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RECENT CASE: THE THIRD CIRCUIT HOLDS THAT
PENNSYLVANIA CANNOT APPLY ITS BALLOT ACCESS LAW
TO TWO SPECIFIC CANDIDATES BUT FAILS TO RULE
ON THE LAW'S OVERALL CONSTITUTIONALITY

I. INTRODUCTION

Pennsylvania's election code requires candidates for public office to pay a filing fee before their names are placed on the general election ballot.¹ Specifically, the code provides that "[e]ach person filing any nomination petition shall pay for each petition, at the time of filing, a filing fee . . . and no nomination petition shall be accepted or filed, unless and until such filing fee is paid."² When the state collects the monies from such fees, the monies become part of Pennsylvania's general treasury.³

Pennsylvania's ballot access law is not unique among the states.⁴ Many states currently charge candidates fees to have their names placed

1. *See* PA. STAT. ANN. tit. 25, § 2873(b.1) (West 1994) (requiring persons filing nomination petitions to pay filing fee at time petition is filed).

2. *Id.* (stating that potential candidates must pay filing fee to have name placed on ballot).

3. *See id.* (stating that all filing fees shall become part of general fund).

4. *See* ALA. CODE § 17-16-15 (1975) (stating that political party's governing body may require persons desiring to become candidates for political office to pay fees); ALASKA STAT. § 15.25.050(a) (Michie 2002) (requiring candidates to pay nonrefundable filing fee to be placed on primary election ballot); CAL. ELEC. CODE § 8104 (West 1994) (stating that candidates for judicial offices or county offices must pay filing fee equaling one percent of annual salary for position they wish to obtain); HAW. REV. STAT. ANN. § 12-6(b) (Michie 1993) (requiring candidates to pay filing fee to be placed on primary election ballot); IDAHO CODE § 34-605(4) (Michie 2001) (requiring candidates to pay \$300 filing fee to be placed on ballot for House of Representatives); KAN. STAT. ANN. § 25-206(a) (2000) (stating that candidates must pay fee equaling one percent of annual salary for position they wish to obtain); KY. REV. STAT. ANN. § 118.255(1) (Michie Supp. 2003) (requiring candidates to pay filing fees to be placed on primary election ballot); LA. REV. STAT. ANN. § 18:464 (West Supp. 2003) (same); MD. ANN. CODE art. EL, § 5-401(a)-(b) (2002) (stating that persons who file certificates of candidacy must pay filing fee at time certificate of candidacy is filed); MINN. STAT. § 204B.11 (Supp. 2003) (stating that candidates who file affidavit of candidacy must pay filing fee for office sought); MISS. CODE ANN. § 23-15-297 (2003) (requiring candidates to pay filing fee upon entering race for party nomination); MO. ANN. STAT. § 115.357.1 (West 2003) (requiring candidates for federal, state or county office to pay filing fee before filing declaration of candidacy); MONT. CODE ANN. § 13-10-202 (2003) (stating that candidates running for offices with annual salaries of more than \$2,500 must pay fee equaling one percent of total annual salary, but stating that no filing fee is required for offices receiving no salary); NEB. REV. STAT. § 32-608 (1998) (stating that candidates must pay filing fees before filing for office); NEV. REV. STAT. ANN. § 293.193 (Michie 2002) (imposing fees in order to file declarations of candidacy); N.H. REV. STAT. ANN. §§ 655:19, 655:19-c (1996) (stating that candidates must pay mandatory filing fees at time declaration of candidacy is filed).

on the primary or general election ballots.⁵ Some of these states provide waivers for those who cannot afford the fees.⁶ Others provide an alternative method for obtaining ballot access, such as a voter signature requirement.⁷ Pennsylvania's law, however, does not discuss either the possibility of a waiver or an alternative means of ballot access.⁸

This Article examines the Third Circuit's analysis and holding in *Belitskus v. Pizzingrilli*⁹ in light of U.S. Supreme Court decisions discussing the constitutionality of ballot access laws.¹⁰ Moreover, this Article argues that although the Third Circuit properly applied Supreme Court ballot access principles to invalidate Pennsylvania's filing fee requirement as applied to two specific plaintiffs, it improperly failed to strike the statute down as unconstitutional on its face.¹¹ Part II of this Article summarizes U.S. Supreme Court cases, which addressed the equal protection concerns raised by filing fee requirements.¹² Part III describes the facts and procedural history of *Belitskus*.¹³ Part IV outlines the Third Circuit's examination of Pennsylvania's filing fee requirement and its determination that the filing fees were unconstitutional as applied to two specific plaintiffs.¹⁴ Part V

5. See Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L.J. 1281, 1281 (1997) (noting that most states impose ballot access restrictions but arguing that ballot access restrictions should be reduced).

6. See ALA. CODE § 17-16-15 (stating that parties can only require potential candidates to pay filing fees if they are able to pay such fees); ALASKA STAT. § 15.25.050(b) (stating that indigent persons may file statements of indigency in lieu of paying filing fee); MD. ANN. CODE art. EL, § 5-401(c) (stating that filing fees are waived if potential candidate demonstrates inability to pay such fees); MO. ANN. STAT. § 115.357.3 (stating that filing fees are waived if person files declaration of inability to pay with declaration of candidacy); NEB. REV. STAT. § 32-608 (stating that filing fee is not required if potential candidate's "income and other resources for maintenance are . . . insufficient for meeting the cost of his or her requirements").

