

The Burger Court Opinion Writing Database

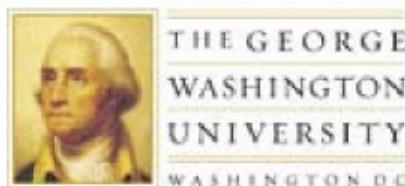
Lubin v. Panish

415 U.S. 709 (1974)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

1st DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: MAR 7 1974

No. 71-6852

Recirculated: _____

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

} On Writ of Certiorari to the
Supreme Court of Cali-
fornia.

[March —, 1974]

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

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

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

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

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1974

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

MEMORANDUM TO THE CONFERENCE:

A second draft of the above will be in your hands soon.

It will (?) satisfy almost everyone.

Regards,



p's 1, 3, 4, 5, 6, 7, 9, 10, 11

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

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 71-6852

Recirculated: MAR 19 1974

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

On Writ of Certiorari to the
Supreme Court of Cali-
fornia.

[March —, 1974]

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

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

CHAMBERS OF
THE CHIEF JUSTICE

March 21, 1974

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

MEMORANDUM TO THE CONFERENCE:

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

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

*Regards
WSB*

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 14, 1974

RE: 71-6852, Lubin v. Panish

Dear Chief:

The suggestions raised by Potter Stewart in his memo to you of March 3, 1974 and the additional one raised by Bill Brennan in his memo to you of March 12, 1974 state just about my views; and if you felt free to revise your earlier circulation to meet those suggestions from Potter and Bill I would be very happy to join your opinion.

W.O.D. by [initials]

William O. Douglas

The Chief Justice
cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 20, 1974

Dear Chief:

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

WW

William O. Douglas

The Chief Justice

cc: The Conference

The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice White

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6852

Circulated:

Recirculated:

3-21

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

On Writ of Certiorari to the
Supreme Court of California.

[March —, 1974]

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion I wish to add a few words, since in my view this case is clearly controlled by prior decisions applying the Equal Protection Clause to wealth discriminations. Since classifications based on wealth are "traditionally disfavored," *Harper v. Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966), the State's inability to show a compelling interest in conditioning the right to run for office on payment of fees cannot stand. *Bullock v. Carter*, 405 U. S. 134 (1972).

The Court first began looking closely at discrimination against the poor in the criminal area. In *Griffin v. Illinois*, 351 U. S. 12 (1955), we found that *de facto* denial of appeal rights by an Illinois statute requiring purchase of a transcript denied equal protection to indigent defendants since there "can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." *Id.*, at 19. In *Douglas v. California*, 372 U. S. 353 (1963), we found that the State had drawn "an unconstitutional line . . . between rich and poor" when it allowed an appellate court to decide an indigent's case on the merits al-

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6852

From: Douglas, J.

Circulate:

MAR 22

Recirculated:

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

On Writ of Certiorari to the
Supreme Court of Cali-
fornia.

[March —, 1974]

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion I wish to add a few words, since in my view this case is clearly controlled by prior decisions applying the Equal Protection Clause to wealth discriminations. Since classifications based on wealth are "traditionally disfavored," *Harper v. Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966), the State's inability to show a compelling interest in conditioning the right to run for office on payment of fees cannot stand. *Bullock v. Carter*, 405 U. S. 134 (1972).

The Court first began looking closely at discrimination against the poor in the criminal area. In *Griffin v. Illinois*, 351 U. S. 12 (1955), we found that *de facto* denial of appeal rights by an Illinois statute requiring purchase of a transcript denied equal protection to indigent defendants since there "can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." *Id.*, at 19. In *Douglas v. California*, 372 U. S. 353 (1963), we found that the State had drawn "an unconstitutional line . . . between rich and poor" when it allowed an appellate court to decide an indigent's case on the merits al-

Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE WM. J. BREWSTER, JR.

March 12, 1974

RE: No. 71-6852 Lubin v. Panish

Dear Chief:

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

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 20, 1974

RE: No. 71-6852 Lubin v. Panish

Dear Chief:

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

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 8, 1974

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

Dear Chief,

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

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

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

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

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

Sincerely yours,

C.S.
1

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 21, 1974

71-6852 - Lubin v. Panish

Dear Chief,

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

Sincerely yours,

P.S.
P.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 8, 1974

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

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 21, 1974

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

Dear Chief:

Please join me.

