be held.

The only reasonable choice we had was to go by way of writ of mandate to the Appellate Court.

To give them the best opportunity to rule reasonably, we attached a copy of the transcript of the hearing in the lower court.

We were denied without hearing, and we promptly filed a writ of mandate in the Supreme Court, and, again, the transcript of the hearings, including Judge Wenke's statement at page 3, to the effect that it appears to the Court that the fees are reasonable as a matter of law, was before the Supreme Court. And they denied the mandate without a hearing.

Q Under California law, is that necessarily a determination on the merits, their denial without hearing of a petition for an extraordinary writ?

MISS BUCKLEY: Inasmuch as they had the complete proceedings of the lower court, I know of no case, Your Honor --

Q This wasn't certiorari though, I mean, where you are trying to get before them. This was a petition for an original writ of mandate, wasn't it?

MISS BUCKLEY: But it presented to the court all of

the material which was before the lower court, Your Honor.

Q And then their denial without hearing, you say, then, is necessarily a decision on the merits. They don't in their practice occasionally simply deny discretionarily?

MISS BUCKLEY: I have no knowledge of that, Your Honor.

And so, we are now here before --

Q Writ of mandate in California is an extraordinary writ, I assume?

MISS BUCKLEY: Yes, Your Honor.

Q Well, isn't that the answer? Extraordinary writ is the opposite of an appeal, isn't it?

MISS BUCKLEY: Yes, Your Honor, but the particular route that we took is recognized in California law.

Q Miss Buckley, while you are interrupted, let me ask, has the California law with respect to write-ins been changed since this case developed?

MISS BUCKLEY: Justice Blackmun, it has not been changed. And, even if it were, I submit to this Court that write-in's are not a suitable alternative.

Q You would feel that your case is no weaker if write-in's were permitted?

MISS BUCKLEY: That's correct.

Q Without payment of fee.

MISS BUCKLEY: That's correct. And, at a later point,

I will discuss the differences between the write-in and the position on the ballot, because it makes a difference -- No, Your Honor, since you've raised the question now, I will answer it now.

In a write-in situation, and, in the first place, Donald Lubin had a territory that covered 600,000 people. As a write-in candidate, he would be required to make his name known to those people not only well enough so that they recognized it on the ballot, but so that they could remember it to write it down.

Now, I cited in my reply brief, an instance in California, where we had a case of fraud. A man by the name of Vicenzia was placed on the ballot to take votes away from a man by the name of Valencia. And the circumstances around that particular filing, made it obvious that there was only one reason for that filing to be done. And that was that voters could even make the mistake between Vicenzia and Valencia and not be able to vote for the man that they wanted to.

How much more difficult would it be for them to remember the man's name to write it down as a write-in candidate

Secondly, as a candidate on the ballot, you are entitled to all sorts of things. Number one, you are entitled to equal time on radio and TV.

Number two, every major newspaper has a practice in

Los Angeles County, for instance, of writing articles on the ballot candidates at least once, and possibly twice, during the campaign.

Q Is a write-in candidate, an established write-in candidate, not entitled to equal time on television?

MISS BUCKLEY: I do not believe so, Your Honor, because until he has in some way established himself as a write-in candidate, he is just running around telling people, "Vote for me." But, until he complies with the provisions of the Code, including paying the fee, he is not entitled even to have his votes counted.

Q But is this a Federal Communications Commission ruling that you are relying on or just, kind of, your own judgment of what the law ought to be?

MISS BUCKLEY: I am relying on the fact that as a candidate I am aware of how difficult it was for even established candidates to get equal time from the stations, as a practical matter.

Not all candidates, particularly poor candidates, who would be the only people who are being write-in candidates, would have even less resources at their command to force the stations, for instance, to give them equal time.

And that brings up another point. If, what you offer as an alternative is a write-in campaign, you are placing a much greater burden on those people who cannot afford even, in

many cases, the beginning filing fee. And, what you are requiring them to do is additional kinds of work that will require more resources than the normal candidate. You are putting them in an unfair position and a different kind of position than those people who can afford to pay the fee.

