

IN THE SUPREME COURT OF PENNSYLVANIA  
Middle District

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No. 70 M.A.P. 2008

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IN RE THE SUBSTITUTE NOMINATION CERTIFICATE OF BOB BARR  
AS THE LIBERTARIAN CANDIDATE FOR PRESIDENT OF THE UNITED STATES

OBJECTION OF VICTOR P. STABILE

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APPEAL OF VICTOR P. STABILE

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Appeal from the Final Order of the Commonwealth Court of Pennsylvania  
entered on September 15, 2008, in No. 414 M.D. 2008

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**BRIEF FOR APPELLANT**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS .....	iii
STATEMENT OF JURISDICTION .....	1
ORDER IN QUESTION.....	1
STATEMENT OF THE SCOPE OF REVIEW AND STANDARD OF REVIEW.....	2
STATEMENT OF THE QUESTIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
1.    Form of Action and Procedural History. ....	4
2.    Prior Determinations. ....	8
3.    Identity of Judges and Other Officials.....	8
4.    Chronological Factual Statement. ....	8
5.    Statement of Order under Review.....	20
SUMMARY OF ARGUMENT .....	22
ARGUMENT .....	24
I.    THE COMMONWEALTH COURT ERRED AS A MATTER OF LAW AND/OR ABUSED ITS DISCRETION IN RULING THAT THE PENNSYLVANIA ELECTION CODE PERMITS A PARTY OR POLITICAL BODY TO HAVE PENNSYLVANIA QUALIFIED ELECTORS NOMINATE AS A CANDIDATE FOR PLACEMENT ON THE GENERAL ELECTION BALLOT A SHAM/PROXY CANDIDATE. ....	26
A.    A Substitute Nomination Certificate and a Candidate Affidavit Should be Set Aside Where There Is Fraud or Intent to Subvert the Basic Tenets of the Election Code.....	27
B.    The Designation on a Nomination Paper of a Sham/Proxy Candidate Constitutes a Fraud Upon Qualified Pennsylvania Electors and Subverts the Basic Tenets of Pennsylvania’s Election Laws. ....	32
C.    The Third Circuit’s Decision in <i>Rogers v. Corbett</i> Does Not Compel A Contrary Conclusion. ....	35

II. THE COMMONWEALTH COURT ERRED AS A MATTER OF LAW AND/OR ABUSED ITS DISCRETION IN DENYING APPELLANT’S PETITION WHEN THE SUBSTANTIAL EVIDENCE, MOST OF WHICH WAS STIPULATED AND UNDISPUTED, PROVED THAT THE SUBSTITUTE NOMINATION CERTIFICATE OF CANDIDATE BARR AND THE AFFIDAVITS OF CANDIDATES ETZEL AND BARR WERE FILED AS A RESULT OF FRAUD OR AN INTENT TO SUBVERT THE BASIC TENETS OF PENNSYLVANIA’S ELECTION LAWS. .... 37

III. THE COMMONWEALTH COURT ERRED AS A MATTER OF LAW AND/OR ABUSED ITS DISCRETION IN RULING THAT THE PETITION SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION. .... 42

CONCLUSION ..... 46

APPENDIX

EXHIBIT A (9/15/08 Memorandum Opinion and Final Order)

CERTIFICATE OF SERVICE

## TABLE OF CITATIONS

	<u>Page</u>
<b><u>Cases</u></b>	
<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974) .....	27
<i>Anderson v. Davis</i> , 54 Pa. Commw. 60, 419 A.2d 806 (1980) .....	31
<i>Berman v. Heffernan</i> , 185 Misc. 746 (N.Y. Sup. Ct. 1945) .....	32, 33
<i>California Democratic Party v. Jones</i> , 530 U.S. 567 (2000) .....	36
<i>Cathcart v. Keene Indus. Insulation</i> , 324 Pa. Super 123, 471 A.2d 493 (1984).....	45
<i>Farbstein v. Suchman</i> , 260 N.E.2d 817 (N.Y. 1970) .....	33
<i>In re Diettrick</i> , 136 Pa. Commw. 66, 583 A.2d 1258 (1990) .....	27
<i>In re Luzerne County Return Bd.</i> , 447 Pa. 418, 290 A.2d 108 (1972) .....	29
<i>In re Mayor of Altoona</i> , 413 Pa. 305, 196 A.2d 371 (1964).....	27
<i>In re Nomination Paper of Nader</i> , 580 Pa. 22, 858 A.2d 1167 (2004).....	2, 38
<i>In re Nomination Paper of Nader</i> , 588 Pa. 450, 905 A.2d 450 (2006), <i>cert. denied</i> by ___ U.S. ___, 127 S. Ct. 995 (2007) .....	1
<i>In re Nomination Papers of Carlson</i> , 60 Pa. Commw. 170, 430 A.2d 1210 (1981)..	31, 32, 34, 35
<i>In re Nomination Papers of James</i> , 944 A.2d 69 (Pa. 2008).....	1, 2, 29
<i>In re Nomination Papers of Mann</i> , 944 A.2d 119 (Pa. Commw. 2008), <i>aff'd</i> 944 A.2d 77 (Pa. 2008) .....	35
<i>In re Nomination Petition of Flaherty</i> , 564 Pa. 671, 770 A.2d 327 (2001).....	29
<i>In re Nomination Petition of Johnson</i> , 509 Pa. 347, 502 A.2d 142 (1985).....	44
<i>In re Petition of Cianfrani</i> , 467 Pa. 491, 359 A.2d 383 (1976) .....	passim
<i>In re Vidmer</i> , 65 Pa. Commw. 562, 442 A.2d 1203 (1982), <i>aff'd</i> 497 Pa. 642, 444 A.2d 100 (1982).....	1
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971).....	27
<i>Moore Nomination Petition</i> , 447 Pa. 526, 291 A.2d 531 (1972) .....	45
<i>New York State Bd. of Elections v. Lopez</i> , ___ U.S. ___, 128 S.Ct. 791 (2008) .....	26
<i>Oliviero v. Diven</i> , 908 A.2d 933 (Pa. Commw. 2006) .....	34
<i>Rogers v. Corbett</i> , 468 F.3d 188 (3d Cir. 2006) .....	36, 37
<i>Smith v. Cherry</i> , 489 F.2d 1098 (7th Cir. 1973) .....	32, 33
<i>State Ethics Comm'n v. Baldwin</i> , 498 Pa. 255, 445 A.2d 1208 (1982).....	31

*Wakefield's Appeal (No. 1)*, 229 Pa. 581, 79 A. 117 (1911) ..... 30

**Statutes**

25 P.S. § 2602(k)..... 28

25 P.S. § 2602(p)..... 9

25 P.S. § 2602(t)..... 9

25 P.S. § 2831(a)..... 9

25 P.S. § 2868 ..... 29

25 P.S. § 2911 ..... passim

25 P.S. § 2911(b)..... 10, 36

25 P.S. § 2912 ..... passim

25 P.S. § 2913(b)..... 10

25 P.S. § 2937 ..... passim

25 P.S. § 2938(b)..... 11

25 P.S. § 2941(a)..... 11

25 P.S. § 2941.1 ..... 11, 28

25 P.S. § 2942 ..... 5, 44

42 Pa.C.S. § 723(a)..... 1

42 Pa.C.S. § 761(a)(4) ..... 1

42 Pa.C.S. § 764..... 1

**Treatises**

29 C.J.S. § 7 ..... 27

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal pursuant to 42 Pa.C.S. § 723(a), which grants the Supreme Court of Pennsylvania exclusive jurisdiction over appeals from final orders of the Commonwealth Court of Pennsylvania entered in any matter which was originally commenced therein. *See In re Nomination Papers of James*, 944 A.2d 69 n. 3 (Pa. 2008). The court below had jurisdiction over this election matter pursuant to 42 Pa.C.S. §§ 761(a)(4) and 764, which grants the Commonwealth Court of Pennsylvania exclusive original jurisdiction over all matters arising in the Office of the Secretary of the Commonwealth relating to statewide office, including contested nominations. *See In re Nomination Paper of Nader*, 588 Pa. 450, 461, 905 A.2d 450, 457 (2006), *cert. denied by* \_\_\_ U.S. \_\_\_, 127 S. Ct. 995 (2007); *In re Vidmer*, 65 Pa. Commw. 562, 564-565, 442 A.2d 1203, 1204 (1982), *aff'd* 497 Pa. 642, 444 A.2d 100 (1982).

## **ORDER IN QUESTION**

The full text of the final order of the Commonwealth Court of Pennsylvania entered on September 15, 2008 is as follows:

### **ORDER**

AND NOW, this 15<sup>th</sup> day of September, 2008, Victor P. Stabile's Petition to Set Aside the Substitute Nomination Certificate of Robert Barr is hereby Dismissed as against the Libertarian Party and the Libertarian Party of Pennsylvania, and Denied with respect to all Respondents.

The Chief Clerk is directed to forward a copy of this order to the Secretary of the Commonwealth; the Secretary of the Commonwealth is directed to include on the ballot for the 2008 General Election the name of Bob Barr as the Libertarian Party candidate for President of the United States; Victor P. Stabile is ordered to pay all costs; and the parties shall be responsible for their own attorney's fees.

s/ Johnny J. Butler, Judge

A true and correct copy of the Commonwealth Court's Memorandum Opinion in support of the Final Order, as amended by Order dated September 19, 2008, is attached hereto as Exhibit "A." As amended, the Memorandum Opinion has been designated as "Reported." As of the filing of this Brief, no official or unofficial reporter citation has been issued.

### **STATEMENT OF THE SCOPE OF REVIEW AND STANDARD OF REVIEW**

This Court may reverse a Commonwealth Court's final order concerning the validity of challenges brought pursuant to Section 977 of the Pennsylvania Election Code,<sup>1</sup> 25 P.S. § 2937, when its findings of fact are not supported by substantial evidence in the record, there was an abuse of discretion, or there was an error of law. *In re Nomination Paper of Nader*, 580 Pa. 22, 39, 858 A.2d 1167, 1177 (2004). Moreover, in reviewing election issues, this Court "must consider the longstanding and overriding policy in our Commonwealth to protect the elective franchise." *Id.* However, while this Court's "overriding concern must be to be flexible in order to favor the right to vote," this Court must also "strictly enforce all provisions [of the Election Code] to prevent fraud." *In re Nomination Papers of James*, 944 A.2d at 72. *See also In re Petition of Cianfrani*, 467 Pa. 491, 494, 359 A.2d 383, 384 (1976)("[O]ur cases have made clear that the provisions of the election laws relating to the form of nominating petitions and the accompanying affidavits are not mere technicalities but are necessary measures to prevent fraud and to preserve the integrity of the election process."). Therefore, "[t]he policy of the liberal reading of the Pennsylvania Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process." *In re Petition of Cianfrani*, 467 Pa. at 494, 359 A.2d at 384.

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<sup>1</sup> Act of June 3, 1937, P.L. 1333, art. I, §§ 101, *et seq.*, as amended, 25 P.S. §§ 2601, *et seq.* (hereinafter, the "Election Code").

**STATEMENT OF THE QUESTIONS INVOLVED**

- I. WHETHER THE PENNSYLVANIA ELECTION CODE BARS A PARTY OR POLITICAL BODY TO HAVE PENNSYLVANIA QUALIFIED ELECTORS NOMINATE AS A CANDIDATE FOR PLACEMENT ON THE GENERAL ELECTION BALLOT A SHAM/PROXY CANDIDATE WHO, AS PART OF THE SCHEME, WITHDRAWS HIS OR HER CANDIDACY AFTER THE ELECTORAL NOMINATION IN FAVOR OF THE PARTY'S INTERNALLY NOMINATED CANDIDATE?