Sincerely,

T.M.
T. M.

The Chief Justice

cc: The Conference

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6852

Circulated: 3/11/74

Recirculated: _____

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

On Writ of Certiorari to the
Supreme Court of Cali-
fornia.

[March --, 1974]

MR. JUSTICE BLACKMUN, concurring in part.

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

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

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

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

2nd DRAFT

From: Blackmun, J.

Circulated:

SUPREME COURT OF THE UNITED STATES

No. 71-6852

Recirculated: 3/12/74

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

On Writ of Certiorari to the
Supreme Court of Cali-
fornia.

[March --, 1974]

MR. JUSTICE BLACKMUN, concurring in part.

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

In addition to a proper petitioning process suggested by the Court in its opinion, *ante*, p. 9, I would also regard a write-in procedure, free of fee, as an acceptable alternative. Prior to 1968, California allowed this, and write-in votes were counted, although no prior fee had been paid. But the prior fee requirement for the write-in candidate was incorporated into the State's Elections Code in that year, Laws 1968, c. 78, § 3, and is now § 18603 (b) of the Code. It is that addition, by amendment, that serves to deny the petitioner the equal protection guaranteed to him by the Fourteenth Amendment. Section 18603 (b) appears to be severable. See *Frost v. Corporation Comm'n*, 278 U. S. 515, 525-526 (1929); *Truax v. Corrigan*, 257 U. S. 312, 341-342 (1921). The Code itself provides for severability. § 48.

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

pp. 1,2

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Two Blackmun, J.

No. 71-6852

Circulated:

Recirculated: 3/13/74

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

On Writ of Certiorari to the
Supreme Court of California.

[March --, 1974]

MR. JUSTICE BLACKMUN, concurring in part.

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

In addition to a proper petitioning process suggested by the Court in its opinion, *ante*, p. 9, I would regard a write-in procedure, free of fee, as an acceptable alternative. Prior to 1968, California allowed this, and write-in votes were counted, although no prior fee had been paid. But the prior fee requirement for the write-in candidate was incorporated into the State's Elections Code in that year, Laws 1968, c. 78, § 3, and is now § 18603 (b) of the Code. It is that addition, by amendment, that serves to deny the petitioner the equal protection guaranteed to him by the Fourteenth Amendment. Section 18603 (b) appears to be severable. See *Frost v. Corporation Comm'n*, 278 U. S. 515, 525-526 (1929); *Truax v. Corrigan*, 257 U. S. 312, 341-342 (1921). The Code itself provides for severability. § 48. That, however, is an issue for the California courts to decide.

I would hold that the California election statutes are unconstitutional insofar as they presently deny access to

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

APP. 1.2

4th DRAFT.

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-6852

Recirculated: 3/20/74

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

[March —, 1974]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in part.

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

In addition to a proper petitioning process suggested by the Court in its opinion, *ante*, p. 10, I would regard a write-in procedure, free of fee, as an acceptable alternative. Prior to 1968, California allowed this, and write-in votes were counted, although no prior fee had been paid. But the prior fee requirement for the write-in candidate was incorporated into the State's Elections Code in that year, Laws 1968, c. 78, § 3, and is now § 18603 (b) of the Code. It is that addition, by amendment, that serves to deny the petitioner the equal protection guaranteed to him by the Fourteenth Amendment. Section 18603 (b) appears to be severable. See *Frost v. Corporation Comm'n*, 278 U. S. 515, 525-526 (1929); *Truax v. Corrigan*, 257 U. S. 312, 341-342 (1921). The Code itself provides for severability. § 48. That, however, is an issue for the California courts to decide.

March 11, 1974

No. 71-6852 Lubin v. Panish

Dear Chief:

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

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

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

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

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

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

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 21, 1974

No. 71-6852 Lubin v. Panish

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

1fp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 11, 1974

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

Dear Harry:

Here is a possible approach to the proposed insertion in your partially concurring opinion. As I said on the telephone, any language that you choose, any place that you choose it, would suit me fine so long as the idea is gotten across. You could re-write the first sentence of the second paragraph to read as follows:

"In addition to the petitioning process mentioned in the Court's opinion, I would also regard a write-in procedure, free of fee, as an acceptable alternative."

Sincerely,



Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 13, 1974

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

Dear Harry:

Please join me in your concurring opinion.

Sincerely,

Bill

Mr. Justice Blackmun

Copies to the Conference