Q How unkind is it? A man has not enough money to put up the filing fee, and you say, therefore, he is put under additional burden by not being able to go out and get people to know him. Well, if I understand you, he couldn't get out there anyhow.

MISS BUCKLEY: That's not true, Your Honor. And I cited an example from our last election, where a Democratic candidate who, because of Chote v. Brown and the filing of this suit, was able to get a place on the ballot. And, as a result, he spent -- he would have spent $450 in order to be a candidate for Congress. He did not have that kind of money. He spent $138 of his own money and $40 from supporters, and he gained 33% of the vote, or 17,000 votes.

Now, the alternative is --

Q Well, I know of a candidate who didn't have to go by the pauper route but he paid less than $100 and was elected a senator.

MISS BUCKLEY: But, Your Honor, in our State, he would have had to pay over -- he would have had to pay for the privilege of --

Q No, my whole point is, being factually correct, if the man is broke and hasn't got a nickel, is there any way under the sun he is ever going to be known to anybody?

MISS BUCKLEY: Yes, Your Honor. In fact, one of the important things --

Q Well, how is it possible? The only way it is possible if somebody gives him some money.

MISS BUCKLEY: Justice Marshall --

Q Am I right?

MISS BUCKLEY: No, you are not. May I say with all due respect, because what will happen is the same thing that happened to our Democratic candidate who went around and knocked on doors, and thereby brought more --

Q How many doors did he knock down?

MISS BUCKLEY: Well, he got 16,000 votes.

Q You mean that he went to 16,000 doors and knocked on them?

MISS BUCKLEY: Yes.

Q Oh, okay.

MISS BUCKLEY: Not only that, Your Honor, but we presently have a potential candidate for Democratic Governor who fortunately doesn't have to file forma paupus, but he doesn't have very much money, and he is walking the entire State of California, thereby getting free publicity, both from TV and radio and newspapers.

So it is possible, and it is not necessarily, you know, going to be the result that somebody who is able to avoid paying a very large fee of $850 or $1,000 is going to win the election. But the important thing is that persons not be barred from the political process. And I think this is what we are talking about.

Q But, that's an entirely different argument from all of these things about he can't get on TV, and what have you. Is your argument that he can't be discriminated against solely because he doesn't have $850? That, and no more. Is that your argument?

MISS BUCKLEY: Yes, Your Honor. But you ask -- but I have been getting questions about the practical results, and I agree that the practical results are not at issue here. What is at issue is whether we can deny people who cannot afford to pay for the privilege of running an opportunity to participate meaningfully in the political process.

And, I think that when we look at the fact that the United States, which is one of the greatest democracies, has a lower voting turnout than many of the other democracies, according to the New York Times, then we have to begin to ask why. And part of why is because in this country approximately 25% of the people are on a poverty standard of living.

According to the United States -- I was director of a poverty neighborhood legal services, and I remember our

guidelines very well, $3,500 for a family of four. And yet the Bureau of Labor Standards says that you need $7,000 for a family of four.

Well, if you don't have enough money to feed your family, how are you going to be able to take part in the political process? And, if, in addition, people who want to represent you and who come from your own class and don't have money either, can't even get on the ballot, then you don't want to vote.

Now, I think, though, that this Court has made it quite clear that the rights of voters are intertwined with rights of candidates, but I think that it is time for the Court to make the decision that there is a right to be a candidate, to take a forthright position and say that you cannot have elections without candidates.

Q You have mentioned the fact that a very large percentage of voters do not vote in this country.

MISS BUCKLEY: Yes, Your Honor.

Q Are you familiar with some of the studies which have come to the conclusion, for whatever the conclusion may be worth, that one of the reasons is -- for the low voter turnout, not the only reason, but one of the reasons is the excessively large number of people on the ballots, the long and confusing ballots they must deal with, either on a voting machine or on a paper ballot?