Answered in the negative by the Commonwealth Court.

- II. WHETHER THE SUBSTANTIAL EVIDENCE OF RECORD, MOST OF WHICH WAS STIPULATED AND UNDISPUTED, PROVED THAT THE SUBSTITUTE NOMINATION CERTIFICATE OF CANDIDATE BOB BARR AS THE LIBERTARIAN PARTY'S U.S. PRESIDENTIAL CANDIDATE AND THE CANDIDATE'S AFFIDAVITS OF ROCHELLE ETZEL AND BOB BARR WERE FILED AS A RESULT OF FRAUD OR AN INTENT TO SUBVERT THE BASIC TENETS OF PENNSYLVANIA'S ELECTION LAWS BY USING CANDIDATE ROCHELLE ETZEL AS A SHAM/PROXY CANDIDATE?

Answered in the negative by the Commonwealth Court.

- III. WHETHER PERSONAL JURISDICTION EXISTS OVER THE NATIONAL AND PENNSYLVANIA STATE LIBERTARIAN PARTIES DUE TO LACK OF FORMAL SERVICE WHEN THE COMMONWEALTH COURT'S CASE MANAGEMENT ORDER DID NOT REQUIRE SUCH SERVICE UPON THEM AND THE PARTIES VOLUNTARILY APPEARED AND PARTICIPATED AT THE HEARING ON APPELLANT'S PETITION?

Answered in the negative by the Commonwealth Court.



## STATEMENT OF THE CASE

### 1. Form of Action and Procedural History.

This case raises the issue of whether the Pennsylvania Election Code permits a party or political body to knowingly use a sham/proxy candidate on nomination papers that are circulated among the qualified electors of Pennsylvania and subsequently filed with the appropriate election authority when it is known and agreed by the party or political body and the sham/proxy candidate that once the Pennsylvania electoral nomination is complete, the sham/proxy candidate will immediately withdraw his or her candidacy in favor of the party or political body's internally nominated candidate.<sup>2</sup> In such an instance, the party or political body's internally nominated candidate will appear on the Pennsylvania general election ballot even though not one qualified Pennsylvania elector has signed his or her name to a duly filed nomination paper naming the party or political body's internally nominated candidate as the electors' candidate. It is Appellant's position that the use of sham/proxy candidates is inconsistent with public policy and the basic tenets and spirit of the Election Code's purpose of preventing fraud and corruption and preserving the integrity of the electoral process and that the Commonwealth Court erred in ruling otherwise.

Procedurally speaking, on August 18, 2008, Appellant Victor P. Stabile ("Appellant") commenced the proceeding below as a petition under Section 982 of the Pennsylvania Election

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<sup>2</sup> It is important to understand that there are two types of nominations discussed in this case: (1) the internal nomination process used by the Libertarian Party at its National Convention; and (2) the nomination process to be used by political bodies that is set forth in Sections 951 and 952 of the Election Code, 25 P.S. §§ 2911 and 2912. ***Importantly, Appellant makes no challenge to the Libertarian Party's internal nomination process.*** Rather, Appellant challenges only whether the Election Code permits a party or political body to use a sham/proxy candidate as part of the electoral nomination process set forth in the Election Code.

Code, 25 P.S. § 2942. (R. 4a [8/18/08 Docket Entry]; R. 13a [Petition to Set Aside Substitute Nomination Certificate (“Petition”), ¶ 21]).<sup>3</sup> In his Petition, Appellant objected to the substitute nomination certificate that was filed on August 15, 2008 with the Secretary of the Commonwealth (“Secretary”) naming the Libertarian Party’s internally nominated candidate, Bob Barr (“Candidate Barr”), as its U.S. Presidential candidate in place of the Pennsylvania electoral nominated candidate, Rochelle Etzel of Ashland Township, Pennsylvania (“Candidate Etzel”). (R. 8-13a [Petition, ¶¶ 6-20]). Candidate Etzel had withdrawn her U.S. Presidential candidacy on August 7, 2008, approximately six days after her electoral nomination papers and candidate’s affidavit were filed with the Secretary. (R. 177-180a [Transcript of 9/5/08 Hearing (“H.T.”), pp. 18-21]). In his Petition, Appellant contended that the substituted nomination certificate and the candidate’s affidavits of Candidates Etzel and Barr were filed as a result of fraud or an intent to subvert the electoral process and should be set aside as invalid, and that therefore, Candidate Barr’s name should not appear on the Pennsylvania ballot for the upcoming November 4, 2008 General Election (“2008 General Election”). (R. 8-13a [Petition, ¶¶ 6-20]).

Section 982 of the Election Code provides that the process for objecting to a substituted nomination certificate is governed by Section 977 of the Election Code, 25 P.S. § 2937. *See* 25 P.S. § 2942. Section 977 of the Election Code mandates that a copy of any petition objecting to a candidate’s electoral nomination be served on the officer or board with whom the nomination was filed. *See* 25 P.S. § 2937. Accordingly, on August 18, 2008, a copy of the Petition was personally served upon the Secretary, and a written Certificate of Service of the same was attached to the Petition when filed. (R. 168a [H.T., p. 9]).

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<sup>3</sup> Consistent with Pennsylvania Rule of Appellate Procedure 2132, references to the original record appearing in the reproduced record shall be designated as “(R. \_\_a [description of document]),” whereas references to the original record not reproduced shall be designated as “([description of document], p. \_\_).”

On August 21, 2008, the Commonwealth Court entered a Per Curiam Scheduling and Case Management Order (hereinafter, the “8/21/08 Order”), scheduling a hearing on the Petition for September 4, 2008. (R. 4a [8/21/08 Docket Entry]). Pursuant to its 8/21/08 Order, the Commonwealth Court ordered Appellant to personally serve copies of the Petition and the 8/21/08 Order on Candidate Barr on or before August 26, 2008, and file promptly thereafter a proof of service. (R. 4a [8/21/08 Docket Entry]; [8/21/08 Order, ¶ 1.C]). Also, the Commonwealth Court ordered Appellant to serve a copy of the 8/21/08 Order upon the Secretary and file promptly thereafter a proof of service. (R. 4a [8/21/08 Docket Entry]; [8/21/08 Order, ¶ 1.D]). The 8/21/08 Order did not mandate any service of either the Petition or the 8/21/08 Order upon the national Libertarian Party, the Libertarian Party of Pennsylvania (the “LPPa”) or Candidate Etzel. (R. 4a [8/21/08 Docket Entry]; [8/21/08 Order]).

On August 25, 2008, copies of the Petition and the 8/21/08 Order were served upon Candidate Barr, and a written Acceptance of Service of the same was filed on August 26, 2008. (R. 169a [H.T., p.10]; R. 5a [8/26/08 Docket Entry]; [Candidate Barr’s Acceptance of Service]). Also, on August 25, 2008, a true and correct copy of the 8/21/08 Order was served upon the Secretary, and a written Acceptance of Service of the same was filed on August 26, 2008. (R. 169 a [H.T., p. 10]; R. 5a [8/26/08 Docket Entry]; [Secretary’s Acceptance of Service]).

On August 26, 2008, Candidate Barr filed a motion to continue the September 4, 2008 hearing. (R. 5a [8/26/08 Docket Entry]; [Candidate Barr’s Application for Continuance]). By order dated August 28, 2008, the Commonwealth Court granted Candidate Barr’s motion and rescheduled the hearing for September 5, 2008. (R. 5a [8/28/08 Docket Entry]; [Order Granting Application for Continuance]).

On September 5, 2008, the hearing before the Commonwealth Court took place. At the hearing, the Libertarian Party and the LPPa appeared and requested to participate in the proceedings, which request was granted. (*See* R. 162-163a & 183-184a [H.T., pp. 3-4 & 24-25]). Thereafter, with the full participation of counsel for the Libertarian Party, the LPPa and Candidate Barr, evidence was taken and factual stipulations were placed of record, including that: (1) Candidate Etzel and the Party knew and understood throughout the entire electoral nomination process that her name was placed on the nomination papers as a proxy candidate; (2) Candidate Etzel never intended to be the Libertarian Party's U.S. Presidential candidate and; (3) it was always understood that after the nomination papers were circulated and filed, Candidate Etzel would withdraw her candidacy in favor of whomever the national Libertarian Party internally nominated as its U.S. Presidential candidate. (R. 224-226a [H.T., pp. 65-68]) *See also* (R. 170a, 183-84a, 214-216a, 223-224a, 262a, 273-74a, 289a [H.T., pp. 3-4, 11, 24-25, 55-57, 64-65, 103, 114-15, 130]). The stipulations were offered so to expedite the hearing and eliminate the need to have Candidate Etzel (who was present at the hearing) testify. (R. 216-224a [H.T., pp. 57-65]).

On September 15, 2008 the Commonwealth Court entered a final order ("Final Order") denying Appellant's Petition on the merits because the Commonwealth Court did not believe that there was any intent to mislead voters or subvert the election process by using Candidate Etzel as a sham/proxy candidate. (R. 6a [9/15/08 Docket Entry of Order]; R. 380-388a [Exhibit "A" to Appellant's Jurisdictional Statement]). Alternatively, the Commonwealth Court dismissed the Petition against the Libertarian Party and the LPPa for lack of personal jurisdiction. *Id.*

On September 18, 2008, Appellant filed his appeal to this Court, seeking a reversal of the Final Order and a granting of the relief requested in his Petition. (R. 6a [9/18/08 Docket Entry]; R. 360-371a [9/18/08 Notice of Appeal]; R. 372-389a [9/18/08 Jurisdictional Statement]).

**2. Prior Determinations.**

Other than the Commonwealth Court's Opinion and Order at Case No. 414 M.D. 2008, which is discussed in Section 5 *infra*, Appellant is unaware of any prior determination of this Court or any other court or other governmental unit in this case.

**3. Identity of Judges and Other Officials.**

The names of the judges or other officials whose determinations are to be reviewed are as follows: The Honorable Johnny J. Butler, the Commonwealth Court of Pennsylvania.

**4. Chronological Factual Statement.**

**a. *The Parties.***

Appellant is a resident and a duly registered and enrolled "qualified elector" of the Commonwealth of Pennsylvania. (R. 168 [H.T., p. 9]). Further, Appellant is registered to vote in the upcoming 2008 General Election. (R. 168 [H.T., p. 9]).

Candidate Barr is the Libertarian Party candidate for the office of President of the United States in the 2008 General Election. (R. 169 [H.T., p. 10]). Candidate Barr's campaign address for his 2008 Presidential Election Committee is in Atlanta, Georgia. (R. 169-70a [H.T., p. 10-11]). Also, Candidate Barr maintains a Pennsylvania office at 3915 Union Deposit Road #223, Harrisburg, Pennsylvania 17109. (R. 170a [H.T., p. 11]).

The Libertarian Party is a nationwide political body whose principal place of business is located in Washington, District of Columbia. (R. 170a [H.T., p. 11]). According to Paragraph 2 of Article 6 of its Bylaws, the Libertarian Party shall charter state-level affiliate parties from any

qualifying organization requesting such status in each state, territory and the District of Columbia. (R. 170-71a [H.T., pp. 11-12]; R. 391a [Petitioner's Hrg. Ex. 1, p. 2]).

The LPPa is an organization to which the Libertarian Party has granted state-level affiliate party status within the meaning of Article 6 of its Bylaws. (R. 171a [H.T., p. 12]). Further, the LPPa is a corporation whose principal place of business is located at the same location as Candidate Barr's Pennsylvania office. (R. 171a [H.T., p. 12]).

