

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 09-2227

**CHUCK BALDWIN, DARRELL R. CASTLE,
WESLEY THOMPSON, JAMES E. PANYARD,
and the CONSTITUTION PARTY OF
PENNSYLVANIA,**

Appellants

v.

**PEDRO A. CORTÉS,
Secretary of the Commonwealth
of Pennsylvania, in his official capacity**

BRIEF FOR APPELLEE CORTÉS

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA ENTERED MARCH 24, 2009

THOMAS W. CORBETT, JR.
Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17102
Phone: (717) 783-1478
FAX: (717) 772-4526

BY: HOWARD G. HOPKIRK
Senior Deputy Attorney General

CALVIN R. KOONS
Senior Deputy Attorney General

DATE: August 10, 2009

JOHN G. KNORR, III
*Chief Deputy Attorney General
Chief, Appellate Litigation Section*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES.....	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	7
STATEMENT OF RELATED CASES.....	11
SUMMARY OF ARGUMENT	12
ARGUMENT.....	14
I. PENNSYLVANIA’S AUGSUT 1 ST FILING DEADLINE FOR NOMINATION PAPERS FOR CANDIDATES FOR PRESIDENT DOES NTO VIOLATE ARTICLE II, SECTION 1 OF THE CONSTITUTION	14
A. Pennsylvania’s August 1 st Filing Deadline Was Established By Two Separate Consent Decrees Entered By Federal Courts With Consent Of The Secretary Of The Commonwealth Acting Pursuant To His Legislatively Created Duties Under The Election Code	16
B. Even If The Filing Deadline Established Under The 1984 Consent Decrees Violates Article II, Section 1 Of The Constitution, The Only Appropriate Remedy Would Be To Reinstate The Prior Statutory Deadline	21
CONCLUSION	25
CERTIFICATE OF COUNSEL	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	18,19,20,21
<i>Bush v. Palm Beach County</i> , 531 U.S. 70 (2000).....	18
<i>Council of Alternative Political Parties v. Hooks</i> , 179 F.3d 64 (3d Cir. 2008).....	23
<i>Hall v. Davis</i> , No. 84-1057 (E.D. Pa.)	<i>passim</i>
<i>In re Price</i> , 370 F.3d 362 (3d Cir. 2004).....	3
<i>Libertarian Party v. Blackwell</i> , 462 F.3d 579 (6 th Cir. 2006).....	22
<i>Libertarian Party v. Brunner</i> , 567 F. Supp.2d 1006 (S.D. Ohio, 2008)	22,23
<i>Libertarian Party of Pennsylvania v. Davis</i> , No. 84-0262 (M.D. Pa.)	<i>passim</i>
<i>Rogers v. Corbett</i> , 468 F.3d 188 (3d Cir. 2006).....	14,15,23
<i>Ruiz v. New Garden Township</i> , 376 F.3d 203 (3d Cir. 2004).....	14
<i>Salera v. Tucker</i> , 399 F. Supp. 1258 (E.D. Pa. 1975).....	17
<i>Spencer v. Kemna</i> , 523 U.S. 1 (1998).....	3

TABLE OF AUTHORITIES – CONT'D.

U.S. CONSTITUTION:

Article II, Section 1.....	<i>passim</i>
Amend. I.....	14
Amend. XIV	14

STATUTES:

28 U.S.C. §1291.....	1
28 U.S.C. §1331.....	1
28 U.S.C. §1343.....	1
42 U.S.C. §1983.....	1
Pennsylvania Election Code, 25 P.S. §§ 2600-3554	<i>passim</i>

STATEMENT OF JURISDICTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983, over which the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

This appeal is from a final order, over which this Court has jurisdiction by virtue of 28 U.S.C. § 1291. The district court's order was entered on March 24, 2009, and the notice of appeal was filed on April 22, 2009.