MISS BUCKLEY: Yes, Your Honor, I understand that has been --

Q Would your approach tend to increase the number of candidates running for public office?

MISS BUCKLEY: Your Honor, I believe that there is an alternative, and in my brief we have discussed the fact that you do need to, in some ways, make sure that your ballot contains a reasonable number of people, and people who are reasonably serious. But that can be taken care of by a requirement of petitions and signatures.

New York, which is a rival to California, you know, in every way, handles this matter very well with petitions. And they don't worry about an unwieldy ballot, because the very act of requiring signatures also means that the candidate has to get out in advance and make himself or herself known to the people in the community.

Q Well, because there is another good way, or perhaps even another better way, does that lift it to a constitutional issue?

MISS BUCKLEY: Well -- but, Your Honor, we are dealing with the very basis of our society. We are dealing with the political system. Now, unlike -- I would like to point out that not only do Articles 1 and 2 require elected legislature and executives, but that Article 4, Section 4, provides that the United States shall guarantee to every State

a republican form of government, and a republican form of government means citizens who are entitled to vote.

Q Are you familiar with the Pacific Telephone case, Miss Buckley?

MISS BUCKLEY: No, Your Honor, I am not.

Q That's the case where this Court held that the Republican Form of Government clause was not jucdiciable and was not enforceable by the courts.

MISS BUCKLEY: Well, Your Honor, I think that this Court has already, in fact, in San Antonio v. Rodriguez, in which you were dealing with an educational problem, that you took many pages of decision to deal with the fact that the electoral process is one of the most important processes to our form of government.

And, I only mention the Constitution as a basis, and I am not unaware of the fact that this Court has time after time after time stressed the importance of voting, that it is, in fact, one of the explicit rights guaranteed in the Constitution, and, therefore, has to be protected in the highest way.

I am merely --

Q When did the Court ever say that?

MISS BUCKLEY: Well --

Q The right to vote is one of the explicit rights guaranteed in the Constitution?

MISS BUCKLEY: Well, in Rodriguez, you made the distinction between implicit and explicit, and you said that items such as education and very many other important kinds of rights may be very important, but were not protected by the Constitution because they were not explicit. And then you went in, and I assume that you -- I may have misread your opinion, although I did read it several times -- we then -- you then went into the importance of the electoral process to our system.

Q We all would agree that it is important --

MISS BUCKLEY: Not only that, but you did what I thought was -- for my purposes in preparing for this, Your Honor -- you did lay out very carefully the line of cases in which you dealt with the importance of this right.

Q Yes.

MISS BUCKLEY: And my only -- I am attempting here to point out that the right to be a candidate may, one day in the future in the Year 2000, if we use R. Buckminster Fuller's notion of having all of the people come in and vote via two-way television, we may be able to do away with the necessity of candidates and representatives. But, right now, that's our system.

Q Yes. And is there any question about the fact that your client is a pauper. I gather there is not, reading page 10 of the Appendix. He says his average monthly income during

the year 1972 has been the sum of no dollars. And that's sworn to, was it?

MISS BUCKLEY: Yes, it was, Your Honor.

Q Under the penalty of perjury -- that the foregoing is true and correct. That's never been questioned, the bona fides of his poverty, has it?

MISS BUCKLEY: No, Your Honor. He is a member of --

Q His absolute inability to pay this fee of $702.

MISS BUCKLEY: That's true, Your Honor.

Q I don't think -- do you need to advance the proposition that there is an explicit, to use your word, Constitutional right to be a candidate for office in order to make an Equal Protection claim?

MISS BUCKLEY: No, Your Honor.

Q I suppose there is not an explicit right to run an unregulated laundry, and yet Yick Wo says you can't regulate some people and not regulate others, with an evil eye and an uneven hand.

MISS BUCKLEY: But in Turner v. Fouche, Your Honor, I think the Court pointed out very well that once you open a position to some people then you cannot discriminate based on those kinds of factors which are protected by the Fourteenth --

Q Precisely, whether or not the right to the position is a constitutional right. Isn't that your argument? At least part of it?