***b. The Pennsylvania Electoral Nomination Process for the 2008 General Election.***

The Libertarian Party and the LPPa are "political bodies"<sup>4</sup> within the meaning of Section 801(a) of the Election Code, 25 P.S. § 2831(a). (R. 172a [H.T., p. 13]). According to Sections 951 and 952 of the Election Code, 25 P.S. §§ 2911 and 2912, as political bodies, the Libertarian Party and LPPa can have their candidates nominated for placement on a Pennsylvania general election ballot by submitting nomination papers that, among other things, identify the name of the nominated candidate and the office for which such candidate is nominated and are properly signed and completed by the statutorily prescribed number of Pennsylvania "qualified electors"<sup>5</sup> regardless of the electors' party affiliation or registration. 25 P.S. §§ 2911(a)-(c) and 2912. Moreover, "in the case of electors for President and Vice-President of the United States, the ***names of the candidates for President and Vice-President of such political body***" must be set forth on the nomination papers. 25 P.S. § 2912 (emphasis added). Further, there must be

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<sup>4</sup> Section 102(p) of the Election Code defines a "political body" as "an independent body of electors, as defined in section 801 of this act." 25 P.S. § 2602(p).

<sup>5</sup> Section 102(t) of the Election Code defines a "qualified elector" as follows:

any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.

25 P.S. § 2602(t).

appended to the nomination papers of a political body candidate nominated therein an affidavit by the candidate stating, among other things, “the name of the office for which he *consents* to be a candidate,” “that he is eligible for such office,” and “that he will not knowingly violate any provision of [the Election Code] or any law regulating and limiting election expenses, and prohibiting corrupt practices in connection therewith.” 25 P.S. § 2911(e) (emphasis added).

For the 2008 General Election, the number of qualified electors’ signatures statutorily prescribed for the nomination papers of a political body candidate is twenty-four thousand six hundred and sixty-six (24,666). (R. 172a [H.T., p. 13]). This number represents two percent (2%) of the 1,233,265 votes cast for the election of the Honorable Seamus McCaffery as Justice of the Supreme Court during the 2007 Municipal Election, as prescribed by Section 951(b) of the Election Code, 25 P.S. § 2911(b). (R. 172a [H.T., p. 13]).

According to Section 953(b) of the Election Code, 25 P.S. § 2913(b), the first legal day to circulate and file nomination papers nominating a candidate of a political body for placement on the Pennsylvania 2008 General Election ballot was February 13, 2008. (R. 172-73a [H.T., pp. 13-14]). Pursuant to a consent decree entered into by the Secretary on June 13, 1994, in the case of *The Libertarian Party of Pennsylvania v. Davis*, Case No. 84-0262 (M.D. Pa.) and on June 15, 1994, in the case of *Hall v. Davis*, Case No. 84-1057 (E.D. Pa.), the last legal day to circulate and file nomination papers nominating a candidate of a political body for placement on the Pennsylvania ballot for the 2008 General Election was August 1, 2008. (R. 173a [H.T., p. 14]).

According to Section 977 of the Election Code, 25 P.S. § 2937, the last day to file objections to nomination papers nominating a political body candidate for placement on the Pennsylvania ballot for the 2008 General Election was August 8, 2008, which represents the seventh day after the last day for the filing of such nomination papers. (R. 173-74a [H.T., pp. 14-

15]). August 8, 2008 was also the last day for a nominated candidate of a political body to withdraw his or her name from nomination and placement on the Pennsylvania 2008 General Election ballot, which represents the seventh day next succeeding the last day for the filing of such nomination papers as prescribed by Section 978(b) of the Election Code, 25 P.S. § 2938(b). (R. 174a; [H.T., p. 15]).

According to Section 981(a) of the Election Code, 25 P.S. § 2941(a), the last day to file a substitute nomination certificate to fill a vacancy caused by the withdrawal of a political body candidate's nomination by nomination papers was August 21, 2008, which represents seventy-five (75) days before the day of the 2008 General Election. (R. 174-75a; [H.T., pp. 15-16]). Moreover, according to Section 981.1 of the Pennsylvania Election Code, 25 P.S. § 2941.1, a substituted nominated candidate of a political body must file with the substituted nomination certificate an affidavit by the substituted nominated candidate stating, among other things, "the name of the office for which he *consents* to be a candidate," "that he is eligible for such office," and "that he will not knowingly violate any provision of [the Election Code] or any law regulating and limiting election expenses, and prohibiting corrupt practices in connection therewith." 25 P.S. § 2941.1 (emphasis added).

*c. Use of Candidate Etzel as a Sham/proxy Candidate.*

Both the Libertarian Party and the LPPa have adopted bylaws and other documents to govern their organizations. (R. 390a-403a [Petitioner's Hrg. Ex. 1]; R. 404a-406a [Petitioner's Hrg. Ex. 2]; R. 407a-415a [Petitioner's Hrg. Ex. 1]). Pursuant to its Bylaws, the Libertarian Party is the organization that is entrusted with the responsibility of nominating candidates for the U.S. Presidency. (R. 231a [H.T., p. 72]; R. 390a [Petitioner's Hrg. Ex. 1, p.1]). The Libertarian Party's Bylaws also mandate that its National Convention for the nomination of a U.S.



Presidential candidate for the 2008 General Election had to occur sometime between July 1, 2007 and August 31, 2008.<sup>6</sup> (R. 232-33a [H.T., p. 73-74]; R. 395a, 397a [Petitioner's Hrg. Ex. 1, p. 6, 8]). Accordingly, the Libertarian Party chose to hold its National Convention for the nomination of its 2008 U.S. Presidential candidate on May 23-26, 2008 in Denver, Colorado. (R. 176a [H.T., p. 17]).

Rather than wait for the Libertarian Party's internal nomination of its 2008 U.S. Presidential candidate, in February 2008, the LPPa and Candidate Etzel agreed that her name would be placed on Pennsylvania electoral nomination papers ("Nomination Papers") identifying her as the Libertarian Party's U.S. Presidential candidate. (R. 224-25a [H.T., p. 65-66]). Significantly, however, the LPPa, as a state charter organization, is not authorized to select the Libertarian Party's bona fide U.S. Presidential candidate nominee. As discussed above, such an undertaking is explicitly reserved for the national Libertarian Party. (R. 231a [H.T., p. 72]; R. 390a [Petitioner's Hrg. Ex. 1, p.1]). At best, the LPPa is merely authorized to select a proxy candidate to act as a placeholder until the Libertarian Party selects its Presidential nominee. Indeed, Article X, Section 1 of the LPPa's Bylaws specifically states that with respect to U.S.

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<sup>6</sup> Pursuant to Paragraph 1 of Article 11 of the Libertarian Party's Bylaws:

Regular Conventions:

The Party shall hold a Regular Convention every two years, at a time and place selected by the National Committee. Regular Conventions shall be held sometime during the period of July of an odd-numbered year through August of an even-numbered year. All business required to be conducted at Regular Conventions shall be conducted at Regular Conventions only.

(R. 395a [Petitioner's Hrg. Ex. 1, p. 6]). Further, according to Paragraph 1 of Article 12 of the Libertarian Party's Bylaws:

Nomination of candidates for President and Vice President of the United States may be made only at the Regular Convention immediately preceding a presidential election.

(R. 397a [Petitioner's Hrg. Ex. 1, p. 8]).

Presidential candidates, the LPPa's powers are limited to "select[ing] individuals whose names are to appear on statewide nominating petitions as *proxies* for President and Vice-President." (R. 237a-238a [H.T., pp. 78-79]; R. 413a [Petitioner's Hrg. Ex. 3, p. 7])(emphasis added). Thus, as the LPPa's Bylaws explicitly confirm, the placement of Candidate Etzel's name on the Nomination Papers was solely as a sham/proxy U.S. Presidential candidate. *Id.*

Because the LPPa was only authorized to select a proxy candidate, the LPPa and Candidate Etzel agreed in February 2008 that Candidate Etzel would withdraw her candidacy in favor of whomever the Libertarian Party subsequently selected as its internally nominated U.S. Presidential candidate. (R. 266a [H.T., p. 67]). Stated differently, and as the parties stipulated at the September 5, 2008 hearing, from the outset, Candidate Etzel was simply a sham/proxy candidate who had no intention of ever serving as the Libertarian Party's U.S. Presidential candidate on the Pennsylvania 2008 General Election ballot. (R. 266a [H.T., p. 67]).

On or about February 23, 2008, the Libertarian Party and the LPPa began circulating the Nomination Papers for Candidate Etzel and other statewide candidates to appear on the Pennsylvania 2008 General Election ballot. (R. 175a; [H.T., p. 16]). Notably, there was no indication on the circulated Nomination Papers that Candidate Etzel was simply a proxy candidate who would later withdraw in favor of whomever the Libertarian Party subsequently selected as its internally nominated U.S. Presidential candidate. (*See* R. 554-3396a [Petitioner's Hrg. Ex. 10]). Rather, the Nomination Papers represented to Pennsylvania electors that Candidate Etzel, a Pennsylvania resident, was in fact seeking the Libertarian Party's U.S. Presidential nomination. *Id.*

Because she was simply a sham/proxy candidate, Candidate Etzel never sought to become the Libertarian Party's U.S. Presidential candidate. (R. 288a [H.T., p. 129]). Thus, it is

not surprising that when the LPPa, the New Jersey Libertarian Party and Libertarian Party of West Virginia held their tri-state regional convention in March 2008, Candidate Etzel was not one of the eight candidates who attended and spoke at the event seeking the Libertarian Party's 2008 U.S. Presidential nomination. (R. 175-76a [H.T., pp. 16-17]; R. 257a [H.T. p. 98]).

Moreover, Candidate Etzel took no steps in accordance with the Libertarian Party's Bylaws or Convention Rules to secure the Libertarian Party's U.S. Presidential nomination at its May 2008 National Convention. (R. 226a [H.T., p. 67]). For example, pursuant to Paragraph 2 of Article 12 of the Libertarian Party's Bylaws, a candidate may not be nominated for President or Vice President unless they have "expressed a willingness to accept the nomination of the Party." (R. 233a [H.T., p. 74]; R. 397a [Petitioner's Hearing Ex. 1 p. 8]). If anything, Candidate Etzel did just the opposite when she agreed with the LPPa that she would withdraw her candidacy in favor of whomever the Libertarian Party subsequently selected as its nominated Presidential candidate. (R. 266a [H.T., p. 67]). The Libertarian Party's Convention Rules also require that a person seeking the U.S. Presidential nomination secure the support of at least "30 registered delegates [to] join in the nomination in writing submitted to the Chair." (R. 234-35a [H.T., p. 75-76]; R. 401a [Petitioner's Hearing Ex. 1, p. 9]). Candidate Etzel made no effort to gather this requisite support. (R. 226a [H.T., p. 67]).

Not only did Candidate Etzel fail to take any internal steps to secure the Libertarian Party's nomination, but she also failed to form a committee pursuant to the federal election laws. (R. 226a [H.T., p. 67]). Similarly, she made no filings in any other states to run as the candidate for President of the United States. (R. 226a [H.T., p. 67]). Indeed, after she was selected by the LPPa as a proxy candidate, Candidate Etzel "took no additional steps," including the expenditure of any moneys, to seek the Office of President of the United States. (R. 226a [H.T., p. 67]).

**d. *The Selection of Candidate Barr as the Libertarian Party's U.S. Presidential Candidate.***

Beginning on May 23, 2008 and ending on May 26, 2008, the Libertarian Party held its National Convention in Denver, Colorado. (R. 176a; [H.T., p. 17]). Eight candidates, none of whom were Candidate Etzel, were qualified to speak at the Libertarian Party's National Convention. (R. 238-39a [H.T., p. 79-80]; R. 464a [Petitioner's Hrg. Ex. 6, p. 47] ).

