



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 18, 1996

Mr. Antonio O. Garza, Jr.
Secretary of State
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Letter Opinion No. 96-005

Re: Constitutionality, as applied to independent and major party candidates, of the provisions of Election Code section 141.063(2)(B), which require that a petition filed in connection with a candidate's application for a place on the ballot contain each petition signer's voter registration number (ID# 35318)

Dear Mr. Garza:

You ask about the constitutionality, as applied to independent and major party candidates, of the provisions of Election Code section 141.063(2)(B), which require that a petition filed in connection with a candidate's application for a place on the ballot contain each petition signer's voter registration number in addition to his name, address, and the date of signing.

You note that *Pilcher v. Rains*, 683 F. Supp. 1130 (W.D. Tex. 1988), *aff'd*, 853 F.2d 334 (5th Cir. 1988), struck down, on First and Fourteenth Amendment grounds, the application of the section 141.063(2)(B) requirement to petitions of parties not on the ballot at the previous general election to have the names of their candidates placed on the next election ballot. To obtain ballot access, such parties must submit to the secretary of state petition signatures of registered voters which, when added to the number of the parties' convention participants, equal the total votes received for gubernatorial candidates at the last election. Elec. Code § 181.006(b)(1). The federal district trial court in *Pilcher*, noted that "[b]allot access restrictions burden two fundamental rights protected by the Constitution, that is, the right to political association and the right to cast votes effectively. . . . In considering the validity of the restrictions challenged in this case, the Court examines whether or not the challenged restrictions are necessary to further compelling state interests." *Pilcher*, 683 F. Supp. at 1134. In its analysis, the *Pilcher* court stated that it followed the criteria set out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983):

The Court first considers the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments. Second, the Court considers and identifies the precise interests which are put forth by the State of Texas as justifications for the burden imposed by the voter registration number requirement. Finally, the Court considers the extent to which the State's interests

make it necessary to burden the Plaintiff's rights. After weighing all these factors in the case at bar, it is the opinion of this Court that the Secretary of State of the State of Texas has failed to show a necessity for the inclusion of the voter registration number with petition signatures on petitions seeking new party ballot recognition.

Pilcher, 683 F. Supp. at 1134.

The *Pilcher* court, in reaching its decision, considered in detail evidence as to the secretary of state's office's procedures for verifying the validity of petition signatures including compliance with the requirement that signers be registered voters (*see* Elec. Code § 141.063(1)), the efforts required by petition circulators to obtain signers' voter registration numbers for inclusion on petitions, the accessibility of records necessary to the secretary's and circulator's tasks in both large counties with computerized records and in other counties, and the necessity of obtaining voter registration numbers to distinguish petition signers with the same names or addresses. *Pilcher*, 683 F. Supp. at 1131-33. The court concluded:

Although the requirement that the voter's registration number be contained in the petition . . . may once have been an important aid in signature verification and in maintaining the integrity of the electoral process, the electronic and computer revolution, together with general record keeping improvements, have made the old requirement a stifling anachronism. . . . [which] now has no constitutionally legitimate purpose and only serves to administratively delay and burden those citizens seeking eligible third-party access to the ballot and thus restricts for all citizens important rights guaranteed to them by the Constitution.

Id. at 1135-36. In affirming the *Pilcher* district court decision, the Fifth Circuit noted that "the district court in the instant case examined whether the voter registration numbers were necessary to the State's asserted purpose, and found they were not. This finding is not clearly erroneous." 853 F. 2d at 337.

However, subsequent to the *Pilcher* proceedings, the Texas Supreme Court in *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712 (Tex. 1990)—in reviewing a mandamus issued by the Fourteenth Court of Appeals not to place on the Democratic Party primary ballot the name of a candidate for justice for the First Court of Appeals for lack, among other things, of voter registration numbers accompanying the signatures on the candidate's petition submitted under Election Code section 172.021—found that whether the voter registration number requirement could be constitutionally applied to the candidate's petition there involved fact questions not resolved by the appeals court and directed that the latter's writ be withdrawn. The Supreme Court stated:

Application of a constitutional balancing test is particularly dependent on a fully-developed factual record. In *Pilcher v. Rains*, applying the balancing test to several of the Texas Election

Code provisions in controversy here, the Fifth Circuit concluded that as applied to the Libertarian Party's candidates on the factual record there presented, the requirement that correct voter registration numbers be listed with the signatures was unconstitutional. Our point is not that the evidence and facts as to Brady would necessarily be the same, nor that the Fifth Circuit necessarily correctly applied the constitutional balancing test, but rather that resolving the constitutional issue necessarily requires factual determinations. . . . The court of appeals [which issued the writ at issue in *Brady*] abused its discretion by adjudicating constitutional issues that necessarily dealt with disputed areas of fact.

Id. at 715-16. (citations omitted).

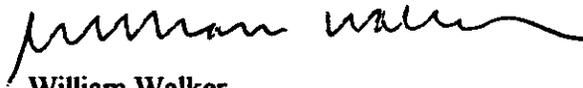
We understand the Supreme Court in *Brady* to have considered that the scope of the *Pilcher* holding was confined to the particular factual scenario developed there. Despite the Fifth Circuit's holding on the arguably analogous party petitions in *Pilcher*, the Texas Supreme Court determined that the constitutionality of application of the voter registration number requirement to major party primary candidate's petitions would require further resolution of factual issues. We think that, following *Brady*, the same must be said with regard to the constitutionality of the voter registration number requirement for the other petitions you ask, those of independent candidates: resolution of the issue would require resolution of fact questions. See Elec. Code § 142.004 (petition requirement for placement of independent candidate's name on ballot). We are unable in the opinion process to take evidence and resolve such factual issues. See, e.g., Attorney General Opinion DM-42 (1991) (whether Real Estate Licensing Act exemption from continuing education requirement violates constitutional equal protection involves questions of fact that cannot be resolved in attorney general opinion). Accordingly, despite the holding in *Pilcher* with regard to petitions of parties for placement of their candidates' names on the ballot, we decline to opine that as a matter of law the voter registration number requirement for major party candidates' and independent candidates' petitions submitted in connection with their applications for places on the ballot is unconstitutional. Resolution of those issues would require findings of fact.

As your other questions appear to be predicated on our opining as matter of law that the voter registration number requirement as applied to major party candidates' and independent candidates' petitions is unconstitutional, we do not reach them here.

S U M M A R Y

Whether the Election Code requirement that petitions of major party candidates' and independent candidates' petitions submitted in connection with their applications for places on the ballot include petition signers' voter registration numbers is unconstitutional involves fact questions which cannot be resolved in the opinion process.

Yours very truly,

A handwritten signature in cursive script, appearing to read "William Walker", written in black ink.

William Walker
Assistant Attorney General
Opinion Committee