MISS BUCKLEY: Yes, Your Honor.

The reason I suggested the second part of the question had to do with the question which the members of this Court presented to me, that is, whether it made a difference whether it was individual poverty or that of his group. And I took that question to mean I should address myself to the right of the candidate versus the right of his supporters, or the voters.

Q Miss Buckley, you referred to the alternative of nominating petitions --

MISS BUCKLEY: Yes, Your Honor.

Q -- have you given any thought to what percentage of the people who voted in the last election, for example, might be an appropriate yardstick to determine the number of signatures required?

MISS BUCKLEY: Well, Your Honor, if you are talking about a primary election, I would think that it would not be a percentage of the total who voted, but the total who voted in that particular party. Because in California we have four parties, two of which are minor parties. To demand that they have the same percentage of the vote as those who belong to the majority party would work a great hardship. They might not even have that many people in their party.

For instance, if you ask for 2% of the population, the American Independent may not even have that many people in

the party right now, and it would require 100% of their membership.

So, I think you have to schedule it, and I think it should be a minimum amount, something, say, between 1,000 and 5,000 signatures in a fairly large district, and something scaled down in a smaller district.

Q Assume you had a requirement for 5,000 petitions in the Los Angeles District --

MISS BUCKLEY: That would be a statewide office, Your Honor.

Q What would you assume for Los Angeles?

MISS BUCKLEY: Well, I believe that there were 30,000 -- for instance, in the Peace and Freedom Party, they had 30,000 members registered and Los Angeles County, of course, course, covers 400 miles. I covered them all, so I am aware of them.

I think that in that case you might want -- 1% of 30,000 would only be 3,000 signatures.

Q What do you think it would cost to obtain 3,000 signatures?

MISS BUCKLEY: Well, I think, Your Honor, that poor people have learned to walk. And I think they've learned to get out and knock on doors. They may not be able to contribute money, and I documented fairly well the fact that, although we now have the opportunity to mark off on our income

tax forms the right to give a dollar to the party of our choice, if we belong to a major party, the -- only 3% of the people nationwide bothered to check off to give money to their major party. So, for people who may not even be able to file income tax returns, they cannot give money. But they will go out and knock on doors. They will go out and collect signatures.

Q Are you required to have a notary public witness the signatures on nominating petitions?

MISS BUCKLEY: We require, in California, that the person who is collecting the signatures gets -- certifies that the -- that he has, in fact, obtained those signatures from the people that he says he did.

Q That doesn't have to be a notary public?

MISS BUCKLEY: On some, Your Honor, they do, but California provides for certification rather than necessity of having a notary public.

Q Most notaries charge fees for doing it.

MISS BUCKLEY: Well, except that there is also a provision in the California law that says notaries may not charge fees for political type of documents.

MR. CHIEF JUSTICE BURGER: Mr. Gaylord.

ORAL ARGUMENT OF EDWARD H. GAYLORD, ESQ.

ON BEHALF OF THE RESPONDENT

MR. GAYLORD: Mr. Chief Justice, and may it please the Court:

There were certain preliminary questions asked. As I understand this election, this was a true primary. In California, you have a primary both for partisan and non-partisan officers. As to partisan officers, only those persons registered with a party can vote in that particular primary. But the local officers and judicial officers are all non-partisan. And every qualified voter who is registered in the district can vote for one of those officers.

Ever since 1926, if in a nonpartisan office a person gets majority, he is then and there elected. And then for him it becomes a general election, but otherwise it remains a primary and the one who gets the most votes and the one who gets second -- the second most votes then is the -- are the two nominated candidates who then go before the voters in the general election in November.

If I am correct, that this was the Fourth District, that happened then, there were two candidates that got the most and next to the most voters, neither one getting majority, and one of them was elected in the general election.