The minutes from the Libertarian Party's National Convention, which accurately document the Libertarian Party's internal selection of its 2008 U.S. Presidential candidate, reflect that six rounds of ballots were cast before the Libertarian Party nominated its U.S. Presidential candidate. (R. 176a [H.T., p. 17]; R. 464-67a [Petitioner's Hrg. Ex. 6 p. 47-50]). The minutes also reflect the voting for each of the eight candidates, as well as the write-ins. (R. 464-67a [Petitioner's Hrg. Ex. 6 p. 47-50]). Interestingly, while there were Pennsylvania write-ins for Penn Gillette and Ralph Nader, there were no write-in candidates by anybody for Candidate Etzel. (R. 239a [H.T., p. 80]; R. 465a, 467a [Petitioner's Hrg. Ex. 6 pp. 48, 50]). On Sunday, May 25, 2008, in accordance with its Bylaws, the Libertarian Party internally nominated Candidate Barr to be its 2008 U.S. Presidential candidate. (R. 225-26a [H.T., 66-67]; R. 464-67 [Petitioner's Hrg. Ex. 6 pp. 47-52]).

**e. *The Continued Circulation of Nomination Papers Naming Candidate Etzel as the Libertarian Party's U.S. Presidential Candidate.***

Despite the fact that the Libertarian Party had internally nominated Candidate Barr as its 2008 U.S. Presidential candidate, the Libertarian Party and the LPPa continued to circulate on or after May 25, 2008 the Nomination Papers naming Candidate Etzel as the Libertarian Party's U.S. Presidential nominee. (R. 226a [H.T., p. 67]; R. 504a [Petitioner's Hrg. Ex. 7]). Further, the Libertarian Party and the LPPa continued to circulate among Pennsylvania electors the

Nomination Papers with Candidate Etzel identified as the Libertarian Party's U.S. Presidential candidate, even though they knew that Candidate Etzel had no intention of being the Libertarian Party's U.S. Presidential candidate on the Pennsylvania 2008 General Election ballot. (R. 266a [H.T., 67]). Notably, even after Candidate Barr was nominated at the National Convention, there was still no indication on the Nomination Papers that Candidate Etzel was simply a proxy candidate who would later withdraw in favor of Candidate Barr. (*See* R. 554-3396a [Petitioner's Hrg. Ex. 10]). Rather, the Nomination Papers represented to Pennsylvania electors that Candidate Etzel, a Pennsylvania resident, was seeking the Libertarian Party's U.S. Presidential nomination. *Id.*

The continued circulation of the Nomination Papers naming Candidate Etzel as the Libertarian Party's 2008 U.S. Presidential candidate was nothing more than a scheme to subvert the electoral process by gaining enough signatures under Candidate Etzel's name and then substituting her candidacy with that of Candidate Barr. (R. 266-67a [H.T. 108-09]; R. 508a [Petitioner's Hrg. Ex. 8]). Indeed, in an on-line forum appearing on LPPa's web site, the Libertarian Party and its members acknowledged the existence and execution of this plan. (R. 266-67a [H.T. 108-09]; R. 505-514a [Petitioner's Hrg. Ex. 8]). Specifically, when presented with the following question:

On the nomination papers, the president/VP slots are listed as Rochelle Etzel and Chuck Boust. Can they remain on the nomination papers as 'place holders' or should Barr/Root be in those slots?

I don't want to see the entire page tossed out because we had the wrong names in the nomination slots[.]

David Jahn, the Eastern Vice Chair of the LPPa, wrote:

Thanks for asking. We need to continue collecting signatures under Rochelle and Chuck Boust names. ***Once we get enough to***

***qualify them on the ballot, we'll submit the nomination papers in their names. Then they will withdraw and we'll substitute their names with actual candidates.*** I know it sounds weird, but that is the way we have to do it in PA.

Thanks,

David Jahn.

(R. 266-67a [H.T. 108-09]; R. 508a [Petitioner's Hrg. Ex. 8])(emphasis added).

**f. *The Submission of the Nomination Papers Naming Candidate Etzel as the U.S. Presidential Candidate.***

Although Candidate Etzel admittedly had no intention of ever serving as the Libertarian Party's 2008 U.S. Presidential candidate, she executed on July 10, 2008 a candidate's affidavit for that candidacy. (R. 177a [H.T., p. 18]; R 515-16a [Petitioner's Hrg. Ex. 9]). Similarly, although the Libertarian Party and LPPa knew that Candidate Etzel would withdraw her electoral nomination in favor of Candidate Barr, they filed with the Secretary on July 30, 2008, before the Nomination Papers were filed, the candidate's affidavit executed by Candidate Etzel. (R. 177a [H.T., p. 18]). Significantly, in her affidavit, Candidate Etzel swore under oath that, among other things, "the name of the office for which [she] desire[d] to be a candidate [is President of the United States]" and that she "will not knowingly violate any election law or any law ... prohibiting corrupt practices in connection therewith." (R. 116a [Petitioner's Hrg. Ex. 9]). Candidate Etzel's affidavit was false because she knew that she was not the Libertarian Party's internally nominated 2008 U.S. Presidential candidate and that she would step aside for such internally nominated candidate once the electoral nomination process was completed. (R. 226a [H.T., p. 67]).

In spite of Candidate Barr's undisputed nomination as the Libertarian Party's 2008 U.S. Presidential candidate and in furtherance of their scheme to subvert the electoral process, the

Libertarian Party and the LPPa filed on August 1, 2008, the Nomination Papers nominating Candidate Etzel as the Libertarian Party's 2008 U.S. Presidential candidate. (R. 178a [H.T., p. 19]). As filed, the Nomination Papers consisted of pages that are numbered one (1) through one thousand four hundred and thirty (1,430), with at least forty-nine thousand eight hundred and seventy-nine (49,879) lines marked with purported signatures of electors. (R. 178a [H.T., p. 19]; R. 241a [H.T., p. 82]; R. 554-3396a [Petitioner's Hrg. Ex. 10]). The Secretary, who in such capacity, *inter alia*, is empowered to determine the sufficiency of electoral nomination papers for the U.S. Presidential Office, examined the Nomination Papers and struck or otherwise disregarded approximately one thousand nine hundred and three (1,903) signatures appearing thereon, leaving a total of at least forty-seven thousand nine hundred and seventy-six (47,976) signatures. (R. 178-79 [H.T., pp. 19-20]; R. 242a [H.T., p. 83]; R. 548a [Petitioner's Hrg. Ex. 11]).

Of the total signatures that were not struck by the Secretary from the Nomination Papers, at least thirty-four thousand, three hundred and five (34,305) were dated on or after May 25, 2008. (R. 179-80a [H.T., pp. 20-21]; R. 242a [H.T., p. 83]; R. 548a [Petitioner's Hrg. Ex. 11]). Thus, the amount of signatures collected after Candidate Barr's nomination at the National Convention exceeded the statutorily prescribed number needed to place a genuine political body candidate's name on the Pennsylvania 2008 General Election ballot. *Id.*

***g. The Withdrawal of Candidate Etzel's Candidacy and The Substitution of Candidate Barr as the Libertarian Party's U.S. Presidential Candidate.***

On August 4, 2008, Candidate Etzel executed an affidavit withdrawing her electoral nomination on behalf of the Libertarian Party as its 2008 U.S. Presidential candidate. (R. 180a [H.T., p. 21]; R. 549-50a [Petitioner's Hrg. Ex. 12]). On August 7, 2008, one day before the time period for which objections could be filed to the Nomination Papers themselves, and in

furtherance of their scheme to subvert the electoral process, the Libertarian Party and the LPPa filed with the Secretary the withdrawal affidavit executed by Candidate Etzel. (R. 180a [H.T., p. 21]; R. 242a [H.T., p. 83]; R. 549-50a [Petitioner's Hrg. Ex. 12]).

On August 9, 2008, Candidate Barr executed a candidate's affidavit on behalf of the Libertarian Party for the Office of President of the United States. (R. 180a [H.T., p. 21]; R. 244a [H.T., p. 85]). Then, on August 15, 2008, almost three months after Candidate Barr's internal nomination as the Libertarian Party's U.S. Presidential candidate, the Libertarian Party and the LPPa filed a substitute nomination certificate and the candidate's affidavit executed by Candidate Barr, thereby nominating Candidate Barr as the Libertarian Party's 2008 U.S. Presidential candidate. (R. 180-81a [H.T., pp. 21-22]; R. 243-245a [H.T., pp. 84-86]; R. 551-53a [Petitioner's Hrg. Ex. 13]). Candidate Barr's candidate affidavit states that Candidate Barr swears under oath that, among other things, that he "will not knowingly violate any election law or any law ... prohibiting corrupt practices in connection therewith." (R. 244-245a [H.T., pp. 85-86]; R. 553a [Petitioner's Hrg. Ex. 13]).

Against this backdrop, and as the parties stipulated at the September 5, 2008 hearing, it is clear that from the outset, Candidate Etzel, was simply a sham/proxy candidate who had no intention of ever serving as the Libertarian Party's Presidential candidate on the Pennsylvania 2008 General Election ballot. (R. 266a [H.T., p. 67]). Accordingly, on August 18, 2008, Appellant filed his Petition, seeking to set aside the substitute nomination certificate and the candidate's affidavits of Candidates Etzel and Barr as invalid because they were filed as a result of fraud or intent to subvert the electoral process. (R. 8-13a [Petition to Set Aside Substitute Nomination Certificate]).



## 5. Statement of Order Under Review.

On September 15, 2008, the Commonwealth Court entered a Final Order wherein Appellant's Petition was denied and/or dismissed. (R. 6a [9/15/08 Docket Entry of Order]; R. 388a [Final Order]). In its Memorandum Opinion in support of the Final Order, the Commonwealth Court acknowledged that "[t]he Election Code requires, however, that nomination papers actually name a candidate," citing Section 952 of the Election Code, 25 P.S. § 2912. (R. 385a [Mem. Op., p. 6]). Further, the Commonwealth Court reiterated the parties' stipulation that Candidate Etzel "always understood that she would step aside for the [Libertarian Party's] national candidate once the nomination process was completed" and that she "took no steps to form a committee, to actively seek the office of President or to place her name on the ballot in other states." (R. 386a [Mem. Op., p. 7]).

Nevertheless, the Commonwealth Court fundamentally determined that the Election Code permits the use of a sham/proxy candidate and that the Libertarian Party, LPPa, and Candidates Barr and R. Etzel did not intend to mislead voters or subvert the election process by using Candidate Etzel as a sham/proxy candidate. (R. 383-387a [Mem. Op., pp. 4-8]). In reaching this conclusion, the Commonwealth Court stated that:

In Nominating Etzel prior to the Libertarian National Convention and substituting Barr, thereafter, the Party and LPPa merely complied with the Party's election process as it has been established in Pennsylvania since 1966 when, nationally, the Party moved its convention from a date prior to the legal date for circulation of Pennsylvania nomination papers to a subsequent date.

(R. 384a [Mem. Op., p. 5]). Moreover, because the Election Code requires that nomination papers actually name a U.S. Presidential candidate and because the Libertarian Party's National

Convention was held after the first legal day to circulate nomination papers in Pennsylvania, the Commonwealth Court reasoned that the Libertarian Party and LPPa had no choice but to:

[Begin] circulating Pennsylvania nomination papers on February 23, 2008, listing Etzel as their candidate. They did not list Robert Barr as their candidate on the nomination papers because at that point the Libertarian national convention had yet to take place and Barr had yet to be nominated by the Party at the national level.