7. See CAL. ELEC. CODE § 8104 (noting that candidates may gather signatures in lieu of paying filing fee); HAW. REV. STAT. ANN. § 12-6(b) (stating that indigent persons can forego paying filing fee by presenting petition signed by one-half of one percent of total registered voters in particular district); MINN. STAT. § 204B.11 (stating that candidates may present petitions signed by registered voters instead of paying filing fee).

8. See *Belitskus v. Pizzingrilli*, 343 F.3d 632, 636 (3d Cir. 2003) (noting that Pennsylvania's filing fee law contains no waiver provision and does not provide for any alternative means of ballot access).

9. 343 F.3d 632 (3d Cir. 2003).

10. For a discussion of Third Circuit's analysis and holding in *Belitskus*, see *infra* notes 57-85 and accompanying text.

11. For an explanation of why the Third Circuit should have utilized the constitutional principles set forth by the U.S. Supreme Court to invalidate Pennsylvania's ballot access scheme, see *infra* notes 86-111 and accompanying text.

12. For a discussion of U.S. Supreme Court cases examining the constitutionality of filing fee requirements, see *infra* notes 17-38 and accompanying text.

13. For a discussion of the background and procedural history of *Belitskus*, see *infra* 39-56 and accompanying text.

14. For a discussion of the Third Circuit's analysis and holding in *Belitskus*, see *infra* notes 57-85 and accompanying text.

argues that the Third Circuit should have also declared Pennsylvania's filing fee law constitutionally invalid.¹⁵ Lastly, Part VI discusses the adverse impacts of the Third Circuit's decision.¹⁶

II. THE SUPREME COURT'S EXAMINATION OF MANDATORY FILING FEES

Filing fee requirements have the effect of making some level of wealth a prerequisite for running for political office.¹⁷ Accordingly, these fees impede the electoral process because many qualified potential candidates are unable to pay the fee and thus cannot run for office.¹⁸ This leads to voters sometimes being unable to choose the person they desire for a particular political office.¹⁹ As a result, filing fees raise a number of equal protection concerns.²⁰ The U.S. Supreme Court has addressed these concerns in two principal cases.²¹

In the first case, *Bullock v. Carter*,²² the Court struck down a Texas law requiring candidates who wanted to be placed on the state's primary election ballot to pay exorbitant filing fees.²³ The Court reasoned that the Texas law not only infringed on the equal protection rights of individual candidates, but also interfered with voters' ability to support candidates of their choosing.²⁴ Thus, the Court determined that such cases deserve a heightened level of scrutiny, though not strict scrutiny.²⁵ The Court ulti-

15. For an explanation of why the Third Circuit should have utilized the constitutional principles set forth by the U.S. Supreme Court to invalidate Pennsylvania's ballot access scheme, see *infra* notes 86-111 and accompanying text.

16. For a discussion of the impact of the Third Circuit's holding in *Belitskus*, see *infra* 112-18 and accompanying text.

17. See *Bullock v. Carter*, 405 U.S. 134, 149 (1972) ("By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot . . .").

18. See *id.* (acknowledging that imposing filing fees without providing any alternative method of ballot access excludes some qualified candidates from running for office).

19. See *id.* (noting that filing fees deny voters ability to vote for their candidates of choice).

20. See *Brown*, *supra* note 5, at 1287 (stating that because ballot access and voting are fundamental rights, restrictions on either can create equal protection problems).

21. See *id.* (noting that Supreme Court discussed equal protection issues surrounding mandatory filing fees in two principal cases).

22. 405 U.S. 134 (1972).

23. See *id.* at 149 (determining that Texas's filing fee system violates Equal Protection Clause).

24. See *id.* at 144 (stating that Texas's filing fee system limits voters' ability to vote for their preferred candidates).

25. See *id.* (holding that Texas's filing fee system "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster"); see also Matthew W. Daus, *Are Politicians a Protected Class?: The Constitutionality of "Reasonable Access" Media Rights Under the Communications Act*, 6 COMM'LAW CONSP'CTUS 173, 177 (1998) (stating that *Bul-*

mately invalidated the Texas law because the state was unable to justify the law as "reasonably necessary to the accomplishment of legitimate state objectives."²⁶ The Court recognized that states have legitimate interests in both limiting the number of candidates on the ballot and eliminating frivolous or fraudulent candidates.²⁷ Nevertheless, the Court stated that Texas's failure to provide potential candidates with a reasonable alternative means of ballot access rendered the filing fee requirement constitutionally invalid.²⁸

Only two years later, the Supreme Court again addressed the equal protection problems generated by a state imposing filing fees on potential candidates in *Lubin v. Panish*.²⁹ In *Lubin*, the Court struck down a California law requiring candidates who wished to be placed on the state's House primary election ballot to pay very modest filing fees.³⁰ The Court again acknowledged that states have a legitimate interest in limiting ballots and preventing frivolous candidacy.³¹ The Court stated, however, that these interests must be achieved without unnecessarily burdening candidates' right to access the electoral process and voters' right to choose their preferred candidate.³² Therefore, the Court held that even though California only required modest filing fees, the state's failure to provide any alternative means for ballot access rendered the statute unconstitutional.³³

Bullock and *Lubin* established an analytical framework for examining challenges to a state's imposition of ballot access filing fees.³⁴ First, states

lock Court did not apply strict scrutiny or rational basis test, but instead used close scrutiny to examine Texas's filing fee requirement).