The question was asked, what is the status of a denial opinion by the Supreme Court of a writ of mandate.

There are three Supreme Court cases that definitely hold that the denial by minute order of an application for writ of mandate is simply a refusal by the State Supreme Court to exercise its original jurisdiction, and is not an adjudication on the merits.

I merely bring that up because the question was asked. I am not objecting to the jurisdiction of this Court.

Did Your Honor want me to list the citations or shall I give them to the Clerk, or --

Q You may hand it to the Clerk.

MR. GAYLORD: I'll hand it to the Clerk.

Q I believe Miss Buckley has a copy.

MR. GAYLORD: I'll see that she has a copy.

There was one case before this Court in 1951, where there was a denial by the Court of Appeal, without opinion, and the Court of Appeal certified that they did deny it on a Federal ground, and the Court said it had jurisdiction, but in its discretion,nevertheless, dismissed the case.

Q Your brief proceeds upon the premise that the Court decided the constitutional merits of this case.

MR. GAYLORD: As I say, I am not objecting to the jurisdiction of this Court. When I originally put my response to the petition for a writ of certiorari and asked this Court to take jurisdiction, frankly, the point had not occurred to me. Later, I hardly thought I was in a position to raise a

question, and I would not have raised it, but I was merely answering questions of the Court.

On the write-in votes, I'd like to stress once more that the requirement for a fee in order to have a write-in vote counted was not put in until 1968, therefore, say, in 1967, there was a reasonable alternative to having your name on the ballot. The law was valid then, and under the decisions of both this Court and the Supereme Court of California, which are cited in our brief, if the fee requirement for write-in votes makes this system unconstitutional -- I am not conceding, but even if it does -- it is the 68th Amendment which is unconstitutional and not the original law which has been in effect since 1913.

Q What is the California law on write-in? Does it have to be exactly correct, and the i's dotted and the t's crossed?

MR. GAYLORD: No, it is not that. The difficulty with the write-in law in California, in 1968, they put in a law that a vote will not be counted for a write-in unless the candidate files a notice at least 5 days ahead of time that he is a write-in candidate and pays a fee he would have paid to get his name on the ballot.

Q I understand that, but there are some States where if the name -- if you leave out the initial -- it is no good. Is that true in California?

MR. GAYLORD: No, I think the rule in California is

that if it is -- if you can definitely ascertain that the name written in is for this particular individual, the vote will be counted for that individual.

I might concede that write-in may be difficult, but it has been done. Mr. Alice Patterson, for example, in 1936, lost his bid to be renominated by the Republican Party as a member of the Assembly, that's the lower house of California. He distributed pencils, having printed thereon, "Write in Alice E. Patterson," and the party had the exact name, the exact spelling, and he did win the election.

I also cited the very unusual case where a judge was -- a candidate for judge was defeated in the primary, and under the law, at that time, prior to 1926, the name of the winner was the only one on the ballot, and this defeated judge defeated the winner in the final election by write-in. So, it can be done.

Q Suppose the Board of Supervisors of Los Angeles County -- how large a board is that?

MR. GAYLORD: It is a five-member board.

Q All five elected at the --

MR. GAYLORD: All five elected from supervisorial districts of about 1,400,000 people in each district.

Q Each runs in a separate district?

MR. GAYLORD: Each runs in a separate district.

Q They do not run at-large throughout --

MR. GAYLORD: That is correct.

So, there would be the voters in a district with a population of 1,400,000.

Incidentally, I take it that what Mr. Lubin was running for was to be a supervisor with a salary of over $35,000 a year, representing almost three times as many people as a Congressman represents. And, in an office that important, if he had any substantial support whatever he surely would have no difficulty in getting the $701 for a filing fee.

As the New Mexico Court said, which I quoted in the brief, that case is now before this Court, I understand, it does not measure the candidates pocketbook but the amount of his support.

Q Mr. Gaylord, in the 68th Amendment, there is a provision reciting the intention of the Legislature that the filing fee shall be used to support the State Commission on voting machines and vote tabulating devices. Has ever any appropriation been made pursuant to that declaration of intent?