(R. 385a [Mem. Op., p. 6]). Given these circumstances, the Commonwealth Court found that “the [Libertarian] Party and LPPa’s intent was to comply with the Election Code, not to mislead Pennsylvania’s voters” and that “[t]he process employed by the Libertarian Party under the circumstances in Pennsylvania appears to be reasonably calculated to allow the Party to produce the nominee who will best represent the party’s platform.” *Id.*

With respect to Candidates Etzel and Barr, the Commonwealth Court also found that “each fully complied with the rigors of the Election Code in effectuating the withdrawal and substitution at issue.” (R. 387a [Mem. Op., p. 8]). The Commonwealth Court went on to note that Candidate Etzel “consented to run as the Party’s Pennsylvania candidate for President, and to step aside when called to do so in favor the Libertarian Party’s agreed upon national candidate once selected.” *Id.* Further, the Commonwealth Court held that “[h]ad the Libertarian Party decided to make Etzel the national candidate, Etzel may very well have accepted the nomination,” even though there was no evidence or testimony of record to support such a finding. *Id.* Additionally, the Commonwealth Court noted “that the [Libertarian] Party maintained a publicly accessible website such that any voter could visit the site *via* the internet at any time to view the then current Libertarian candidates.” (R. 385a [Mem. Op., p. 6]). Consequently, the Commonwealth Court found no misrepresentation or fraud on the part of Candidates Etzel and Barr, the Libertarian Party or the LPPa. *Id.*

Relying on the Pennsylvania Rules of Civil Procedure, the Commonwealth Court also found that it did not have personal jurisdiction over the Libertarian Party or the LPPa because neither party was served in accordance with those rules. (R. 381-382a [Mem. Op., pp. 2-3]). Accordingly, the Commonwealth Court denied and/or dismissed Appellant's Petition. (R. 6a [9/15/08 Docket Entry of Order]; R. 388a [Final Order]).

### **SUMMARY OF ARGUMENT**

The Commonwealth Court erred as a matter of law and/or abused its discretion in ruling that the Pennsylvania Election Code sanctions the use of a sham and/or proxy candidate on electoral nomination papers. When a sham/proxy candidate is used, a fraud or intention to subvert the electoral process is perpetrated on qualified Pennsylvania electors because it is known by both the party or political body and the named candidate that once the Pennsylvania electoral nomination is complete, the electorally nominated candidate will withdraw his or her candidacy in favor of the party or political body's internally nominated candidate. In short, the use of a sham/proxy candidate impinges on the right of suffrage and effectively denies Pennsylvania qualified electors of their right to nominate the party or political body's candidate as mandated by the Election Code.

Further, the Commonwealth Court erred as a matter of law and/or abused its discretion in finding that the Libertarian Party, LPPa, and Candidates Barr and R. Etzel did not intend to mislead voters or subvert the election process by using Candidate Etzel as a sham/proxy candidate. On the contrary, the uncontradicted, substantial evidence at the hearing demonstrated that the substitute nomination certificate of Candidate Barr and the candidate's affidavits of Candidates Etzel and Barr were filed as a result of fraud or intent to subvert public policy and the basic tenets of Pennsylvania's elections laws and that unless this Court rules otherwise,

Candidate Barr's name will appear on the Pennsylvania 2008 General Election ballot even though not one qualified Pennsylvania elector (let alone the 24,666 required under the Election Code) signed his or her name to a duly filed electoral nomination paper naming Candidate Barr as the Libertarian Party's 2008 U.S. Presidential candidate.

Finally, the Commonwealth Court erred as a matter of law and/or abused its discretion in ruling that Appellant's Petition should be dismissed for lack of personal jurisdiction. The Commonwealth Court's 8/21/08 Order did not require service upon the Libertarian Party or the LPPa, and both parties voluntarily appeared and participated at the hearing without raising any issue as to personal jurisdiction. Thus, the Commonwealth Court erred in dismissing Appellant's Petition on this basis.

In the instant case, where a sham and/or proxy candidate has been knowingly used on the Nomination Papers, permitting the substitution of Candidate Barr as the Libertarian Party's U.S. Presidential candidate undermines public policy and the basic tenets and spirit of the Election Code's purpose of preventing fraud and corruption and preserving the integrity of the electoral process. Accordingly, the substitute nomination certificate of Candidate Barr as the Libertarian Party's 2008 U.S. Presidential candidate and the Candidate's Affidavits of R. Etzel and Barr should be set aside as invalid, and the Secretary should be directed to remove Candidate Barr's name from Pennsylvania's 2008 General Election ballot.

## ARGUMENT

In order to appear on a general election ballot, the Election Code requires that a candidate of a political body submit qualified nomination papers. *See* 25 P.S. §§ 2911 and 2912. Further, the Election Code requires that the nomination papers contain the statutorily required number of valid signatures from Pennsylvania qualified electors, and that the nomination papers state, among other things, that the electors are nominating a particular, named candidate. *See* 25 P.S. §§ 2911(a)-(c) and 2912. Moreover, in the case of electors for President and Vice-President of the United States, the names of the candidates for President and Vice-President of such political body must be set forth on the nomination papers. *See* 25 P.S. §2912. For the upcoming 2008 General Election, the Election Code requires that at least 24,666 valid signatures of Pennsylvania qualified electors duly appear on nomination papers for a political body candidate. (R. 172a [H.T., p. 13]). Further, the Election Code mandates that the nomination papers have appended to them an affidavit by the candidate stating, among other things, “the name of the office for which he consents to be a candidate,” “that he is eligible for such office,” and “that he will not knowingly violate any provision of [the Election Code] or any law regulating and limiting election expenses, and prohibiting corrupt practices in connection therewith.” 25 P.S. § 2911(e). These requirements of the Election Code regarding nomination papers, signatures and affidavits, among other requirements, are protections against fraud and corruption, making sure that the named candidate has the support of valid and qualified Pennsylvania electors. *In re Petition of Cianfrani*, 467 Pa. at 494, 359 A.2d at 384.

In this case, Candidate Barr is attempting to be placed on the Pennsylvania 2008 General Election ballot without ever receiving a single signature from a qualified Pennsylvania elector. Instead, the Libertarian Party and the LPPa chose to seek nominating signatures for Candidate

Etzel. (R. 224-227a [H.R., pp. 65-68]). As the record indicates, Candidate Etzel collected and submitted 47,976 signatures on her nomination papers. (R. 178-79 [H.T., pp. 19-20]). However, the Libertarian Party and the LPPa then conducted a barely concealed “bait-and-switch” scheme. In particular, as was agreed both prior to and during the circulation of her nomination papers, once Candidate Etzel had garnered the necessary signatures and submitted her nomination papers as the Libertarian Party’s U.S. Presidential candidate, she withdrew her electoral nomination before the last day in which any challenge to her nomination papers could be filed. (R. 180a [H.T., p. 21]; R. 242a [H.T., p. 83]; R. 549-50a [Petitioner’s Hrg. Ex. 12]). Then, a week later, without ever receiving any signatures for Candidate Barr, the Libertarian Party and the LPPa filed a substitute nomination certificate naming Candidate Barr as the Libertarian Party’s 2008 U.S. Presidential candidate. (R. 180-81a [H.T., pp. 21-22]; R. 243-245a [H.T., pp. 84-86]; R. 551-53a [Petitioner’s Hrg. Ex. 13]).

Thus, as it currently stands, the Libertarian Party has successfully used a sham/proxy candidate to fulfill the requirements of the Election Code, then substituted the Libertarian Party’s hand-picked candidate for placement on Pennsylvania’s 2008 General Election ballot. If the Democratic or Republican Party had attempted such a maneuver, the headlines would be blaring “FRAUD!” Nothing in the Election Code, either expressly or implicitly, permits such illegal and fraudulent conduct. Accordingly, this Court should not permit Candidate Barr’s name to appear on the Pennsylvania 2008 General Election ballot and should reverse the Commonwealth Court’s order sanctioning such illegal and fraudulent conduct.

**I. THE COMMONWEALTH COURT ERRED AS A MATTER OF LAW AND/OR ABUSED ITS DISCRETION IN RULING THAT THE PENNSYLVANIA ELECTION CODE PERMITS A PARTY OR POLITICAL BODY TO HAVE PENNSYLVANIA QUALIFIED ELECTORS NOMINATE AS A CANDIDATE FOR PLACEMENT ON THE GENERAL ELECTION BALLOT A SHAM/PROXY CANDIDATE.**

As an initial matter, Appellant does not challenge the Libertarian Party's internal process for selecting its presidential nominee. In an attempt to obfuscate the issues, Candidate Barr argued at the September 5, 2008 hearing before the Commonwealth Court that this case involved intra-party matters and as such, the Commonwealth Court should be "very reluctant" to infringe on a party's First Amendment right of association. (R. 203-04a [H.T. p. 44-45]). The Commonwealth Court seemingly was persuaded by this argument when in its Memorandum Opinion, it not only cited *New York State Bd. of Elections v. Lopez*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 791 (2008), for the proposition that "a political party/body has a right to choose the candidate selection process that it determines to be most appropriate to produce the nominee who will best represent the chosen platform," but also ruled that the Libertarian Party and the LPPa "simply took reasonable action to abide by the Election Code while furthering its legitimate interest in producing the nominee best suited to represent the Libertarian platform as the Libertarian presidential candidate." (R. 383a & 387a [Mem. Op., pp. 4 & 8]). *See also* (R. 395a [Mem. Op., p. 6])("The process employed by the Libertarian Party under the circumstances in Pennsylvania appears to be reasonably calculated to allow the Party to produce the nominee who will best represent the party's platform.").

However, this case does not involve any challenge to the Libertarian Party's internal selection of Candidate Barr as its 2008 U.S. Presidential candidate. Rather, the issue raised by this case is whether the Election Code sanctions the placement of Candidate Barr on the Pennsylvania 2008 General Election ballot when, because of the intentional use of a sham/proxy

candidate, not one qualified Pennsylvania elector has signed his or her name to a filed nomination paper naming Candidate Barr as the electors' Libertarian Party candidate. According to the Commonwealth Court, the Election Code authorizes Candidate Barr's nomination despite the undisputed use of a sham/proxy candidate as part of the electoral nomination process. (R. 384-387a [Mem. Op., pp. 5-8]). For the reasons that follow, the Commonwealth Court's decision is erroneous as a matter of law and must be reversed.

**A. A Substitute Nomination Certificate and a Candidate Affidavit Should be Set Aside Where There Is Fraud or Intent to Subvert the Basic Tenets of the Election Code.**

The United States Supreme Court has explicitly recognized that states have a compelling interest in preserving the integrity of the electoral process, in regulating the number of candidates appearing on the ballot and in ensuring the existence of viable candidates. *American Party of Texas v. White*, 415 U.S. 767, 783 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971). In accordance with this principle, this Court has recognized that one of the general purposes of election law is to prevent fraud and corruption. Specifically, this Court has noted that:

the very purpose of election laws is to secure 'freedom of choice and to prevent fraud and corruption; to obtain a fair election and an honest election return; to insure fair elections, or an equal chance and opportunity for every-one to express his choice at the polls; and to secure the rights of duly qualified electors and not to defeat them.'

*In re Mayor of Altoona*, 413 Pa. 305, 311, 196 A.2d 371, 374 (1964)(citing 29 C.J.S. § 7, p. 27); *See also In re Diettrick*, 136 Pa. Commw. 66, 72, 583 A.2d 1258, 1261 (1990)(recognizing same).

Sections 951 and 952 of the Election Code, 25 P.S. §§ 2911 and 2912, authorize nominations to be made by nomination papers, that, among other things, identify the name of the candidate nominated therein and the office for which such candidate is nominated and have been



properly signed and completed by the statutorily prescribed number of qualified Pennsylvania electors regardless of the electors' party affiliation or registration. *See* 25 P.S. §§ 2911(a)-(c) and 2912. Moreover, “in the case of electors for President and Vice-President of the United States, the ***names of the candidates for President and Vice-President of such political body***” must be set forth on the nomination papers. *See* 25 P.S. § 2912 (emphasis added). These provisions of the Election Code ensure that Pennsylvania electors nominate a specific candidate as opposed to a particular party. *See also* 25 P.S. § 2602(k) (“The word “nomination” shall mean the selection, in accordance with the provisions of this act, of ***a candidate*** for a public office authorized to be voted for at an election.”).