STATEMENT OF ISSUES

- I. Does the Secretary of the Commonwealth, as part of his legislatively created authority under the Pennsylvania Election Code, have the power to enlarge the period for minor party Presidential candidates to file nomination papers without violating Article II, Section 1 of the Constitution?**

This issue was raised by appellants in their complaint and motion for a preliminary injunction in which they alleged that Pennsylvania's August 1st deadline for filing nomination papers violates Article II, Section 1 of the United States Constitution. (Complaint, 8/29/2008; Joint Appendix ("Vol. ___, ___a") at Vol. 2, 1a-61a) (Motion for a preliminary Injunction) After a preliminary injunction hearing, the district court held that there was no likelihood of success on the merits and denied the motion for a preliminary injunction. (Memorandum and Order, 9/12/2008; Vol. 1, 4a-13a) Pursuant to a stipulation of the parties (Vol. 1, 14a-16a), the district court's order denying the preliminary injunction was subsequently converted to a final order. (Vol. 1, 14a-15a)

STATEMENT OF THE CASE

Appellants are the Constitution Party of Pennsylvania and the following candidates and/or members of the Constitution Party: Chuck Baldwin, candidate for President in 2008;¹ Darrell R. Castle, candidate for Vice-President in 2008; Wesley Thomson, member; and James E. Panyard, member (collectively, “Constitution Party”). The appellee is Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania. He is sued in his official capacity.

The Constitution Party commenced this action by filing a complaint and a motion for a preliminary injunction in the district court on August 29, 2008. It alleged, *inter alia*, that Pennsylvania’s deadline of August 1st for the filing of nomination papers violated Article II, Section 1 of the United States Constitution. Article II, Section 1 provides in relevant part that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress” The Constitution Party claimed that Pennsylvania’s August 1st deadline violates Article II, Section 1 because it was established by the

¹ Although the 2008 Presidential election is now over, appellees concede that this case should not be dismissed as moot since it raises an issue that is likely to arise again but would evade judicial review. *See Spencer v. Kemna*, 523 U.S. 1 (1998); *In re Price*, 370 F.3d 362 (3d Cir. 2004).

Secretary of the Commonwealth and not by a statute promulgated by the Legislature. (Complaint, 8/29/2008; Vol. 2, 1a-61a) (Motion for a preliminary Injunction)

Secretary Cortés acknowledged that the statutory filing deadline would have been May 2, 2008, but in 1984 the Secretary of the Commonwealth entered into two separate consent decrees in which the deadline was moved back to August 1st. (Answer to the Complaint at ¶ 21; Vol. 2, 64a-65a) These consent decrees were entered into as a result of claims that had been made in federal courts in both the Eastern and Middle Districts of Pennsylvania that the statutory deadline substantially burdens the rights of third party candidates and, therefore, is unconstitutional. (Consent Decree entered in *Hall v. Davis*, No. 84-1057 (E.D. Pa.); Vol. 2, 106a-07a; and Consent Decree entered in *The Libertarian Party of Pennsylvania v. Davis*, No. 84-0262 (M.D. Pa.); Vol. 2, 108a)

A preliminary injunction hearing was held on Wednesday, September 10, 2008.² The district court denied the preliminary injunction by a Memorandum

² The only evidence submitted to the district court were the attachments to the Complaint (Vol. 2, 18a-61a); 2008 Election Calendar for Pennsylvania (Vol. 2, 74a-105a); and the two consent decrees entered in 1984 upon which the Department of State had relied in setting the August 1st filing deadline for circulating and filing nomination papers. (Vol. 2, 106a-08a) Secretary Cortés, pursuant to an order of the district court, also submitted a supplemental affidavit
(continued...)