26. See *Bullock*, 405 U.S. at 149 (determining that Texas had not sufficiently justified its ballot access requirements).

27. See *id.* at 145 (acknowledging that states have legitimate interests in regulating number of people on ballot and preventing frivolous candidacies).

28. See *id.* at 149 (ruling that because Texas imposed mandatory filing fees without providing reasonable alternative means of ballot access, its filing fee system was invalid).

29. 415 U.S. 709, 713-18 (1974) (discussing application of Equal Protection Clause to voting and ballot-access arena).

30. See *id.* at 710 (addressing constitutionality of California's statute requiring payment of filing fee to be placed on primary election ballot).

31. See *id.* at 714 (discussing California's articulated reasons for imposing mandatory filing fees).

32. See *id.* at 716 (stating that states must achieve their interests without interfering with party's or candidate's political opportunities).

33. See *id.* at 718 (holding that states cannot require filing fees without also providing reasonable alternative means of ballot access).

34. See Brown, *supra* note 5, at 1294-95 (discussing constitutional limits established by *Bullock* and *Lubin*). Based on the constitutional principles that emerged from *Bullock* and *Lubin*, several lower courts have also invalidated state filing fee requirements. See *Robinson v. Pottinger*, 512 F.2d 775, 777 (5th Cir. 1975) (affirming district court's conclusion that Alabama's filing fee requirements violated Equal Protection Clause); see also *Brown v. N.C. Bd. of Educ.*, 394 F. Supp. 359, 362 (W.D.N.C. 1975) (holding that North Carolina's filing fee system was unconstitutional because it failed to provide any reasonable alternative means of ballot access); *W. Va. Libertarian Party v. Manchin*, 270 S.E.2d 634, 640 (W.V. 1980)

cannot utilize filing fees as the sole test of a candidate's seriousness in pursuing election to a particular office.³⁵ Second, states can use filing fees to limit the number of candidates listed on the ballot or to screen for fraudulent and frivolous candidacies as long as the state provides an alternative method for accessing the ballot.³⁶ Finally, a state's alternative to its filing fee requirement must be "reasonable."³⁷ In sum, a court will uphold a state's filing fee requirement as reasonably necessary for the achievement of legitimate interests if the state provides a "reasonable" alternative to fee payment.³⁸

III. *BELITSKUS v. PIZZINGRILLI*

In November of 2000, John Stith wanted to run as the Green Party candidate in the election for state representative of the 77th District.³⁹ To have his name placed on the ballot, Pennsylvania required him to pay a \$100 filing fee.⁴⁰ At the time he was required to pay this fee, however, his take-home pay was approximately \$1,200 per month and his living expenses were approximately \$1,073 per month.⁴¹ Further, his personal

(determining that West Virginia's filing fee requirement was unconstitutional because it failed to provide any reasonable alternative means of ballot access). Other courts have applied these principles and upheld the state's filing fee requirement. *See, e.g., Green v. Mortham*, 989 F. Supp. 1451, 1462 (M.D. Fla. 1998) (determining that Florida's filing fee system did not violate Fourteenth Amendment because it allowed candidates to forego paying fees by collecting reasonable number of voter signatures).

35. *See Brown, supra* note 5, at 1294-95 (discussing constitutional limits established by *Bullock* and *Lubin*).

36. *See id.* (discussing constitutional limits established by *Bullock* and *Lubin*).

37. *See id.* (discussing constitutional limits established by *Bullock* and *Lubin*). The Supreme Court has not explicitly stated what constitutes a "reasonable alternative" method of ballot access. *See id.* at 1292-93 (arguing that alternatives that are overly demanding, such as requiring 8,000 voter signatures, should raise constitutional concerns). Despite the Court's failure to define "reasonable alternative," some lower courts have upheld state filing fee requirements by determining that the state provided potential candidates with a reasonable alternative means of ballot access. *See, e.g., Andress v. Reed*, 880 F.2d 239, 242 (9th Cir. 1989) (affirming district court's holding that because California permitted candidates to forgo paying filing fees by gathering 100,000 voter signatures in sixty days, California's ballot access law was constitutionally valid); *Green*, 989 F. Supp. at 1462 (holding that Florida's filing fee system did not violate Fourteenth Amendment because it allowed candidates to forego paying fees by collecting reasonable number of voter signatures).

38. *See Brown, supra* note 5, at 1295 (arguing that even small fee requirements are not saved from constitutional invalidity by unreasonable alternatives such as excessive signature requirements).