Significantly, Section 951(e) of the Election Code also mandates that:

... there shall be appended to each nomination paper offered for filing an affidavit of each candidate nominated therein, stating . . .  
 (2) the name of the office for which he consents to be a candidate;  
 (3) that he is eligible for that office; [and] (4) that he will not knowingly violate any provision of this act, or of any law regulating and limiting election expenses, and prohibiting corrupt practices in connection therewith; ... .

25 P.S. § 2911(e). *See also* 25 P.S. § 2941.1 (same for affidavits of substituted nominated candidates). These requirements ensure that when a party or political body presents nomination papers to Pennsylvania electors, the party or political body fairly represents that the person whose name appears on the nomination paper is in fact, a real candidate, that he or she is in fact going to run, and that he or she has every intention of being the candidate the nomination papers state he or she will be. *In re Petition of Cianfrani*, 467 Pa. at 494, 359 A.2d at 384 (“The requirements of sworn affidavits are to insure the legitimacy of information crucial to the election process.”).

This Court has recognized that the specific provisions of Pennsylvania’s election laws regulating nomination papers and affidavits are “not mere technicalities but necessary measures to prevent fraud and preserve the integrity of the election process.” *In re The Nomination Papers of James*, 944 A.2d 69, 72 (Pa. 2008) (citing *In re Petition of Cianfrani*, 467 Pa. at 494, 359 A.2d at 384.). Accordingly, while this Court’s ““overriding concern at all times must be to be flexible in order to favor the right to vote,” [this Court] must also ‘**strictly enforce all provisions to prevent fraud.**’” *Id.* (citing *In re Luzerne County Return Bd.*, 447 Pa. 418, 420, 290 A.2d 108 109 (1972)(emphasis added). *See also In re Nomination Petition of Flaherty*, 564 Pa. 671, 679, 770 A.2d 327, 332 (2001) (finding, *inter alia*, that the Election Code’s requirement that a Pennsylvania elector must sign (as oppose to print) his or her name to a candidate’s nomination petition was not a mere technicality, but rather a “means of preventing forgery and assuring that each elector personally signs the petition with an understanding of what he is signing.”).<sup>7</sup>

While neither this Court nor any other court in this Commonwealth has addressed squarely the issue of whether a sham/proxy candidate may be used on electoral nomination papers, this Court has recognized the propriety of setting aside electoral nomination papers where there has been a showing of fraud or intent to subvert the basic tenets of the Election Code. *See In re Nomination Petition of Cianfrani*, 467 Pa. at 494, 359 A.2d at 384 (finding that a nomination petition cannot be valid if it is supported by a false candidate’s affidavit);

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<sup>7</sup> It is ironic that in its Memorandum Opinion, the Commonwealth Court cites *Flaherty* for the proposition that “the Election Code must also be liberally construed in order to protect a candidate’s right to run for office and the voters’ rights to elect the candidate of their choice.” (R. 383a [Mem. Op., p. 4]). In *Flaherty*, this Court gave a strict construction to the requirement under Section 908 of the Election Code, 25 P.S. § 2868, that a Pennsylvania elector sign a petition and provide a valid residency. *In re Nomination Petition of Flaherty*, 564 Pa. at 679, 770 A.2d at 332. Such a strict construction is proper because “[t]he policy of the liberal reading of the Pennsylvania Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process.” *In re Petition of Cianfrani*, 467 Pa. at 494, 359 A.2d at 384.

*Wakefield's Appeal (No. 1)*, 229 Pa. 581, 585, 79 A. 117, 119 (1911)(recognizing that nomination papers may be set aside where “trick, artifice, or fraud has been practiced”).

For example, in *Cianfrani*, this Court found that a nomination petition was invalid because it was supported by a false affidavit. *In re Nomination Petition of Cianfrani*, 467 Pa. at 359 A.2d at 384. In that case, the evidence showed that the candidate executed an affidavit in which he averred that he was a registered and enrolled member of the Democratic Party when in fact he did not become a registered and enrolled Democratic Party member until the following day. 467 Pa. at 493, 359 A.2d at 384.

In addressing the issue of whether a petition can be valid if it is supported by a false candidate's affidavit, this Court stated:

First, our cases have made clear that the provisions of the election laws relating to the form of nominating petitions and accompanying affidavits are not mere technicalities but are necessary measures to prevent fraud and preserve the integrity of the election process. The requirements of sworn affidavits are to insure the legitimacy of information crucial to the election process. ***Thus, the policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process.***

467 Pa. at 493-94, 359 A.2d at 384 (internal citations omitted)(emphasis added). Although Cianfrani became a member of the Democratic Party just one day after he executed his affidavit, this Court determined that the candidate's affidavit was falsely made as even “assuming the absence of any wrongful intent, the fact remains that when the affidavit was taken the facts sworn to were not true.” 467 Pa. at 494, 359 A.2d at 384. Because the candidate affidavit

“speaks from the moment the oath was administered,” this Court found that the petition was void and invalid. *Id.*<sup>8</sup>

Courts in this Commonwealth have not only been willing to set aside nomination papers when the underlying candidate affidavit is invalid, but also where the nomination papers themselves contain false information. For example, the Commonwealth Court in *In re Nomination Papers of Carlson*, 60 Pa. Commw. 170, 174, 430 A.2d 1210, 1211 (1981), set aside nomination papers and struck a candidate’s name from the ballot when the candidate failed to use a proper address on the nomination papers and failed to specify a committee to fill vacancies of at least three persons as required by the Election Code. In setting aside the nomination papers, the Commonwealth Court noted that the Pennsylvania Legislature “has established rigid procedures for nomination and election of candidates of political bodies.” 60 Pa. Commw. at 174, 430 A.2d at 1212. Moreover, the Commonwealth Court recognized that these “rigid procedures,” including the laws regulating nomination papers and affidavits, serve an important purpose of preventing fraud and preserving the integrity of the election process. *Id.*

Likewise, the Commonwealth Court has also recognized that a substitute nomination certificate may be set aside where there has been a “showing of fraud or an intent to subvert the basic tenets of our election laws.” *Anderson v. Davis*, 54 Pa. Commw. 60, 64, 419 A.2d 806, 808 (1980). The Commonwealth Court in *Carlson* ruled that when there is ample evidence demonstrating that a political body candidate has failed to scrupulously adhere to the tenets of the Election Code and has misrepresented himself to the signers of his nomination papers as a viable candidate, then this Court “cannot condone such an abuse of the electoral process” and

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<sup>8</sup> In *State Ethics Comm'n v. Baldwin*, 498 Pa. 255, 262, 445 A.2d 1208, 1211 (1982), this Court further noted that the “*Cianfrani* ruling was required to deter deliberate attempts to frustrate the election process.”

must set aside such nomination. See *In re Nomination Papers of Carlson*, 60 Pa. Commw. at 174, 430 A.2d at 1212.

**B. The Designation on a Nomination Paper of a Sham/Proxy Candidate Constitutes a Fraud Upon Qualified Pennsylvania Electors and Subverts the Basic Tenets of Pennsylvania's Election Laws.**

Although the permissibility of sham/proxy candidates is an issue of first impression for this Court, courts from other jurisdictions have recognized that the designation of a sham/proxy candidate, who has no intention of running for political office, may be struck down as a fraud upon the voters or a subversion of the election laws' policy and purpose. See, e.g., *Smith v. Cherry*, 489 F.2d 1098, 1100 (7th Cir. 1973)(finding that the use of a sham candidate “debased the rights of all voters in the election.”); *Berman v. Heffernan*, 185 Misc. 746, 747 (N.Y. Sup. Ct. 1945) (finding overall petition was invalid because signatures were fraudulently obtained).

For example, in *Berman v. Heffernan*, a case strikingly analogous to the instant case, the New York Supreme Court found that a substitution was invalid because a fraud was perpetrated on New York voters. *Berman*, 185 Misc. at 747. In that case, candidate Beldock of the Republican Party was substituted for candidate Roth. *Id.* The court found that the substitution was worthless because candidate Roth's original petition designating candidate Roth for District Attorney of Kings County as the so-called Liberal Party candidate was found to be invalid. *Id.* The invalidity of the overall petition was due in part to the fact that 905 signatures solicited by relatives and friends of candidate Beldock for candidate Roth's petition were fraudulently obtained. *Id.* As the New York Supreme Court reasoned:

These solicitors knew . . . Beldock was to be the candidate. If they revealed that fact to the signer, the signature should be disregarded as the signer had no intention of supporting the nominee designated on the petition. If they failed to reveal that fact to the signers, the solicitors procured the signatures by fraud.

*Id.* Thus, because a sham/proxy candidate was used, the New York Supreme Court found that a fraud had occurred and struck the substitution of candidate Beldock. *Id.* See also *Farbstein v. Suchman*, 260 N.E.2d 817, 818 (N.Y. 1970) (“A plan to utilize a stand-in candidate who intends to decline in order to permit a Committee to Fill Vacancies to control a designation, if sufficiently established as a means of circumventing the policy of Election Law, may be held invalid.”).

In *Smith v. Cherry*, the Seventh Circuit was also presented with the issue of a sham candidacy. In that case, plaintiffs pleaded that the defendant Cherry, the incumbent state senator, was a sham candidate who opposed plaintiff Smith in the Democratic primary for state senate without intending to run in the general election but rather intended to withdraw after capturing the nomination so as to allow the Democratic Senatorial Committee to appoint another candidate, defendant Palmer. *Smith*, 489 F.2d at 1100. As noted by the Seventh Circuit, “[t]hose who thought they were voting for Cherry were as a practical matter voting for whomever the Committeemen might thereafter select.” *Id.* at 1102. In reversing the District Court’s dismissal of the plaintiff’s complaint for failing to state a claim upon which relief could be granted, the Seventh Circuit recognized that such “deception on the face of the ballot clearly debased the rights of all voters in the election.” *Id.* “Such an abridgment of the right to votes is impermissible and evinces the sufficiency of [the plaintiffs’] complaint.” *Id.*

Just as in the cases of *Berman v. Heffernan* and *Smith v. Cherry*, the Libertarian Party, the LPPa and Candidates Etzel and Barr, by their actions, have effectively denied qualified electors of Pennsylvania the ability to nominate a Libertarian Party Presidential candidate for the 2008 General Election. The instant case is not an ordinary situation where a named nominee who has been designated by electoral nomination papers has thereafter declined because of a change of

heart, poor health, or desire to seek another office. Rather, the situation most closely resembles the situation found in *Berman v. Heffernan* where the solicitation proceeded and a filing took place when it was known that the named nominee would decline and another candidate would be substituted by the Libertarian Party or its Committee to Fill Vacancies.

Indeed, from the moment her name was placed on the Nomination Papers, Candidate Etzel, the Libertarian Party, and the LPPa knew that she would withdraw her candidacy immediately after the Nomination Papers were filed and before the time lapsed for the filing of any objections to her nominated candidacy.<sup>9</sup> (R. 226a [H.T. p. 67]). In short, the only purpose of placing Candidate Etzel on the Nomination Papers was to enable the Libertarian Party and the LPPa to begin to collect signatures in order to ensure that the Libertarian Party, as opposed to a specific candidate, would be represented on the ballot for the 2008 General Election without any permitted challenge to its nominated status. In doing so, they intended to subvert the basic tenets of the Election Code which mandates that qualified electors nominate and vote for specific candidates who are mounting a serious candidacy with the aim of representing a constituency's views. *See In re Nomination of Carlson*, 430 A.2d at 1211-1212.

