

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**THE CONSTITUTION PARTY OF
PENNSYLVANIA, *et al.*,
Plaintiffs**

v.

**PEDRO A. CORTÉS, *et al.*,
Defendants**

NO. 09-CV-1691

JUDGE STENGEL

ELECTRONICALLY FILED

**BRIEF OF DEFENDANT PEDRO A. CORTÉS, CHET HARHUT,
AND THOMAS CORBETT IN SUPPORT OF THEIR
MOTION TO DISMISS THE AMENDED COMPLAINT**

Respectfully submitted,

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I. INTRODUCTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of three separate parts of the Pennsylvania Election Code governing the conduct of minor political parties, political bodies and their candidates for public office. The plaintiffs are the Constitution Party of Pennsylvania (a political body) and its chair, Wes Thompson; the Green Party of Pennsylvania (a political body) and its chair, Hillary A. Kane; and the Libertarian Party of Pennsylvania (a minor political party)¹ and its chair, Michael J. Robertson. (Amended Complaint at ¶¶ 1-6)

The defendants are Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania; Chet Harhut, Commissioner of the Pennsylvania Department's Bureau of Commissions, Elections, and Legislation; and Thomas Corbett, Attorney General of the Commonwealth of Pennsylvania (collectively, "Executive

¹ State-wide minor political parties are political parties whose voter registration is less than 15% of the total voter registration for Pennsylvania, but who obtained at least 2% of the largest entire vote cast for a single state-wide candidate in the last preceding general 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.

Defendants”). (Amended Complaint at ¶¶ 7-9). Also named as defendants are the Justices and Prothonotary of the Pennsylvania Supreme Court, and the Judges and Chief Clerk of the Commonwealth Court (collectively, “Judiciary Defendants”).² (Amended Complaint at ¶¶ 10-13)

The Plaintiffs filed an amended complaint on June 19, 2009.³ The plaintiffs allege that Pennsylvania’s Election Code substantially burdens “minor party”⁴ candidates in three ways. First, they allege that 25 P.S. § 2872.2 (Section 912.2 of the Election Code),⁵ is unconstitutional as applied because it treats major party

² Defendants Cortés, Harhut, and Corbett are all officials of the executive branch of Pennsylvania’s state government. They are represented by the Office of Attorney General pursuant to the Commonwealth Attorneys Act. 71 P.S. § 732-204(c). The Judiciary Defendants are represented separately by counsel from the Administrative Office of Pennsylvania Courts.

³ Executive Defendants were never properly served with the original complaint. They were served the amended complaint by mail on June 24, 2009 and subsequently waived personal service on July 1, 2009.

⁴ Only the Libertarian Party meets the technical requirements to qualify as a “minor political party” at this time. However, for the sake of simplicity and to avoid excess verbiage, the term will be used to include “political bodies” such as the Constitution Party and the Green Party unless specifically noted otherwise. The differences between the treatment of “minor political parties” and “political bodies” under Pennsylvania’s Election Code are largely, if not entirely, irrelevant to the resolution of the claims raised in the amended complaint.

⁵ Plaintiffs in their complaint refer to the Election Code by the section numbers assigned in Purdon’s Statutes (“P.S.”). The Election Code as enacted by the Legislature has different section numbers. However, to avoid confusion and to

candidates (Democratic and Republican) differently from minor party candidates. Major party candidates have their names placed on the ballot through the primary system. However, Plaintiffs must obtain signatures on nomination papers to be placed on the ballot. Plaintiffs allege that this violates their rights under the First and Fourteenth Amendments since minor party candidates may be subject to costs and fees (including attorneys fees) under 25 P.S. § 2937 (Section 977 of the Election Code), if their nomination papers are later determined to be deficient. Plaintiffs seek a declaratory judgment that Section 2872.2 is unconstitutional as applied. (Amended Complaint at ¶¶ 42-50)