and Order dated September 12, 2008. (Vol. 1, 4a-13a) It found that the Constitution Party had “no likelihood of success on the merits.” In reaching this conclusion, the district court determined that the “[August 1st] deadline is not a creation of [Secretary Cortés] but a court-ordered adjustment to the election calendar that has been part of the election process for over twenty years without prior contest by any political group or amendment by the legislature.” (Memorandum Opinion at 7-8; Vol. 1, 10a-11a). It also found that “the adjusted date represents a lawful exercise of the powers delegated to Secretary Cortés by the Pennsylvania General Assembly, and therefore no departure from the legislative scheme at all.”³ (*Id.* at 8; Vol. 1, 11a)

Pursuant to a stipulation of the parties, the district court subsequently converted the order denying the motion for a preliminary injunction into a final

showing independent and political body candidates for federal offices who had submitted nomination papers that had been accepted by the Department of State after May 2, 2008 (the statutory deadline), but on or before the August 1st deadline (the deadline set by the Department of State under the two consent decrees). (Vol. 2, 72a-73a) This affidavit has relevance only to the 2008 election and not the underlying constitutional issue which this Court is asked to decide.

³ The Constitution Party initially filed an appeal from the order denying the preliminary injunction on October 3, 2008. (No.08-4117, 3d Cir.) However, the appeal was voluntarily dismissed by the appellants pursuant to F.R.A.P. 42(b). (Notice of Voluntary Dismissal in No. 08-4117, 12/08/08) (Order dismissing appeal pursuant to F.R.A.P. 42(b), 12/22/08)

order on the merits. (Stipulation for Entry of Final Judgment, 3/24/2009; Vol. 1, 14a-16a) (Order, 3/24/2009; Vol. 1, 17a) This appeal followed.

STATEMENT OF FACTS

Pennsylvania has a two-track system for candidates of political parties to be placed on the General Election ballot. The first track is for major political parties. *See* 25 P.S. §§ 2831(a) (defining political parties) and 2861-83 (providing for nomination of political party candidates at primaries). Based on voter registrations, the Democratic Party and Republican Party are the only major political parties in Pennsylvania at this time. The Democratic and Republican parties generally place their candidates on the November ballot through the primary process⁴. 25 P.S. §§ 2861-2883. The General Primary to choose candidates to be placed on the ballot for the November 2008 General Election was held on April 22, 2008.⁵ (Vol. 2, 76a)

The second track for candidates to be placed on the ballot is by filing nomination papers. All candidates who are not members of a major political party

⁴ Though candidates seeking the office of U.S. President may appear on the primary ballot in Pennsylvania as part of the political parties' process for selecting delegates to the National convention, the nominees of the major political parties for the office of President and Vice-President whose names appear on the November ballot are chosen not in the primary, but through the National conventions of the major political parties held during the late summer of the election year. *See* 25 P.S. § 2878.

⁵ The primary election in Presidential election years (the fourth Tuesday in April) is held earlier than for non-Presidential elections (the third Tuesday in May). *See* 25 P.S. § 2753(a).

(e.g., minor political parties, political bodies, and independents) must file nomination papers to have their names placed on the General Election ballot.⁶ These candidates must obtain signatures on nomination papers equaling at least two percent of the largest entire vote cast for an elected candidate in the state at large at the last preceding election at which statewide candidates were voted for. *See* 25 P.S. § 2911(b). For 2008, the number of signatures needed to be placed on the ballot for President and Vice-President was 24,666. (Complaint at ¶ 17; Vol. 2, 5a)

The first day to circulate nomination papers for the 2008 General Election was February 13, 2008. *See* 25 P.S. § 2913(b). Under the terms of Section 2913 (b) and (c) of the Election Code, the filing deadline is the second Friday after the primary election. 25 P.S. § 2913(b) & (c). For 2008, the filing deadline would have been Friday, May 2nd under the statute. However, under two consent decrees