Moreover, applying precisely the same reasoning as used in the *Berman* decision, even if the evidence of record were such that it had been revealed to the signers of the Nomination Papers that Candidate Etzel intended to withdraw if so nominated, as the Commonwealth Court implies in its Memorandum Opinion vis-à-vis its finding as to publicly accessible websites maintained by the Libertarian Party and the LPPa (R. 385a [Mem. Op., p. 6]), the signatures should be disregarded as the signers had no intention of supporting the nominee designated on

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<sup>9</sup> It is generally recognized that once a candidate withdraws his or her candidacy from the nomination process, any challenge to the nomination papers is moot. *See Oliviero v. Diven*, 908 A.2d 933, 938-941 (Pa. Commw. 2006).

the Nomination Papers. If, however, the evidence of record, including the Nomination Papers themselves, prove that Candidate Etzel's intention to withdraw if so nominated was not revealed to the signers of the Nomination Papers, then the electors' signatures were procured by fraud. In either case, the basic tenets of the Election Code have been subverted.

Further, the candidate's affidavits filed by Candidates Etzel and Barr are false in that both candidates both swore under oath that they would not violate the provisions of the Election Code, even though that is what they did by perpetrating the scheme that has led to the substituted nomination of Candidate Barr. Furthermore, the candidate's affidavit of Candidate Etzel is false because she knew that she was not the Libertarian Party's nominated 2008 U.S. Presidential candidate and that the Nomination Papers did not contain the proper name of the Libertarian Party's nominated U.S. Presidential candidate as required by Section 952 of the Election Code, 25 P.S. § 2912. It is well established in this Commonwealth that "[s]worn affidavits ensure the legitimacy of information crucial to the election process." *In re Nomination Petition of Cianfrani*, 359 A.2d at 384; *In re Nomination Papers of Mann*, 944 A.2d 119, 126 (Pa. Commw. 2008), *aff'd* 944 A.2d 77 (Pa. 2008).

In short, the substitute nomination certificate of Candidate Barr and the candidate's affidavits of Candidates Etzel and Barr must be set aside because they were filed as part of a scheme to abridge the right of qualified Pennsylvania electors to decide who would be nominated in the 2008 Pennsylvania General Election and thus has rendered the electoral nomination process a sham. *See In re Nomination of Carlson*, 430 A.2d at 1212.

C. **The Third Circuit's Decision in *Rogers v. Corbett* Does Not Compel A Contrary Conclusion.**

At the September 5, 2008 hearing before the Commonwealth Court, Candidate Barr argued that the issue raised by Appellant in his Petition was addressed squarely by the Third



Circuit Court of Appeals in *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006), when it ruled that “[i]n Pennsylvania, a minor political party is free to select anyone it chooses as its candidate, unaffected by the requirements of §2911(b).” *Rogers*, 468 F.3d at 198. However, Candidate Barr’s reading of the Third Circuit’s statement in *Rogers* is misplaced.

In *Rogers*, a group of minor political parties and minor party nominees for statewide office<sup>10</sup> challenged the constitutionality of the 2% signature threshold that is set forth in Section 951(b) of the Election Code, 25 P.S. § 2911(b), for nomination papers filed by political body candidates. *Rogers*, 468 F.3d at 190. As part of their challenge, the minor party plaintiffs in *Rogers* argued that the 2% signature threshold requirement violated their right to freedom of association recognized by the United States Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), and thus was unconstitutional. *Id.* at 197.

In rejecting this argument, the Third Circuit made the statement upon which Candidate Barr is now placing undue weight. Specifically, the Third Circuit stated as follows:

*Jones*, however, is not applicable to a ballot access case, like the present one, in which internal party deliberations on the choice of party candidates are not implicated. Unlike the law at issue in *Jones*, Pennsylvania election law does not open the intra-party deliberations of minor political parties to persons who are unaffiliated with the party. “Forced” association caused by §2911(b) occurs only as a minor party candidate solicits signatures from registered voters, who may be registered with any party or as an independent. However, in *Jenness* and its progeny, the Supreme [C]ourt recognized that the test for a modicum of support can be taken from registered voters in general in order to allow access to the general election ballot. But in regard to the issue presented in *Jones*, the intra-party procedures to select the party’s candidates, there is no interference under the Pennsylvania system. ***In Pennsylvania, a minor political party is free to select anyone it chooses as its candidate, unaffected by the requirements of § 2911(b).*** As such, *Jones* is inapplicable.

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<sup>10</sup> The plaintiffs in *Rogers* were represented by Samuel C. Stretton, Esquire, who is Candidate Barr’s counsel in this matter. *Rogers*, 468 F.3d at 190.

*Rogers*, 486 F.3d at 198 (emphasis added).

Following the above quote, the Third Circuit went on to explain that there is a distinction between “intra-party deliberations” and “ballot access” through Pennsylvania’s electoral nomination process. *Id.* Because of this distinction, the Third Circuit concluded in *Rogers* that “Pennsylvania’s 2% [signature threshold] requirement [under the Election Code for nomination papers for political body candidates] regulates neither the minor political parties’ internal affairs nor its core associational activities.” *Id.*

Read in context, the statement by the Third Circuit in *Rogers* does not stand for the proposition that Candidate Barr has advocated. Quite to the contrary, the Third Circuit in *Rogers* acknowledged that there is marked distinction between “intra-party” candidate nominations and electoral candidate nominations. *Rogers*, 468 F.3d at 198. Further, the Third Circuit recognized that of the two nomination processes, only the electoral nomination process provides a candidate with access to the Pennsylvania general election ballot and that such ballot access can be legitimately limited through reasonable requirements under the Election Code that protect a state’s interests in avoiding ballot clutter and ensuring viable candidates. *Id.* at 194-198.

Accordingly, for the reasons set forth above, the Commonwealth Court erred as a matter of law and/or abused its discretion, requiring an immediate reversal of its Final Order.

**II. THE COMMONWEALTH COURT ERRED AS A MATTER OF LAW AND/OR ABUSED ITS DISCRETION IN DENYING APPELLANT’S PETITION WHEN THE SUBSTANTIAL EVIDENCE, MOST OF WHICH WAS STIPULATED AND UNDISPUTED, PROVED THAT THE SUBSTITUTE NOMINATION CERTIFICATE OF CANDIDATE BARR AND THE AFFIDAVITS OF CANDIDATES ETZEL AND BARR WERE FILED AS A RESULT OF FRAUD OR AN INTENT TO SUBVERT THE BASIC TENETS OF PENNSYLVANIA’S ELECTION LAWS.**

In addition to its conclusion that the Election Code authorizes the use of a sham/proxy candidate as part of the Pennsylvania electoral nomination process, the Commonwealth Court

denied Appellant's Petition because it found that neither the Libertarian Party, LPPa, nor Candidates Barr or Etzel engaged in any misrepresentation or fraud. (R. 382-387a [Mem. Op., pp. 3-8]). Further, without making any citation to the record, the Commonwealth Court found that "[h]ad the Libertarian Party decided to make [Candidate] Etzel the national candidate, [Candidate] Etzel may very well have accepted the nomination." (R. 387a [Mem. Op., p. 8]). It is Appellant's contention that the Commonwealth Court's findings are not supported by any of the evidence of record and that its Final Order must be reversed for abuse of discretion and/or legal error. *In re Nomination Paper of Nader*, 580 Pa. at 39, 858 A.2d at 1177 ("This Court may reverse a Commonwealth Court's order concerning the validity of challenges to a nomination petition ... if the Commonwealth Court's findings of fact are not supported by substantial evidence in the record, there was an abuse of discretion, or there was an error of law.").

In this case, the uncontradicted, substantial evidence at the hearing demonstrates that the Libertarian Party, LPPa, and Candidates Barr Etzel knew and understood throughout the entire electoral nomination process that Candidate Etzel was placed on the Nomination Papers as a sham/proxy candidate, that she never intended to be the Party's U.S. Presidential candidate, and that after the Nomination Papers were circulated and filed, she would withdraw her candidacy in favor of whomever the Libertarian Party internally nominated as its U.S. Presidential candidate. (R. 224-27a; [H.T. pp. 65-68]). In fact, the parties entered on the record a stipulation to this effect, the pertinent part of which is as follows:

Rochelle Etzel, in February of 2008, was initially selected by the Libertarian Board of Directors to have her name placed on the nominating petitions to run for President of the United States on the Libertarian Party. . .

[H]er name was, in fact, placed and circulation process began, with the signatures that were already stipulated to.

In May 24 through May 25 of 2008, the National Party nominated Bob Barr. . . to the candidate for President of the United States.

During the time period aforementioned, the February, March, and the circulation time periods where Ms. Etzel's name was on the nominating petitions, *Ms. Etzel always understood that she would step aside for the nationally selected candidate of the Libertarian party for President of the United States once the nominating process was completed.*

During this time period, Ms. Etzel, other than circulating some petitions, took no steps to form a committee pursuant to the Federal Election Laws for President of the United States, and took no additional steps to seek the Office of President of the United States or expend moneys to seek the Office of President of the United States. . .

[S]he made no filing in any other states to run as the candidate for the United States Presidency.

(R. 224-27a; [H.T. pp. 65-68]).(emphasis added).

Moreover, Candidate Barr conceded on the record that there was no factual dispute in this case as Candidate Etzel “*always understood that she was going to step aside once a national candidate was chosen*, and once the nomination petition process was completed [because] that was done repeatedly in the years ’96, 2000, 2004, by the Libertarian Party.” (R. 201a, [H.T., p. 42]). This concession and the other stipulations of record eliminated the need (and indeed were offered to expedite the hearing and eliminate the need) to have Candidate Etzel (who was present at the hearing) testify. (R. 216-224a [H.T., pp. 57-65]).

In addition to the stipulation and admissions of record, other facts presented at the September 5, 2006 hearing demonstrate that the Libertarian Party, LPPa and Candidates Barr and Etzel knew that Candidate Etzel was simply a sham/proxy candidate. For example, while the LPPa and Candidate Etzel agreed that her name would be placed on the Nomination Papers for the Office of President of the United States, the LPPa, as a state charter organization, is not

authorized to select the bona fide Libertarian Party's Presidential nominee. At best, the LPPa is merely authorized to select a proxy candidate to act as a placeholder until the Libertarian Party selects its Presidential nominee. Indeed, Section 1 of the LPPa's Bylaws Article X, titled "Nominations of Candidates for Office," specifically state that with respect to U.S. Presidential candidates, the LPPa's powers are limited to "select[ing] individuals whose names are to appear on statewide nominating petitions as *proxies* for President and Vice-President." (R. 237a-238a [H.T., pp. 78-79]; R. 413a [Petitioner's Hrg. Ex. 3, p. 7])(emphasis added).

Furthermore, knowing that her role was solely as a sham/proxy candidate, Candidate Etzel never sought to become the Libertarian Party's U.S. Presidential candidate. (R. 288a [H.T., p. 129]). In March 2008, Candidate Etzel did not speak at the tri-state regional convention hosted by the LPPa, the New Jersey Libertarian Party and Libertarian Party of West Virginia. (R. 175-76a [H.T., pp. 16-17]; R. 257a [H.T. p. 98]). Moreover, Candidate Etzel failed to take any steps pursuant to the Libertarian Party's Bylaws or Convention Rules of the Libertarian Party to secure the Libertarian Party's nomination at its National Convention. (R. 226a [H.T., p. 67]).