Second, plaintiffs allege that 25 P.S. § 2937 (Section 977 of the Election Code), is unconstitutional as applied because it permits the Judiciary Defendants to impose costs and fees (including attorney's fees) on minor party candidates whose nomination papers are successfully challenged by private parties. They allege that this has a chilling effect on the right of minor party candidates to seek placement of their names on the ballot. Plaintiffs seek a declaratory judgment that Section 2937 is unconstitutional as applied. (Amended Complaint at ¶¶ 51-58).

maintain consistency with the amended complaint, we will refer to the Purdon's cites as appear in the statutory compilation. The actual section number of the Election Code is provided in parenthesis for the convenience of the Court.

Third, plaintiffs allege that minor party candidates are being forced into running for public office as write-in-candidates to avoid the imposition of costs and fees under 25 P.S. § 2937 if their nomination papers were successfully challenged in Commonwealth Court. However, they maintain that county election officials are not properly computing and reporting write-in-votes as required by 25 P.S. § 3155 (Section 1405 of the Election Code). Plaintiffs seek an injunction requiring Defendants Cortés and Harhut to ensure that all write-in-votes are properly certified and reported as required by 25 P.S. § 3155. (Amended Complaint at ¶¶ 59-64).

Executive Defendants do not believe that the Plaintiffs have alleged sufficient facts to state a claim for which relief may be granted against them.⁶ Accordingly, they have filed a motion to dismiss. This brief is being submitted in support of their motion pursuant to Local Rule 7.1(c).⁷

⁶ Defendant Corbett would further note that the only allegations specifically directed at him are that he has criminally charged twelve members or employees of the Pennsylvania House Democratic Caucus with “numerous counts of criminal conspiracy, theft and conflict of interest” relating, at least in part, to the filing of objections to the nomination papers of Presidential Candidate Nader in 2004 and Senate Candidate Romanelli in 2006. (Amended Complaint at ¶¶ 39-40). Plaintiffs do not state how Attorney General Corbett’s actions violate their rights. Accordingly, there does not seem to be any basis for including him as a defendant in this action.

⁷ The Judiciary Defendants previously filed a second motion to dismiss on July 2, 2009.

II. 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 process. 25 P.S. §§ 2861-83.

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 (*e.g.*, minor political parties, political bodies, and independents) must file nomination papers to have their names placed on the General or Municipal Election ballot.⁸ These candidates must obtain signatures on nomination papers

⁸ State-wide minor political parties are political parties whose voter registration is less than 15% of the total voter registration for Pennsylvania, but who obtained at least 2% of the largest entire vote cast for a single state-wide candidate in the last preceding general 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. §§

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).

The first day to circulate nomination papers is the tenth Wednesday prior to the primary.⁹ *See* 25 P.S. § 2913(b). Nomination papers must be filed on or before August 1st of each election year.¹⁰ *See* Consent Decree entered in *Hall v. Davis*, No. 84-1057 (E.D. Pa.); and Consent Decree entered in *Libertarian Party of Pennsylvania v. Davis*, No. 84-0262 (M.D. Pa.). After the filing of nomination papers, private parties 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

2872.2 & 2911. The differences that do exist are not material to the issue raised on appeal.

⁹ The primary election in Presidential election years is the fourth Tuesday in April. For non-Presidential elections, the primary is the third Tuesday in May. *See* 25 P.S. § 2753(a).

¹⁰ Under the terms of 25 P.S. §§ 2913(b) and (c) (Section 953(b) and (c) of the Election Code), the filing deadline is the second Friday after the primary election. For 2008, the filing deadline under the statute would have been Friday, May 2nd. However, under the two consent decrees entered in *Hall v. Davis*, No. 84-1057 (E.D. Pa.) and *Libertarian Party of Pennsylvania v. Davis*, No. 84-0262 (M.D. Pa.), the filing deadline was extended by three additional months until August 1st.

candidate should be placed on the ballot or stricken.¹¹ 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. 42 Pa. C.S. § 723(a); Pa. R.A.P. No. 1101(a)(1).