⁶ State-wide minor political parties are political parties whose voter registration is less than 15% of the total voter registration for Pennsylvania, but who have obtained 2% of the largest entire vote cast for a single state-wide candidate in the last preceding election. *See* 25 P.S. §§ 2831(a) & 2872.2. Political organizations that do not meet this 2% threshold, as well as independent candidates, are considered “political bodies” under Pennsylvania’s Election Code. Although there are some advantages to being recognized as a “minor political party,” as opposed to a “political body,” the candidates of both types of political organizations must file nomination papers to be placed on the ballot. 25 P.S. §§ 2872.2 & 2911. The differences that do exist are not material to the issue raised on appeal.

entered in 1984, the filing deadline was extended by three additional months until August 1st. *See* Consent Decree entered in *Hall v. Davis*, No. 84-1057 (E.D. Pa.); Vol. 2, 106a-07a; and Consent Decree entered in *The Libertarian Party of Pennsylvania v. Davis*, No. 84-0262 (M.D. Pa.); Vol. 2, 108a.

After the filing of nomination papers, other candidates or registered voters have seven days to file objections challenging the validity of the signatures collected. *See* 25 P.S. §2937. The Commonwealth Court of Pennsylvania then reviews any objections and determines whether the name of the candidate should be placed on the ballot or stricken. 25 P.S. § 2937. Any party aggrieved by the decision of Commonwealth Court may then file an appeal as of right to the Supreme Court of Pennsylvania.

The Constitution Party was considered a political body for purposes of the 2008 General Election under the Pennsylvania Election Code. (Complaint at ¶ 15; Vol. 2, 5a) Chuck Baldwin was the party's chosen candidate for President and Castle Wesley Thompson was its chosen candidate for Vice-President. (Complaint at ¶ 10; Vol. 2, 4a) On August 1, 2008, the Constitution Party submitted nomination papers to the Pennsylvania Department of State, Bureau of Elections containing 21,957 signatures. (Complaint at ¶ 19; Vol. 2, 6a) Since the Constitution Party had failed to obtain the 24,666 signatures required by Pennsylvania law, the nomination papers were rejected by the Department of State.

(*Id.*) Nonetheless, the Constitution Party continued to collect signatures after the August 1st deadline. On August 26, 2008, the Constitution Party attempted to submit an additional 8,000 signatures.⁷ (Complaint at ¶¶ 21-22; Vol. 2, 6a-7a)

The Democratic Party chose its candidates for President and Vice-President at its National Convention on August 27 and 28, 2008. (Complaint at ¶ 23; Vol. 2, 7a) The Republican Party chose its candidates for President and Vice President at its National Convention on September 3 and 4, 2008. (Complaint at ¶ 24; Vol. 2, 7a) The nomination process of the respective major national political parties is essentially self-certified through the national system of primaries and caucuses culminating with the selection of candidates by delegates at their conventions. 25 P.S. §§ 2861-2872.1. Accordingly, the nominations made by the major political parties at their conventions cannot be challenged in state court.

⁷ Since the signatures submitted by the Constitution Party were never accepted for filing, it is not known how many of the signatures collected were in fact valid.

STATEMENT OF RELATED CASES

This case has previously been before the Court at No. 08-4117. The appeal was voluntarily dismissed by the Constitution Party prior to briefing. There are no other pending or completed cases to which it is related.

SUMMARY OF ARGUMENT

The Constitution Party argues that Pennsylvania's August 1st deadline for filing nomination papers violates Article II, Section 1 of the Constitution as applied to candidates for President and Vice-President because it was set by the Secretary of the Commonwealth and not by the Legislature. While it is true that the Secretary is not following the deadline originally established by the Legislature, he is acting pursuant to the powers given to him under the Pennsylvania Election Code and two separate consent decrees approved by both the Middle and Eastern Districts of Pennsylvania in 1984. The modification of the filing deadline does not constitute a material change in Pennsylvania's election laws. Rather, it is consistent with the Secretary's authority delegated to him by the Legislature. Accordingly, the August 1st deadline does not violate the requirement that presidential electors shall be selected "in such Manner as the Legislature thereof may direct." U.S. Const. Art. II, §1.