MR. GAYLORD: I don't think so. I don't know, but I don't think so.

Q Does that have any legal significance in this case?

MR. GAYLORD: No. We are not contending that this fee is necessary to support the election process. We are contending that it is a test of good faith candidacy.

Q What about the person who has $701, or $7,001, or as

much money as anybody wanted to charge him? Do you think charging him $701 to run for this office is a reasonable measure of his support or his seriousness?

MR. GAYLORD: I think it does help. I concede it is not perfect. It could be that a very well-to-do man or a rich man would run frivolously because $701 means nothing to him, but it is less likely. It does keep out a great many frivolous candidates.

Incidentally, a man like that would be less likely to run just as a lark besides.

And that candidates can do that is --

Q Aren't these the two categories we are comparing, the ones without -- with the $701 and the ones without?

MR. GAYLORD: That is true, but I would say that a man without the $700 is not necessarily barred from putting his name on the ballot if he really has any substantial support.

Now, Miss Buckley seems to illustrate a man --

Q But the other group -- a fellow could easily -- you could conceive of a fellow with $701 putting himself on the ballot whether he has any support or not. It doesn't make much sense, but --

MR. GAYLORD: I agree with that. I agree that that's not a perfect method, but I think it --

Q You think it survives Equal Protection?

MR. GAYLORD: No.

Q Do you think it survives Equal Protection if it is challenged?

MR. GAYLORD: Yes, I do.

Q Even by the strict scrutiny test?

MR. GAYLORD: Yes, I would think so. It is a reasonable way, and what is the alternate?

Q Is it a reasonably necessary way?

MR. GAYLORD: Yes. The only alternate, as I see it, is to require a large number of names, like 1% or 2%, which would be enormous in the support from the district.

Q Mr. Gaylord, is there anything else you do other than put up the money?

MR. GAYLORD: Yes, he does have to collect a few signatures, 35, 40, something like that.

Q That's all? I mean -- what is it that you find that he is a responsible person, other than money?

MR. GAYLORD: Well, the qualifications of a supervisor are merely that he be a resident of the district. The Charter says for one year before election. Some of the States -- that is the only requirement to be a candidate for supervisor.

Q Oh, no. The $700-some.

MR. GAYLORD: And to go on the ballot he must put up the --

Q There is nothing other than the money that determines that he is a responsible person?

MR. GAYLORD: That is correct.

I can't think of any -- in a political office like that, I can't think of any Civil Service examination, or anything like that, that would be practical.

Q Wouldn't a man with $1,500 be more responsible than a man with $750?

MR. GAYLORD: He might be a little more responsible, but --

Q So the more he had, the more responsible he'd be?

MR. GAYLORD: That's correct.

And there is a question of drawing lines.

Q I hope that's not everybody's theory.

MR. GAYLORD: Well, I mean a man who is 18 on the day of election can vote and yet you can't say he is much more learned than the man who is two days younger, but you do have to draw the line somewhere.

As this Court itself said in Bullock v. Carter, that fee was too high, but not all fees are invalid, and there comes a time when the fee becomes too high. Now, where you draw the line is a difficult question.

Q Let me go back to my inquiry about the absence of any legislative appropriation of these fees. How do you answer the suggestion that these fees are nothing more than a revenue raising device?

MR. GAYLORD: Well, I would say this, that whether

there is a specific appropriation or not the money spent on elections is probably far greater than the fees collected, and if that is true, does it make too much difference that there isn't a specific appropriation that this particular fund is used for this particular purpose?

Miss Buckley mentions in her brief that very few people took advantage of Give a Dollar to the Party of Your Choice. Well, it is very easy to see that great many people may not be particularly concerned with a particular party, as a whole, but may be very much concerned with a particular candidate, especially a nonpartisan candidate, where a person caring nothing at all about party would be very interested. So I don't think that's a good illustration.