39. *See Belitskus v. Pizzingrilli*, 343 F.3d 632, 637 (3d Cir. 2003) (discussing factual background).

40. *See id.* (discussing factual background).

41. *See id.* (describing Plaintiff Stith's financial situation at time he would have been required to pay filing fee).

bank account balance was only \$1,500 dollars and his liabilities included \$3,500 in credit card debt and \$40,000 in student loans.⁴²

Similarly, Thomas Linzey wanted to run as a Green Party candidate in the November 2000 election for attorney general.⁴³ To have his name placed on the ballot, the state required him to pay a \$200 filing fee.⁴⁴ His gross income in 2000, however, was only \$4,611 and his average monthly living expenses totaled \$380.⁴⁵

Based on the hardship suffered by Stith and Linzey, the Pennsylvania Green Party, on July 24, 2000, instituted an action against the Pennsylvania secretary of state pursuant to 42 U.S.C. § 1983, alleging that the filing fees violated the Fourteenth Amendment's Equal Protection Clause.⁴⁶ The Green Party argued that because many of its members "are drawn from the less affluent segment of the Pennsylvania community," continued application of the filing fees would cause many of its candidates to incur a financial hardship.⁴⁷

On July 28, 2000, the U.S. District Court for the Middle District of Pennsylvania granted a preliminary injunction as to Stith and all other qualified candidates unable to pay the required filing fees.⁴⁸ The injunction stated that such candidates must be provided "an alternative measure or measures for gaining access to the ballot . . ."⁴⁹ In accordance with this injunction, the state offered Stith and Linzey exemptions from the fees if they presented affidavits stating that they could not pay without

42. *See id.* (describing Plaintiff Stith's account balance and outstanding debt).

43. *See id.* (discussing factual background).

44. *See id.* (discussing factual background).

45. *See id.* (describing Plaintiff Linzey's financial situation at time he would have been required to pay filing fee).

46. *See id.* at 638 (stating that Pennsylvania Green Party instituted action on behalf of Plaintiffs Stith and Linzey). The action was also filed on behalf of Pennsylvania State University student William Donovan. *See id.* at 637 (discussing third plaintiff aggrieved by Pennsylvania's filing fee requirement). Donovan was a registered voter and Green Party supporter. *See id.* (describing third plaintiff aggrieved by Pennsylvania's filing fee requirement). The district court determined that Donovan was not entitled to relief and granted the state summary judgment as to his claims. *See id.* at 638 (discussing procedural history). Donovan has since moved from Pennsylvania and has not indicated that he plans to return. *See id.* at 637 (stating reasons for not examining Plaintiff Donovan's claim on appeal). Consequently, the Third Circuit determined that his claim was moot and, thus, the court lacked jurisdiction to address the merits of his appeal. *See id.* at 648-49 (determining that Donovan did not fall into any mootness exception because he no longer resides in Pennsylvania).

47. *Id.* at 637-38 (discussing Green Party's argument against Pennsylvania's imposition of mandatory filing fees).

48. *See id.* at 638 (discussing procedural history).

49. *Id.* (quoting district court's preliminary injunction).

suffering financial hardship.⁵⁰ Stith and Linzey complied, and the state placed their names on the November 2000 ballot.⁵¹

On August 20, 2001, the district court granted a permanent injunction enjoining the state from requiring Stith to pay the filing fee.⁵² More broadly, the district court prohibited the state from “requiring candidates to pay a filing fee [that] they cannot afford.”⁵³ The court determined, however, that Linzey had not demonstrated that he was unable to afford the fee.⁵⁴ Nevertheless, the district court stated that the injunction enabled Linzey to attempt to prove at a later date that he could not afford the fee.⁵⁵ Both parties appealed the district court’s order.⁵⁶

IV. THE THIRD CIRCUIT’S ANALYSIS

The Third Circuit affirmed the district court’s order as to Stith, but it vacated the injunction and remanded the case.⁵⁷ Writing for the court, Judge Jane Roth began by noting that although Article I, Section 4 of the Constitution gives individual states the power to regulate both congressional elections and their own elections, such regulations must be consistent with the Fourteenth Amendment’s Equal Protection Clause.⁵⁸ Accordingly, states may constitutionally limit election ballot access through filing fees or other means so long as they do so in accordance with equal protection principles.⁵⁹ Judge Roth outlined the Supreme Court’s analyses in *Bullock* and *Lubin*, noting that these cases provide the framework for examining an equal protection challenge to Pennsylvania’s filing fee requirement.⁶⁰

Against the backdrop of these two cases, the court relied on the balancing test previously employed by the Supreme Court to determine what level of scrutiny was appropriate for examining Pennsylvania’s ballot access law.⁶¹ This test requires that courts balance the ballot access law’s

50. *See id.* (noting that Pennsylvania complied with district court’s preliminary injunction).

51. *See id.* (stating that Plaintiff Stith’s and Plaintiff Linzey’s names appeared on November 2000 election ballot).

52. *See id.* (discussing procedural history).

53. *Id.* at 638 (quoting district court’s permanent injunction).

54. *See id.* (explaining that district court did not enjoin state from applying filing fee to Plaintiff Linzey).