Moreover, even if the Constitution Party's position had merit, the relief it asks for is totally inconsistent with the rationale underlying its argument. The Constitution Party argues that the 1984 consent decrees are invalid because neither the executive nor the judiciary has the authority under Article II, Section 1 to establish procedures for the selection of presidential electors. However, to vacate the prior consent decrees and judicially establish a later filing deadline would,

according to its own logic, also violate Article II, Section 1 of the Constitution. If the consent decrees were vacated, the only appropriate remedy would be for the statutory deadline to go back into effect. This would not provide the Constitution Party with the relief it seeks and would in fact place it in a worse position than it is in now.

ARGUMENT

I. PENNSYLVANIA'S AUGUST 1ST FILING DEADLINE FOR NOMINATION PAPERS FOR CANDIDATES FOR PRESIDENT DOES NOT VIOLATE ARTICLE II, SECTION 1 OF THE CONSTITUTION.

Standard of Review: This is an appeal from a final order (converted from an order denying a motion for a preliminary injunction). Since there are no material facts in dispute and the only issue raised on appeal involves the district court's interpretation of Article II, Section 1 of the Constitution, the standard of review is plenary. *See Ruiz v. New Garden Township*, 376 F.3d 203, 206 (3d Cir. 2004).

Twenty-five years ago the Pennsylvania Department of State entered into two separate consent decrees which extended the statutory deadline for filing nomination papers for minor party candidates, political body candidates and independent candidates until August 1st of the election year. *See* Consent Decree entered in *Hall v. Davis*, No. 84-1057 (E.D. Pa.); 106a-07a; and Consent Decree entered in *The Libertarian Party of Pennsylvania v. Davis*, No. 84-0262 (M.D. Pa.); 108a. This Court in *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006), held that Pennsylvania's ballot access requirements (which included the August 1st filing deadline) for minor party candidates does not substantially burden their rights under the Constitution.⁸ In the present case, the Constitution Party argues

⁸ To the extent that the Constitution Party is attempting to surreptitiously argue that its rights under the First or Fourteenth Amendment are violated by
(continued...)

that when applied to candidates for President and Vice-President, the August 1st deadline for filing nomination papers violates Article II, Section 1 of the Constitution since it was established by the Secretary of the Commonwealth and not the Legislature.

However, as more fully explained below, the Constitution Party's argument lacks merit for two reasons. First, Pennsylvania's General Assembly has established a detailed statutory scheme for elections. The Secretary of the Commonwealth has been given the responsibility to oversee Pennsylvania's Elections. Secretary Cortés' continued adherence to the August 1st deadline established by the 1984 consent decrees does not represent a material change in the election laws and is consistent with the duties established for the Secretary of the Commonwealth under the Election Code. Therefore, the August 1st deadline does not violate the requirement that Presidential electors shall be selected "in such Manner as the Legislature thereof may direct." U.S. Const. Art. II, §1.

Second, the Constitution Party seeks to have the August 1st deadline (for Presidential and Vice-Presidential candidates) replaced by a deadline in late August or early September that coincides with the Republican and Democratic

Pennsylvania's statutory scheme, they are foreclosed from doing so by this Court's decision in *Rogers*.

National Conventions. The granting of this relief, though, is inconsistent with the very argument the Constitution Party sets forth in support of its position. The Constitution Party argues that the 1984 consent decrees are invalid because neither the executive nor the judiciary has the authority under Article II, Section 1 to establish procedures for the selection of Presidential electors. To vacate the prior consent decrees and judicially establish a later filing deadline would, according to the Constitution Party's own logic, also violate Article II, Section 1 of the Constitution.

A. Pennsylvania's August 1st Filing Deadline Was Established By Two Separate Consent Decrees Entered By Federal Courts With Consent Of The Secretary Of The Commonwealth Acting Pursuant To His Legislatively Created Duties Under The Election Code.