She also raises in her brief, although she hadn't said it orally, that there is a provision that you have to get at least 1% of the vote to get a nomination. That may work some hardship in the case of some very small political parties, but in the case of a nonpartisan it is almost inconceivable that somebody would get less than 1% of the vote and yet be the second person of all those voted for. You'd have to have at least 52 candidates, and a very unusual situation to have that, so it would be practically impossible for a person to get second in amount of votes in a nonpartisan office and not have at least 1%. And, even if that should happen, it would be practically impossible that the person who got that few votes in

the primary would then receive a majority in the general election.

A great deal that Miss Buckley has said, I think, is within her brief and has been answered in our brief and unless the Court has further questions, that's all I have.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gaylord.

Miss Buckley, you have about six minutes left, if you wish to use them.

MISS BUCKLEY: Thank you.

REBUTTAL ORAL ARGUMENT OF MARGUERITE M. BUCKLEY, ESQ.

ON BEHALF OF THE PETITIONER

MISS BUCKLEY: Mr. Chief Justice, and may it please the Court:

I would -- in respect to the question of whether the Supreme Court of the State of California had considered the matter prior to denying it, I would like to draw to your attention the fact that the -- in my experience, the Supreme Court of the State of California generally, when presented with a writ of mandate for the first time, which it does not believe it has sufficient information to deal with, kicks it back to the Appellate Court for decision, and that same thing happened in the case of Zapata v. Davidson, 224 Calif. Appell. decision 3d, 823, on this very question of the filing fees in the elections that we were talking about. That case was sent to the Appellate Court in April, one month after the Supreme Court had

denied us summarily. And, when presented with a writ of mandate on the exact same question, they sent it to Zapata v. Davidson. And the Appellate Court determined that the filing fees were, in fact, unconstitutional based on Bullock, so I would like, at this time, to draw your attention to a case which has not been cited in my brief, and that is Zapata v. Davidson, 24 CA 3d,823, and that is a 1972 decision.

Secondly, I would like to discuss very briefly the question of the reasonableness of the California fee. When counsel leads you to believe that Texas was so different from California, I believe he misstates the question, because the Texas fees, in some case, on the State level, were less than those charged in California.

As I read the Texas statute, the real high fees, the $6,000 and $8,000, were primarily on county levels, but that the State positions ran from $150 to $850 or $1,000, and that's exactly where California is at.

Furthermore, the case of Socialist Party v. Ull was cited as having legitimized California filing fees. But, that's a 1909 case, and at that time California had filing fees ranging from $10 to $50. It had no relationship to the emoluments of office.

Q If a person were a pauper, it wouldn't make any difference if the filing fee were $5 or $500, if he didn't have anything.

MISS BUCKLEY: That's true, Your Honor, but --

Q In that case, was the plaintiff a pauper?

MISS BUCKLEY: No, I don't believe so, Your Honor, but the question that was raised was not a consti -- a U.S. constitutional question. It was a California Constitution question.

Q I wasn't familiar with that case.

MISS BUCKLEY: But, in that case, the dicta was to the effect that while these fees were reasonable, raning from $10 to $50, that if the fee structure had been based on the emoluments of office, as the present system is, that they would have struck it down, because such a fee would have no relationship to what it costs to run an election. It would have no relationship to what it costs to file papers.

Q That case was decided as a matter of California law, was it?

MISS BUCKLEY: Yes, it was, in 1909, and it is the case which my opponent relies upon, and which I believe Judge Wencke relied upon in saying that California fees were reasonable.

Q I have your impression, from your earlier argument, Miss Buckley, that if the fee were $100 you would still be here, is that right, or not?

MISS BUCKLEY: Yes, Your Honor.

Q $10?

MISS BUCKLEY: Well, Your Honor, I really object to the --

Q You really object to any fee, don't you?

MISS BUCKLEY: Well, if it costs $10 to print up the forms for nominating, then I think perhaps that could be reasonably explained.