55. *See id.* at 637 (acknowledging that district court denied motion to amend permanent injunction to include Plaintiff Linzey).

56. *See id.* at 638 (discussing procedural history).

57. *See id.* at 651 (stating court’s holding).

58. *See id.* at 641 (discussing states’ power to regulate elections).

59. *See id.* at 642 (recognizing that states may limit ballot access to concentrate voter attention on fewer candidates).

60. *See id.* (describing two cases where Supreme Court held filing fees to be unconstitutional).

61. *See id.* at 643-47 (applying Supreme Court’s two-step balancing test). The Supreme Court first developed this balancing test in *Anderson v. Celebrezze*, 460 U.S. 789, 789 (1983) (developing balancing test for determining appropriate level of

burdens against the state's asserted justifications for the law.⁶² The court noted that all ballot access restrictions at least incidentally affect the people's right to vote and their right to freely associate.⁶³ Nevertheless, it stated that "the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."⁶⁴

A. *The Burdens That Filing Fee Requirements Impose on Candidates' Constitutional Rights*

In applying the first step of the Supreme Court's balancing test, the Third Circuit discussed the burdens that the filing fees placed on the plaintiffs' constitutional rights.⁶⁵ The court concluded that Stith's and Linzey's "difficulty in raising the funds to pay the required fees, looked at in light of the [candidates'] total assets and liabilities . . . , [was] sufficient to satisfy this [step]."⁶⁶ In other words, potential candidates should not be required to deplete campaign funds or to utilize personal funds, which are necessary for payment of living expenses and prior debts.⁶⁷ Moreover, the court acknowledged the Supreme Court's conclusion in *Bullock* that a severe burden is placed on an indigent candidate's rights when states require filing fees without providing any alternative means of ballot access.⁶⁸ The fact that the fee amounts were small made no difference to the court

scrutiny to apply in ballot access cases). In *Anderson*, the Court determined that courts must weigh certain factors before deciding whether a ballot access restriction is constitutional. *See id.* (providing ballot access analysis). First, a court must consider the law's burden on the challenger's First and Fourteenth Amendment rights. *See id.* ("[A reviewing court] must first consider the character and magnitude of the asserted injury to the [plaintiff's] rights protected by the First and Fourteenth Amendments."). Second, a court must examine the state's asserted justifications for the law's burdens. *See id.* ("[A reviewing court] must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its law."). Once the court balances all factors, it can determine whether the challenged law is constitutional. *See id.* (stating that courts must balance ballot access restriction's burden on plaintiff's rights against state's asserted justification for restriction).

62. *See Anderson*, 460 U.S. at 789 (developing test for determining appropriate level of scrutiny courts should use to examine ballot access law).

63. *See Belitskus*, 343 F.3d at 643 (quoting Council of Alternative Political Parties v. Hooks, 179 F.3d 64, 70 (3d Cir. 1999)); *see also* Brown, *supra* note 5, at 1316 (noting that higher filing fees decrease likelihood that primaries will be contested, and uncontested races produce little or no voter turnout).

64. *Belitskus*, 343 F.3d at 643 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

65. *See id.* at 644-45 (examining burdens Pennsylvania's mandatory filing fee placed on plaintiffs' constitutional rights).

66. *Id.* at 644 (concluding that plaintiffs met first step of balancing test by demonstrating that paying filing fee would cause them financial hardship).

67. *See id.* (stating that because plaintiffs would have to deplete campaign funds or use needed personal expenses to pay filing fee, paying such fee would cause them financial hardship).

68. *See id.* (discussing *Bullock* Court's conclusions).

because even minimal fees create barriers to some classes of persons aspiring to be placed on the ballot.⁶⁹ The court concluded that Pennsylvania's fee requirement severely burdened the plaintiffs' rights because it failed to provide alternative means of ballot access.⁷⁰

B. *Pennsylvania's Justifications for the Burdens Its Filing Fee Requirement Imposes on Candidates' Rights*

In applying the second and final step of the Supreme Court's balancing test, the court discussed the state's asserted justifications for the law's burdens.⁷¹ Because the law's burden on the plaintiffs' rights was deemed severe, the court reasoned that the law must be "narrowly drawn to advance a state interest of compelling importance."⁷² The state's first justification for the fees was that they limited the number of candidates permitted on the ballot, thereby allowing ballot access only for serious candidates.⁷³ The court concluded that the state's law was not narrowly drawn for this purpose because other means existed for ensuring that only qualified and serious candidates were placed on the ballot.⁷⁴ The court acknowledged that limiting the number of candidates might be "of compelling importance," but ultimately determined that imposing signature requirements on all candidates was a more appropriate method for protecting that interest.⁷⁵

Additionally, the state asserted that it had an interest in defraying election costs.⁷⁶ This assertion, however, directly contradicted the Supreme Court's holding in *Bullock* that candidates do not have to pay their pro rata share of election costs.⁷⁷ Also, the state did not use the filing fees to cover election costs, for it instead deposited the fees directly into its general treasury fund.⁷⁸ Thus, the court held that the state's interest in defraying election costs was not "of compelling importance," and the

69. *See id.* at 645 (rejecting state's argument that its required fee is too small to warrant heightened scrutiny).