The General Assembly has established a detailed procedure governing the manner in which elections are conducted in the Commonwealth of Pennsylvania. *See* 25 P.S. §§ 2600-3554. The Secretary of the Commonwealth has been given broad duties over this election process. *See* 25 P.S. §2621. These duties include "receive[ing] and determin[ing] . . . the sufficiency of [nomination papers] for candidates for President of the United States [and] presidential electors." 25 P.S. §2621(d).

Under the Election Code, nomination papers for candidates for minor parties and political bodies had to be filed on or before the second Friday after the primary

election. For 2008, this would have been May 2nd. *See* 25 P.S. § 2913(c). However, pursuant to two separate consent decrees entered by federal courts in 1984 upon consent of the Secretary of the Commonwealth, nomination papers do not have to be filed until August 1st.⁹ *See* Consent Decree in *Hall v. Davis*, No. 84-1057 (E.D. Pa.); 106a-107a; and Consent Decree in *The Libertarian Party of Pennsylvania v. Davis*, No. 84-0262 (M.D. Pa.); 108a.

The Constitution Party attempts to characterize the Secretary and his predecessors' decision to enter into and follow these consent decrees as an action not authorized or approved by the Legislature, and therefore a violation of Article II, Section 1 of the Constitution. However, the actions of Secretary Cortés and his predecessors in using the August 1st filing deadline over the past twenty-five years “represents a lawful exercise of the powers delegated to [the Secretary of the

⁹ In *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), a three judge panel struck down a prior deadline for the filing of nomination papers which was seven weeks prior to the primary election. The court further ordered that the Secretary of the Commonwealth would have to accept nomination papers that were filed on or before August 21st until the General Assembly enacted a new filing deadline. The General Assembly enacted the current statutory deadline in 1980. The two consent decrees were entered into in 1984 as a result of two separate lawsuits claiming that the new filing deadline still substantially burdened political body candidates from getting placed on the ballot. The August 1st filing deadline was three weeks earlier than the deadline imposed in the *Salera* case, but approximately twelve weeks later than the statutory deadline.

Commonwealth under the Election Code], and therefore no departure from the legislative scheme at all.” (Memorandum Opinion at 8; 11a)

Article II, Section 1 of the Constitution undoubtedly limits the powers of the courts and the executive to “circumscribe the legislative power” granted state legislatures in selecting the manner in which electors for President are determined. *See Bush v. Palm Beach County*, 531 U.S. 70, 76-77 (2000). However, this does not mean that the executive or the courts have no role in the process of selecting electors. The Pennsylvania Legislature has enacted the Pennsylvania Election Code to govern voting for offices from President of the United States to local constables and tax collectors. While the Legislature could have chosen to select electors itself as some states did in the early days of our Republic, *see Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*), it is fully consistent with Article II, Section 1 of the Constitution for the Legislature to have created a more democratic system for choosing electors and to have delegated the operation of the voting system to the executive branch.

Under 25 P.S. § 2621, the Legislature has outlined the duties and responsibilities of the Secretary of the Commonwealth. While it would be preferable for the Legislature to enact a new deadline for the filing of nomination papers, it was well within the authority of the Secretary to enter into the consent decrees that are the focus of this litigation. The Secretary’s decision to continue

following the 1984 consent decrees is entirely consistent with the Legislature's vision in establishing his position in the first place. The fact that the Legislature has failed to amend the Election Code, if anything, simply shows that the Legislature is generally in agreement with the August 1st deadline and does not see the necessity to alter the status quo.¹⁰

Although the 2000 Supreme Court election cases do not provide a firm consensus on the scope of Article II, Section 1, it seems clear that it is not as absolute as the Constitution Party suggests. Chief Justice Rehnquist, in his concurring opinion (joined by Justices Scalia and Thomas) in *Bush v. Gore*, would appear to go the farthest in limiting encroachments on the legislative power when it comes to selecting electors. However, even Chief Justice Rehnquist looked into the decisions of State officials no more deeply than necessary to determine whether the Florida judiciary's actions in that case would "frustrate the legislative desire to attain the 'safe harbor' provided by [3 U.S.C. Sec. 5 – regarding contesting electors]". *Bush v. Gore*, 531 U.S. at 534 (Rehnquist, C.J., concurring). Chief