Not only did Candidate Etzel fail to take any internal steps to secure the Libertarian Party's nomination, but she also failed to form a committee pursuant to federal election laws. (R. 226a [H.T., p. 67]). Similarly, she made no filings in any other states to run as the Libertarian Party's 2008 U.S. Presidential candidate. (R. 226a [H.T., p. 67]). Indeed, after she was selected by the LPPa in early February 2008, Candidate Etzel "took no additional steps," including the expenditure of any moneys, to seek the Office of President of the United States. (R. 226a [H.T., p. 67]).

As the parties stipulated at the September 5, 2008 hearing, it is clear that from the outset, Candidate Etzel was simply a sham/proxy candidate who had no intention of ever serving as the Libertarian Party's Presidential candidate on the Pennsylvania ballot in the 2008 General Election. (R. 266a [H.T., p. 67]). Yet, in the face of this undisputed evidence, the Commonwealth Court found that there was no misrepresentation or fraud on the part of the Libertarian Party, LPPa and Candidates Barr and Etzel because "[h]ad the Libertarian Party decided to make Etzel the national candidate, Etzel may very well have accepted the nomination." (R. 387a [Mem. Op., p. 8]). However, there is absolutely no evidence in the record to support such a finding. Indeed, in its Memorandum Opinion, the Commonwealth Court makes no reference to any such evidence and indeed acknowledged that Candidate Etzel offered no testimony at all at the hearing. *Id.* As such, the Commonwealth Court's findings in this regard are pure speculation.

Further, the Commonwealth Court stated in its Memorandum Opinion that "as additional support for the finding that the [Libertarian] Party and LPPa did not intend to mislead voters, the Court notes that the Party maintained a publicly accessible website such that any voter could visit the site *via* the internet at any time to view the then current Libertarian candidates." (R. 385a [Mem. Op., p. 6]). However, such a statement ignores the fundamental process created by the Election Code wherein the nomination of a political body candidate is through the circulation and filing of nomination papers and affidavits by the circulators and the candidate, and not through representations made by the political body's web site. *See* 25 P.S. §§ 2911 and 2912. Stated differently, when approached by circulators, Pennsylvania electors are not required to access and likely do not have access to a political body's web site at the time they sign their names to nomination papers. Nor is there any evidence in the record which supports the

Commonwealth Court's finding to the contrary with respect to the 47,976 Pennsylvania electors who signed the Nomination Papers with Candidate Etzel's name identified as the Libertarian Party's 2008 U.S. Presidential candidate.

In this case, the Commonwealth Court abused its discretion because its findings that the Libertarian Party, LPPa and Candidates Barr and Etzel engaged in no misrepresentation or fraud is wholly unsupported by the record. Here, the parties do not even dispute that Candidate Etzel was simply a sham/proxy candidate who had no intention of ever serving as the Libertarian Party's Presidential candidate. Yet, the Commonwealth Court found otherwise. Moreover, even if there was a dispute, which there is not, there is still ample evidence on the record which indicates Candidate Etzel was a sham/proxy candidate.

Accordingly, for the reasons set forth above, the Commonwealth Court abused its discretion and/or erred as a matter of law, requiring an immediate reversal of its Final Order.

**III. THE COMMONWEALTH COURT ERRED AS A MATTER OF LAW AND/OR ABUSED ITS DISCRETION IN RULING THAT THE PETITION SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION.**

An alternative reason that the Commonwealth Court cited in support of its Final Order pertained solely to the Libertarian Party and the LPPa. According to the Commonwealth Court, Appellant's Petition must be dismissed as to the Libertarian Party and the LPPa for lack of personal jurisdiction because formal service in accordance with the Pennsylvania Rules of Civil Procedure was not accomplished. (R. 381-382a [Mem. Op., pp. 2-3]). However, for the reasons that follow, the Commonwealth Court's Final Order in this regard is the result of legal error and/or abuse of discretion.

Initially, it must be remembered that following the filing of Appellant's Petition, the Commonwealth Court entered the 8/21/08 Order requiring Appellant to personally serve copies

of the Petition and the 8/21/08 Order on Candidate Barr on or before August 26, 2008, and file promptly thereafter a proof of service. (R. 4a [8/21/08 Docket Entry]; [8/21/08 Order, ¶ 1.C]). Also, in that order, the Commonwealth Court ordered Appellant to serve a copy of the 8/21/08 Order upon the Secretary and file promptly thereafter a proof of service. (R. 4a [8/21/08 Docket Entry]; [8/21/08 Order, ¶ 1.D]). However, the 8/21/08 Order did not mandate any service of either the Petition or the 8/21/08 Order upon the national Libertarian Party or the LPPa. (R. 4a [8/21/08 Docket Entry]; [8/21/08 Order]).

Further, it is undisputed that Appellant complied with the Commonwealth Court's 8/21/08 Order. In particular, on August 25, 2008, copies of the Petition and the 8/21/08 Order were served upon Candidate Barr, and a written Acceptance of Service of the same was filed on August 26, 2008. (R. 169a [H.T., p.10]; R. 5a [8/26/08 Docket Entry]; [Candidate Barr's Acceptance of Service]). Also, on August 25, 2008, a true and correct copy of the 8/21/08 Order was served upon the Secretary, and a written Acceptance of Service of the same was filed on August 26, 2008. (R. 169 a [H.T., p. 10]; R. 5a [8/26/08 Docket Entry]; [Secretary's Acceptance of Service]).

Moreover, at the hearing before the Commonwealth Court, Attorney Marc Antony Arrigo appeared on behalf of the Libertarian Party and the LPPa and requested to participate in the hearing, which request was granted. (*See* R. 162-163a & 183-184a [H.T., pp. 3-4 & 24-25]). Notably, Mr. Arrigo did not make a special appearance for the sole purpose of challenging service or any jurisdictional issue. Indeed, at no time did Mr. Arrigo, on behalf of the Libertarian Party or LPPa, raise any issue as to personal jurisdiction. Instead, Mr. Arrigo actively participated in the September 5, 2008 hearing. (*See* R. 162-163a, 170a, 183-84a, 214-216a, 223-224a, 262a, 273-74a, 289a [H.T., pp. 3-4, 11, 24-25, 55-57, 64-65, 103, 114-15,



130]). For example, after specifically being asked by Mr. Arrigo, the Commonwealth Court permitted Mr. Arrigo to object during the proceeding. ( R. 170a, 183-84a, 262a, 273-74a [H.T., p. 11, 24-25, 103, 114-115]). Further, Mr. Arrigo made arguments to the Commonwealth Court, participated in making several stipulations as to Candidate Etzel's testimony and the evidence, and was given an opportunity by the Commonwealth Court to question witnesses. (R. 64-65a, 289a, [H.T., p. 64-65 130]).

In light of the above facts, the Commonwealth Court's ruling that it lacked personal jurisdiction over the Libertarian Party and the LPPa and that Appellant's Petition must be dismissed as a result thereof is erroneous for several reasons. First, it is well-settled that the Pennsylvania Rules of Civil Procedure are not applicable to challenges brought under the Election Code to nomination petitions or papers. *In re Nomination Petition of Johnson*, 509 Pa. 347, 351, 502 A.2d 142, 145 (1985); *See also In Re Nomination Petition of Morgan*, 59 Pa. Commw. 161, 166, 428 A.2d 1055, 1058 (1981). Thus, a petition objecting to a substitute nomination petition filed pursuant to Section 982 of the Election Code, 25 P.S. § 2942, does not need to be served in accordance with the Pennsylvania Rules of Civil Procedure *In Re Nomination Petition of Morgan*, 59 Pa. Commw. at 166, 428 A.2d at 1058.

Secondly, Section 982 of the Election Code incorporates Section 977 of the Election Code, 25 P.S. § 2937, which in turn provides that "the court shall make an order fixing a time for hearing . . . and specifying the time and manner of notice that shall be given to the *candidate or candidates* named in the nomination petition or paper sought to be set aside." *In Re Nomination Petition of Morgan*, 59 Pa. Commw. at 166, 428 A.2d at 1058-59 (*citing* 25 P.S. § 2937)(emphasis added). As written, Section 977 of the Election Code does not mandate the giving of notice to the political body or party whose candidate's nomination or substitution is

being challenged. 25 P.S. § 2937. Instead, Section 977 of the Election Code limits the court's direction of notice to only the candidate whose nomination or substitution is being challenged. *Id.* Nevertheless, pursuant to Section 977 of the Election Code, the court "ha[s] complete control to regulate the time and manner of giving notice and the fixing of hearings." *Id.* (citing *Moore Nomination Petition*, 447 Pa. 526, 533, 291 A.2d 531, 535 (1972)).

Third, when the court fails to enter such an order specifying the time and manner of service, such an error is not fatal to the petitioner's challenge when the respondent has "timely and actual notice of the hearing." *In the Matter of: Nomination Petition of Wilson*, 728 A.2d 1025, 1028 (Pa. Commw. 1999). It is obvious that a respondent has actual notice of a hearing when the respondent's attorney appears at the hearing and is prepared to represent the respondent's interest. *Id.*

In the instant case, all parties listed in the Commonwealth Court's 8/21/08 Order were served in accordance with that order. (R. 169a [H.T. p. 10]). While the Commonwealth Court did not specifically order that the Libertarian Party or LPPa be served, it is clear that the Libertarian Party and LPPa had timely and actual notice of the hearing. (R. 162-63. [H.T. p. 3-4]). Mr. Arrigo not only appeared on behalf of the Libertarian Party and LPPa at the hearing, but he came prepared to represent their interests as demonstrated by the fact that he requested to and did in fact participate in the hearing. (R. 162-163a, 170a, 183-84a, 214-216a, 223-224a, 262a, 273-74a, 289a [H.T., pp. 3-4, 11, 24-25, 55-57, 64-65, 103, 114-15, 130]).

Moreover, at no time did Mr. Arrigo assert that the Libertarian Party or the LPPa suffered any prejudice as a result of the service in this case. It is "well-established that a party may waive objections to personal jurisdiction by consenting to the court's authority." *Cathcart v. Keene Indus. Insulation*, 324 Pa. Super 123, 135, 471 A.2d 493, 500 (1984) (finding that "for a waiver

to occur, a party must take some action (beyond merely entering a written appearance) going to the merits of the case, which evidence an intent to forego objection to the defective service.”). Thus, not only did the Libertarian Party and LPPa receive adequate notice of the hearing, they waived any objection to service or lack of personal jurisdiction by actively participating in and failing to raise such an objection at the hearing.

For the foregoing reasons, the Commonwealth Court erred as a matter of law and abused its discretion in ruling that the Petition should be dismissed for lack of personal jurisdiction. Accordingly, the Commonwealth Court’s Final Order must be reversed.

### **CONCLUSION**

In the instant case, where a sham/proxy candidate was intentionally used on the Nomination Papers, permitting the Libertarian Party, the LPPa and Candidate Barr to proceed with the substitute nomination certificate undermines the public policy and basic tenets and spirit of the Election Code of preventing fraud and corruption and preserving the integrity of the electoral process. Accordingly, Appellant respectfully requests that this Court reverse in its entirety the Commonwealth Court’s Final Order. Further, Appellant asks this Court to set aside the substitute nomination certificate of Candidate Barr as the Libertarian Party’s Candidate for President of the United States and the Candidate’s Affidavits of Etzel and Barr as invalid and direct the Secretary of the Commonwealth to preclude Candidate Barr’s name from appearing on the Pennsylvania ballot for the 2008 General Election. Finally, Appellant requests that this Court grant such other and further relief as is necessary and just.

Respectfully submitted,

Dated: October 2, 2008

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**CERTIFICATE OF SERVICE**

Pursuant to Pa.R.A.P. Rule 906(b), I hereby certify that on this 2<sup>nd</sup> day of October, 2008, two (2) true and correct copies of the within Appellant's Brief were served upon the following persons in the manner indicated below, which service complies with the Pennsylvania Rules of Appellate Procedure:

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## **APPENDIX**