70. *See id.* (determining that plaintiffs' constitutional rights were severely burdened by imposition of filing fee requirement).

71. *See id.* at 645-47 (applying second step of Supreme Court's balancing test).

72. *Id.* at 645 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

73. *See id.* at 646 (examining state's first asserted reason for imposing mandatory filing fees).

74. *See id.* (rejecting state's first asserted reason for imposing mandatory filing fees).

75. *See id.* (declaring that state had less restrictive means of effectuating its interests).

76. *See id.* (examining state's second justification for imposing mandatory filing fees).

77. *See id.* (rejecting state's second asserted justification for imposing mandatory filing fees).

78. *See id.* at 646-47 (reasoning that state's asserted justification was not compelling and, in any event, state's means were not narrowly tailored to effectuate its interests).

means employed by the law were not narrowly drawn to achieve this interest.⁷⁹

C. *The Third Circuit's Failure to Rule on the Overall Constitutionality of Pennsylvania's Filing Fee Requirement*

Although the Third Circuit concluded that the state did not have any narrowly drawn interest of compelling importance to support its filing fee requirement, the court refused to declare the ballot access scheme unconstitutional on its face.⁸⁰ Moreover, the court ruled that the provision of the district court's injunction that enjoined the state from applying the filing fee to all candidates who cannot afford to pay the fee was unnecessarily broad.⁸¹ The Third Circuit determined that the district court should have limited the scope of the injunction to prohibiting the state from applying the fee to Stith and Linzey during this election and future elections where they demonstrate similar financial hardship.⁸² It then struck the rest of the language from the order.⁸³ Finally, the court suggested that the Pennsylvania legislature should amend the election code in accordance with *Bullock*, *Lubin* and the Supreme Court's other ballot access cases.⁸⁴ Thus, although the Third Circuit acknowledged that Penn-

79. *See id.* (concluding that state's second asserted justification for imposing mandatory filing fees did not provide sufficient basis for upholding constitutionality of filing fees).

80. *See id.* at 650 (refusing to strike down ballot access scheme as unconstitutional on its face).

81. *See id.* (concluding that scope of district court's injunction was overly broad).

82. *See id.* (examining scope of district court's injunction).

83. *See id.* (concluding that district court's injunction included unnecessary provisions).

84. *See id.* ("[T]he vagueness and uncertainty of which the Commonwealth complains in challenging the scope of the District Court's injunction, as well as the need for such injunctions in the first instance, could be cured by simply amending the election code to comply with the Supreme Court's ballot access jurisprudence."). In addition to examining the constitutionality of filing fee requirements, the Supreme Court has also addressed the constitutionality of other ballot access restrictions. *See, e.g.,* *Burdick v. Takushi*, 504 U.S. 428 (1992) (examining constitutionality of Hawaii's prohibition on write-in voting). In *Burdick*, the Court addressed whether Hawaii had infringed on voters' First and Fourteenth Amendment rights by failing to permit them to write in votes for candidates not appearing on the election ballot. *See id.* at 432-42 (examining constitutionality of Hawaii's prohibition on write-in voting). The Court began by stating that it must weigh the election law's burden on the plaintiff's First and Fourteenth Amendment rights against Hawaii's articulated justifications for the election law's burden. *See id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1993)). The Court acknowledged that the state's election law impacted the right to vote, but stated that "it can hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot." *Id.* (recognizing that Hawaii's election law undoubtedly impacts voting rights, but that impact did not rise to level of unconstitutional interference). Further, the Court noted that although the law does not permit write-in voting, it does

sylvania's ballot access law did not conform to Supreme Court precedent on what is constitutional in the ballot access context, it failed to use this case to declare the law constitutionally invalid.⁸⁵

V. A DEVIATION FROM *BULLOCK* AND *LUBIN*: NO FACIAL INVALIDITY

In holding that the district court's injunction should have enjoined Pennsylvania from applying the filing fee requirement to only Stith and Linzey, the Third Circuit improperly refused to strike down Pennsylvania's filing fee requirement as unconstitutional on its face.⁸⁶ While the court correctly utilized the ballot access principles extracted from *Bullock* and *Lubin* to invalidate the statute's application to Stith and Linzey, it should have used the same reasoning to strike down the statute altogether.⁸⁷ Instead, it simply suggested that the Pennsylvania legislature exercise its power and amend the statute.⁸⁸

It was improper for the court to place responsibility on Pennsylvania's legislature for fixing the filing fee requirement's constitutional problems.⁸⁹ According to the principles set forth in *Marbury v. Madison*,⁹⁰ Article III, Section 2 of the U.S. Constitution implicitly gives the judiciary

provide voters' preferred candidates with three easy methods of appearing on the ballot. *See id.* at 435-37 (noting that candidates can have their names placed on ballot (1) by filing petition signed by specified number of registered voters, (2) by being member of established party that has qualified by petition in previous three elections or (3) by asking to be placed on nonpartisan ballot). Finally, the Court considered Hawaii's asserted justifications for its prohibition on write-in voting and concluded that they sufficiently outweigh the very minor burden the prohibition placed on voters. *See id.* at 439-40 (discussing Hawaii's articulated justifications for its election law). Thus, the Court concluded that Hawaii's election code imposes a reasonable burden on voters' rights and is, therefore, constitutional. *See id.* at 441 (stating Court's holding).