¹⁰ It is also worth noting that no state court has ruled that the Secretary of the Commonwealth exceeded his authority under state law by entering into the two consent decrees that are the focus of this lawsuit. The federal courts should proceed with caution when declaring the actions of a state official to be unconstitutional. This is particularly true where such a determination depends on the federal court's interpretation of the parameters of the official's duties and authority under state law.

Justice Rehnquist does not advocate, and the majority *per curiam* decision does not hold, that the executive and the judiciary can never play a role in how the voting process works in selecting electors for the office of President.

Chief Justice Rehnquist also discusses the role of the Florida Secretary of State as part of the mechanism that the Florida Legislature had created and whose decisions should have been deferred to by the state judiciary because of Article II, Section 1 of the United States Constitution. *See Bush v. Gore*, 531 U.S. at 535-36 (“Acting pursuant to its constitutional grant of authority, the Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election. . . . The legislature has designated the Secretary as the ‘chief election officer,’ with the responsibility to ‘[o]btain and maintain uniformity in the application, operation and interpretation of the election laws.’”) (Rehnquist, C.J.).

The Secretary of the Commonwealth acts in a similar capacity in Pennsylvania and is authorized to make decisions and take actions even where not expressly provided for by the Legislature in order to carry out the Legislature’s intent. Accordingly, while the United States Supreme Court determined that the Florida Supreme Court’s order to recount ballots conflicted with the intent of the Florida Legislature and its powers under Article II, Section 1 of the Constitution, the Secretary of the Commonwealth’s actions in this case do not conflict with the

intent of the Pennsylvania Legislature. The overriding lesson of *Bush v. Gore* is not that the executive branch overstepped its bounds in violation of Article II, Section 1, but that the judiciary should tread lightly when it intrudes on an electoral system created by the legislature and which delegates responsibility to the executive.

B. Even If The Filing Deadline Established Under the 1984 Consent Decrees Violates Article II, Section 1 Of The Constitution, The Only Appropriate Remedy Would Be To Reinstate The Prior Statutory Deadline.

The Constitution Party argues that the August 1st deadline established by the 1984 consent decrees should be vacated and a new deadline imposed by this Court coinciding with the conventions of the major national political parties. Even if the present filing deadline did not conform to the requirements of Article II, Section 1, though, the remedy suggested by the Constitution Party defies logic. On the one hand, the Constitution Party argues that only the Legislature can determine the filing deadline for nomination papers for purposes of choosing the President and Vice-President. However, having argued that only the Legislature has this power, it then asks the courts to establish a new deadline that constitutes an even greater deviation from the statute than the deadline established by the Secretary of the Commonwealth. If the present filing deadline, approved by two separate federal district judges, violates Article II, Section 1, then any new judicially created deadline must also violate the Constitution. If the consent decrees were vacated,

the only appropriate remedy would be for the statutory deadline to go back into effect. Such a result, however, would not be in the best interest of the Constitution Party or the citizens of Pennsylvania.

The Constitution Party in making its argument relies largely on the Sixth Circuit's decision in *Libertarian Party v. Brunner*, 567 F.Supp.2d 1006 (S.D. Ohio, 2008). However, this is a district court opinion from a different circuit and has absolutely no precedential weight. Furthermore, regardless of any merit that the Ohio district court's opinion might have, it is distinguishable from the present case.