25 P.S. § 2937 provides that “[i]n case any such petition is dismissed, the court shall make such order to the payment of the costs of the proceedings, including witness fees, as it shall deem just.” 25 P.S. § 2937. In *In re Nader*, 588 Pa. 450, 905 A.2d 450 (2006) [hereinafter *Nader*], *cert’ denied*, 549 U.S. 1117 (2007), the Pennsylvania Supreme Court applied this provision to a minor party candidate whose nomination papers were found to be deficient and held that, under the statute, the candidate could be assessed fees and costs (including attorney’s fees) incurred by the objecting parties. Ralph Nader and his running mate were assessed fees and costs of \$81,102.19 in that case. (Amended Complaint at ¶¶ 31-33). After the 2006 election, Green Party Senate candidate Carl Romanelli and his legal counsel were assessed fees and costs of \$80,407.56 after his nomination

¹¹ The Commonwealth Court’s original jurisdiction in election matters is limited to issues relating to state offices. 42 Pa. C.S. § 764. Objections to nomination papers for local offices are reviewed by the courts of common pleas. 42 Pa. C.S. § 931.

papers were successfully challenged in Commonwealth Court.¹² *In re: Rogers*, 942 A.2d 915 (Pa. Cmwlth.) [hereinafter *Romanelli*], *aff'd*, 598 Pa. 598, 959 A.2d 903 (2008). (Amended Complaint at ¶¶ 34-37).

Besides having their names placed on the ballot by way of nomination papers, the only other way minor party candidates may run for public office is as write-in candidates. 25 P.S. § 2963(a). County election officials are required to compute and certify votes cast for write-in candidates. 25 P.S. §§ 2936(a) & 3155. Plaintiffs allege that county election officials “routinely” fail to count write-in votes. (Amended Complaint at ¶ 62). Plaintiffs also allege that in 2006, county election officials from Armstrong, Clinton, Fulton, Jefferson, Lawrence, Monroe, Northumberland, Perry and Philadelphia counties failed to count write-in votes for Hagan Smith (gubernatorial candidate of the Constitution Party), Marakay Rogers (gubernatorial candidate of the Green Party), and Ken V. Krawchuck (senatorial

¹² In 2008, the Office of Attorney General charged twelve members of the General Assembly with numerous counts of criminal conspiracy, theft and conflict of interest. In the Grand Jury Presentment filed in connection with these charges, it was alleged that the petitions objecting to the nomination papers of Nader and Romanelli were secretly prepared by Commonwealth employees using state funds. (Amended Complaint at ¶¶ 39-40). Commonwealth Court refused to grant motions to set-aside its award of fees and costs to the parties who brought these petitions. The decisions in both of those cases are presently on appeal with the Pennsylvania Supreme Court. The Pennsylvania Supreme Court recently affirmed Commonwealth Court’s order assessing costs in *Romanelli*, No. 6 MAP 2009, 2009 WL 2488536 (filed August 17, 2009). Nader’s appeal remains pending before the Pennsylvania Supreme Court at Docket No. 94 MAP 2008.

candidate of the Libertarian Party). (Amended Complaint at ¶ 38). Plaintiffs further allege that after the 2008 General Election, election officials from seven counties failed to compute and certify write-in votes and election officials from several other counties computed and certified incomplete totals of write-in votes. (Amended Complaint at ¶ 41)

III. STATEMENT OF ISSUES PRESENTED

- A. Whether Pennsylvania's System of Treating Minor Parties Differently From Major Parties For Purposes of Placing Their Candidates Names On The Ballot Violates Plaintiffs' Rights Under the First and Fourteenth Amendments?**
- B. Whether the Plaintiffs Can State a Claim Against the Executive Defendants (Cortés, Harhut and Corbett) for the Assessment of Costs and Fees Under 25 P.S. § 2937?**
- C. Whether the Plaintiffs Can State A Claim Against the Executive Defendants For The Alleged Failure of County Boards Of Elections To Count Write-In Votes?**