85. *See Belitskus*, 343 F.3d at 651 (acknowledging that continued case-by-case analysis of challenges to Pennsylvania's mandatory filing fee does not serve interests of state, candidates or voters, but stating that state legislature should resolve this problem).

86. *See id.* (noting that problems will arise with continued case-by-case analysis of challenges to Pennsylvania's ballot access law, but refusing to declare law constitutionally invalid).

87. *See id.* at 650 (holding that district court's injunction should have only prohibited state from applying filing fee requirement to Plaintiffs Stith and Linzey).

88. *See id.* at 650-51 (arguing that problems created by mandatory filing fees should be resolved by state's legislature).

89. *See WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1179 (3d ed. 2001) (stating that Articles I, II and III of Constitution create "an interactive regime of law implementation, rather than one where Congress passes statutes and everyone else does what Congress wants"); *see also* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585, 587 (1975) (noting that many legislators assume their job is to make policy without considering questions of constitutionality).

90. 5 U.S. 137 (1803).

the power to determine what is and is not constitutional.⁹¹ This means that the judiciary is not simply an agent of the legislature, but instead plays a principal role in statutory implementation.⁹² As a coordinate branch of government, the judiciary shares with the legislature the responsibility of imposing substantive preferences on a statutory scheme.⁹³ Further, the judiciary is principally responsible for protecting and upholding the Constitution.⁹⁴ Thus, when a court invalidates a statute that it determines to be unconstitutional, it is not usurping the legislature's power; the court is simply exercising its judicial responsibility.⁹⁵ Therefore, when a court determines that a particular law violates the Constitution, it should intervene.⁹⁶

In *Belitskus*, the Third Circuit should have struck down Pennsylvania's filing fee requirement as unconstitutional on its face because the Supreme Court has invalidated statutes restricting ballot access when the statutes provide no alternative method of ballot access.⁹⁷ In *Bullock*, for instance, a candidate who wished to run for the office of county commissioner in the Democratic primary challenged Texas's filing fee requirement after he was unable to pay the \$1,424.60 assessment required to be placed on the ballot.⁹⁸ A second candidate challenged the law after he was not placed on the primary ballot as a candidate for county judge because he could not pay the \$6,300 assessment.⁹⁹ A third candidate also challenged the fee because he was unable to run for the general land office because he did not submit the required \$1,000 fee.¹⁰⁰ The Supreme Court examined the harms suffered by these three individuals and ultimately held that the

91. See generally *id.* (holding that power to determine what is and is not constitutional resides in judiciary).

92. See ESKRIDGE, *supra* note 89, at 1179 (arguing that courts may play principal role rather than act as agent in statutory implementation).

93. See *id.* (recognizing that judiciary may be considered coordinate branch of government, not agent of Congress).

94. See *Marbury*, 5 U.S. at 141 (stating that it is judiciary's responsibility to state what law is); see also Brest, *supra* note 89, at 588 (acknowledging that judiciary's role is constitutional interpreter, but arguing that because courts sometimes lack capacity to review all aspects of legislative decisions, Constitution must also be applied by legislators themselves).

95. See Brest, *supra* note 89, at 587-88 (stating that one argument supporting judicial review of legislative decisions is that in many instances constitutional problems are not apparent until after statute is implemented).

96. See *id.* at 587 (urging courts to strike down statutes that violate Constitution).

97. See *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (holding that Texas's filing fee requirement was unconstitutional because it failed to provide any alternative method of ballot access); see also *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (holding that California's filing fee requirement was unconstitutional because it did not provide any alternative method of ballot access).

98. See *Bullock*, 405 U.S. at 135 (describing factual background).

99. See *id.* (describing factual background).

100. See *id.* (describing factual background).

Texas law was constitutionally invalid.¹⁰¹ The Court reasoned that the state's failure to establish any alternative method for candidates to gain ballot access had caused wealth to become a prerequisite for candidacy, denying some voters the opportunity to vote for their preferred candidate.¹⁰² Therefore, when considering the burdens that the Texas filing fee requirement imposed on three specific candidates, the Supreme Court concluded that the law itself violated the Equal Protection Clause of the Fourteenth Amendment.¹⁰³ In the present case, the Third Circuit failed to follow the Supreme Court's lead and take this final analytical step.¹⁰⁴

The Supreme Court's holding in *Lubin* further supports the conclusion that the Third Circuit was incorrect in failing to rule on the overall constitutionality of Pennsylvania's filing fee law.¹⁰⁵ The filing fee at issue in *Lubin* was more comparable to Pennsylvania's fee requirement.¹⁰⁶ There, a candidate challenged California's filing fee statute because he was unable to pay the \$701.60 necessary to be placed on the ballot in the primary election for the position of county supervisor.¹⁰⁷ The Court ruled that even statutes that do not involve filing fees that are "so patently exclusionary as to violate traditional equal protection concepts" should be invalidated if they fail to provide for alternative means of ballot access.¹⁰⁸ Here, again the Court used one candidate's deprivation of equal protection rights to hold that the state statute on its face was unconstitutional.¹⁰⁹

101. *See id.* at 149 (concluding that Texas's filing fee system was unconstitutional).