The statutory deadline in the *Brunner* case had previously been declared unconstitutional by the Sixth Circuit Court of Appeals. *See Libertarian Party v. Blackwell*, 462 F.3d 579 (6th Cir. 2006). In this case, the statute has never been declared unconstitutional. Instead, the Secretary of the Commonwealth entered into two consent decrees when faced with litigation, and the consent decrees were approved by two separate federal courts. Furthermore, while election officials in Ohio operated in a vacuum, the only appropriate outcome here if the consent decree were invalidated would be for the statute to come back into effect. This, though, underscores the paradox that is created by the Constitution Party's position. If it is successful in having the consent decrees vacated because the judiciary lacks the constitutional authority to enter such decrees, then the party is

stuck with the May 2nd filing deadline. This, of course, does not provide the Constitution Party the relief it wants and in fact places it in a worse position than under the *status quo*.¹¹

The Constitution Party seeks to have this Court create a new deadline beyond August 1st to file nomination papers in order to be placed on the ballot. Its argument seems to rely largely on the fact that the Democratic and Republican parties do not choose their nominees until the end of August or early September. However, under *Rogers v. Corbett*, 468 F.3d 188 (2006), the fact that major party candidates have a different system to get placed on the ballot does not violate the equal protection rights of minor party and political body candidates.¹² *See also Council of Alternative Political Parties v. Hooks*, 179 F.3d 64 (3d Cir. 2008)

¹¹ There are other differences between the two cases. Most notably, the judge in *Brunner* appears to have concluded that the filing deadline (still well before the primary) was unconstitutional regardless of who had established it. In addition, the Ohio Secretary of State had created an entire system for ballot access for minor party candidates without any legislative guidance. This is a much greater use of executive power than in this case, where the Secretary of the Commonwealth – through a consent decree approved by two courts – has moved the filing deadline back approximately 12 weeks. In Pennsylvania, unlike in Ohio, all other aspects of the statutory scheme are still in place, and even the May 2nd filing deadline found in the statute has never been declared unconstitutional.

¹² In addition to the precedent set by this Court's decision in *Rogers*, Secretary Cortés would note that the Constitution Party was a party in that case and to the extent it is attempting to challenge the outcome of that case here, it is precluded from doing so by principles of *res judicata*.

(statute requiring filing of nomination petitions in New Jersey by date of primary election did not impose unconstitutional burden on rights of voters and candidates).

The only question to be decided in this case is whether the August 1st filing deadline when applied to Presidential and Vice-Presidential candidates violates the specific provisions of Article II, Section 1 of the Constitution. However, if the Constitution Party can demonstrate that the courts lacked the authority to enter the consent decrees in 1984, there is no reason why this Court would have the authority to enter another judicial order setting a filing deadline even later than the one enacted by the Legislature in 1980.

CONCLUSION

For these reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

THOMAS W. CORBETT, JR.
Attorney General

BY: /s/ Howard G. Hopkirk
HOWARD G. HOPKIRK
Senior Deputy Attorney General
Bar No. 74264 (Pa.)

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Appellate Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17102
Phone: (717) 783-1478
FAX: (717) 772-4526

DATE: August 10, 2009

CERTIFICATE OF COUNSEL

I, Howard G. Hopkirk , Senior Deputy Attorney General, hereby certify as follows:

1. That I am a member of the bar of this Court.
2. That the text of the electronic version of this brief is identical to the text of the paper copies.
3. That the following virus detection program — SYBARI ANTIGEN Version 8.00.1470 — was run on the file and no virus was detected.

/s/ Howard G. Hopkirk
HOWARD G. HOPKIRK
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I, Howard G. Hopkirk , Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing **Brief For Appellee Cortés** by depositing two copies of the same in the United States mail, first class, postage prepaid, to the following:

**James N. Clymer
Clymer & Musser, P.C.
408 West Chestnut Street
Lancaster, PA 17603**

Ten copies were also sent by first class mail to the office of the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

/s/ Howard G. Hopkirk
HOWARD G. HOPKIRK
Senior Deputy Attorney General

DATE: August 10, 2009