Q Well, I understood your position to be that you can't put a price tag on any candidacy for the purpose of discouragin candidates.

MISS BUCKLEY: You are right, Your Honor.

Q So I misunderstood it. I thought that your case depended upon the fact that your client was a pauper.

MISS BUCKLEY: It does. He is a pauper. He cannot afford to pay the fee.

Q Then your argument is not so broad as indicated in my brother Brennan's question, is it?

MISS BUCKLEY: Well, what I was suggesting, Your Honor, was that the case has two bases, really. You can -- and I am suggesting to the Court that we ought to go beyond just the Fourteenth Amendment and beyond the idea that paupers should have the fees removed, but we should be looking to the fact that all people have a right to participate in the politic process, because my client, Mr. Lubin, is a poor person, but he is also something else. He has in common with me, and with all of you, that he is a citizen of the United States, and,

as such, has a right to participate. And I think that placing any kind of a fee which has no relationship to the actual cost of filing the papers is interfering with the rights of all citizens.

Q You think the State has no interest in preventing, if they can, having 250 people running for this particular office?

MISS BUCKLEY: Not by using fees, Your Honor, not by using a monetary standard.

Q Well, do you concede they have an interest in doing it in some way?

MISS BUCKLEY: Yes. And I suggested as an alternative --

Q By the petitioning process.

MISS BUCKLEY: Yes, Your Honor.

Q Your broader argument then is not an Equal Protection argument, is it?

MISS BUCKLEY: No. I am suggesting to this Court that I am giving you the opportunity, if you wish to take it, to broaden the scope of what you have done heretofore.

Q What clause of the Constitution would you suggest we use to broaden it?

MISS BUCKLEY: Well, I think, Your Honor, that when we are talking about the rights of people to participate in the political system we are talking about the -- I can't give

you the exact part of the Constitution, but it seems to me --

Q Could you just refer to a number or a section?

MISS BUCKLEY: Well, what I am suggesting, Your Honor, is that the Constitution, as a whole, protects the political process. It was designed to assure that we would continue to have a republican form of government that all of the people would be able to participate by voting. Now, the very provision that you use to sustain --

Q How in the world can you say that? When the Constitution was adopted, there was a large block of people in this Country that couldn't vote.

MISS BUCKLEY: You are right, Your Honor, but --

Q Well, how could it have been set up to do that if it didn't allow it?

MISS BUCKLEY: Well, at that point, the problem with our system was that it did not recognize those people as people, and that is to the shame of our country.

Q Yes, but how are you going to extend that now to give everybody the right to vote?

MISS BUCKLEY: Well, I believe that, for instance, when -- well, we've already given everybody the right to vote by all the decisions which this Court has made.

Q The only decision this Court has made is that you shall not discriminate, but I want you to show me the one that

says you have the right to vote.

MISS BUCKLEY: Well --

Q And then, after you get that one, show me the right to run for office.

MISS BUCKLEY: Well, I --

Q I have trouble finding that one.

MISS BUCKLEY: Well, I am remembering several cases, if I may --

Q Well, don't bring Rodriguez again, please. That involves schools, not voting.

MISS BUCKLEY: Yes, Your Honor. I understand that involves schools.

Well, in Oregon v. Mitchell, your brothers Harlan and Brennan both discussed the fact that under the --

Q I am not talking about discussion. I am saying where they said that there was a right to vote or a right to run for office.

MISS BUCKLEY: Well, both Brennan and Harlan, in Oregon v. Mitchell, said that the right to be a candidate was inherent in the right to vote, and that it was left out of the Fifteenth Amendment because --

Q Because it didn't involve Negroes.

MISS BUCKLEY: They assumed it was already there.

MR. CHIEF JUSTICE BURGER: Well, I think your time is consumed now. Thank you.

MISS BUCKLEY; Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gaylord.

The case is submitted.

(Whereupon, at 2:36 o'clock, p.m., the case in the above-entitled matter was submitted.)