102. *See id.* ("By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot . . ."); *see also* Brown, *supra* note 5, at 1309 ("To the extent that ballot access restrictions allow some, but not others, to run for office, they may cause debilitating inequalities.").

103. *See Bullock*, 405 U.S. at 149 (holding that Texas's filing fee system denied some candidates and some voters equal protection of law).

104. *See Belitskus v. Pizzigrilli*, 343 F.3d 632, 650-51 (3d Cir. 2003) (acknowledging constitutional problems with Pennsylvania's filing fee requirement, but failing to strike filing fee requirement down as constitutionally invalid).

105. *See Lubin v. Panish*, 415 U.S. 709, 718 (1974) (concluding that California could not require candidates to pay filing fees they could not afford because such requirement violated Constitution).

106. *See id.* at 710 (noting that under California's election code, candidates for office had to pay either one percent or two percent of salary of office sought to be placed on primary election ballot).

107. *See id.* (discussing factual background).

108. *Id.* at 715 n.4 (referring to large filing fees held to be unconstitutional in *Bullock*). According to Mark R. Brown, *Bullock* and *Lubin* established that three specific categories of filing fees exist. *See* Brown, *supra* note 5, at 1295 (discussing constitutional limits pertaining to filing fees). There are patently exclusionary fees, such as those that were at issue in *Bullock*, administrative fees and fees that fall between these two extremes, such as the fee that was at issue in *Lubin*. *See id.* (discussing constitutional limits pertaining to filing fees).

109. *See Lubin*, 415 U.S. at 718 (concluding that California's filing fee system was not consistent with constitutional standards).

Specifically, the Court determined that requiring filing fees without providing any alternative method of access, such as a voter signature requirement, is not reasonably necessary for legitimate state interests.¹¹⁰ The Third Circuit should, therefore, have employed this same reasoning to strike down the Pennsylvania filing fee statute instead of shifting the responsibility to the state legislature.¹¹¹

VI. IMPACT OF THE THIRD CIRCUIT'S DECISION

The Third Circuit's determination that the district court's injunction should have enjoined the state from enforcing the filing fee requirement against only Stith and Linzey in November of 2000 and in all future elections where they again demonstrate that they will suffer financial hardship will indirectly open the floodgates for future litigation regarding the equal protection problems raised by these filing fees.¹¹² Because the Third Circuit failed to invalidate Pennsylvania's ballot access scheme despite its acknowledgement that the state's election code does not conform with the principles set forth in *Bullock* and *Lubin*, the door is left wide open for future candidates to challenge the law's application to them.¹¹³ Lower courts are left with the daunting task of examining each individual who comes forward claiming that she would suffer undue hardship if forced to pay the state's filing fee without any clear guidelines for how to properly evaluate these individuals.¹¹⁴ Further, Pennsylvania still possesses "an election structure that is fundamentally flawed and will inevitably fail to pass constitutional muster as applied to a certain percentage of candidates."¹¹⁵ Some indigent candidates, however, may not challenge the application of the mandatory fees due to the expenses and burdens incurred in doing so, and thus such persons are denied the opportunity to run for office.¹¹⁶ Consequently, some voters will not have the opportunity

110. *See id.* (holding that if states utilize filing fee systems, they must provide candidates with alternative means of ballot access).

111. *See Belitskus v. Pizzigrilli*, 343 F.3d 632, 650 (3d Cir. 2003) (stating that problems created by Pennsylvania's filing fee system should be addressed by state legislature instead of courts).

112. *See id.* (holding that district court's injunction was overly broad).

113. *See id.* at 651 (acknowledging that after this decision there will continue to be "case-by-case litigation of the Commonwealth's attempts to collect filing fees from indigent candidates").

114. *See Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2225 (2001) (acknowledging that ballot access cases raise complicated constitutional concerns because "[d]rawing bright constitutional lines to demarcate the rights and legitimate interests of each player in the litigation is an impossible task").

115. *Belitskus*, 343 F.3d at 650-51 (discussing problems created by Pennsylvania's filing fee system).

116. *See Bullock v. Carter*, 405 U.S. 134, 149 (1972) (noting that filing fees lead to exclusion of candidates).

to vote for their preferred candidate.¹¹⁷ Thus, the court's refusal to rule on the overall constitutionality of Pennsylvania's mandatory filing fee allows the state to continue operating an electoral system that perpetuates inequalities in violation of the Equal Protection Clause by failing to provide candidates with a reasonable alternative method for ballot access.¹¹⁸

Lauren Jean McCloskey

117. *See id.* (noting that filing fees deny voters opportunity to vote for their preferred candidates).

118. *See Brown, supra* note 5, at 1287 (arguing that ballot access restrictions, especially filing fees, raise equal protection problems by treating wealthy candidates differently from less wealthy candidates).