IV. ARGUMENT

- A. PENNSYLVANIA'S SYSTEM OF TREATING MINOR PARTIES DIFFERENTLY FROM MAJOR PARTIES FOR PURPOSES OF PLACING THEIR CANDIDATES' NAMES ON THE BALLOT IS CONSTITUTIONAL UNDER THE THIRD CIRCUIT'S RECENT DECISION IN *ROGERS V. CORBETT*, 468 F.3D 188 (3D CIR. 2006).**

In *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006), *cert. denied*, ___ U.S. ___, 128 S. Ct. 288 (2007), the Third Circuit Court of Appeals upheld

Pennsylvania's system of requiring minor party candidates to obtain signatures on nomination papers in order to have their names placed on the ballot. It concluded that the two percent signature requirement (*see* 25 P.S. §§ 2872.2 & 2911) "was justified by Pennsylvania's interest in preventing ballot clutter and ensuring viable candidates." *Rogers*, 468 F.3d at 197. To the extent that Plaintiffs are challenging the different treatment accorded minor parties and their candidates under the Election Code, their argument is foreclosed by this Court's decision in *Rogers*.

Plaintiffs do make a new argument regarding the burdens placed on minor party candidates arising from the possible assessment of costs and fees by the judiciary if their nomination papers were successfully challenged pursuant to 25 P.S. § 2937. However, under *Rogers*, the mere fact that major party candidates are not subject to the same type of assessments does not constitute a violation of the minor parties' right to equal protection.¹³ Rather, the constitutionality of the challenged statutory provisions involves balancing the state's interest against the burdens that are imposed on minor party candidates in getting their names on the ballot. *Rogers*, 468 F.3d at 193-94. This specific question will be discussed more extensively below.

¹³ Executive Defendants note that Section 2937 does in fact apply to nomination petitions filed by major party candidates wishing to be placed on the primary ballot. *See* Discussion *infra* at p. 11-12.

B. MINOR PARTY CANDIDATES CANNOT STATE A CLAIM AGAINST THE EXECUTIVE DEFENDANTS FOR THE IMPOSITION OF COSTS AND FEES UNDER 25 P.S. § 2937.

1. The Judiciary's Assessment Of Costs And Fees Against Minor Party Candidates Under Section 2937 (25 P.S. § 2937) Does Not Violate Their Rights Under The First And Fourteenth Amendments.

Section 2937 of the Election Code provides that in cases where objections to nomination papers are filed, the courts shall enter an “order as to the payment of the costs of the proceedings, including witness fees, as it shall deem just.” 25 P.S. § 2937. The Pennsylvania Supreme Court has interpreted this provision as applying to both “nomination petitions” (filed by major party candidates) and “nomination papers” (filed by minor party candidates).¹⁴ *In re Nader*, 588 Pa. 450, 905 A.2d 450 (2006), *cert. denied*, 549 U.S. 1117 (2007). While the plaintiffs may have been able to argue that it was unclear that the assessment of costs under Section 2937 would apply to minor party candidates prior to the Supreme Court’s decision in *Nader*, they are clearly on notice now.

Moreover, the imposition of costs is both fair and necessary for the smooth operation of elections. Any burden on minor parties and their candidates is

¹⁴ The plaintiffs’ contention that Section 2937 does not apply to major party candidates is simply incorrect. A major party candidate must file nomination petitions to be placed on the ballot. If the candidate’s nomination petitions are successfully challenged, he can be subject to costs pursuant to Section 2937. *See In re Lee*, 525 Pa. 155, 578 A.2d 1277 (1990).

minimal, and outweighed by the Commonwealth's substantial interest in ensuring that only those candidates who have met the requirements established by the Legislature have their names placed on the ballot. As the Supreme Court stated in *Burdick v. Takushi*, 504 U.S. 428, 440 n.10 (1992), "limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable."

Without the cost assessment provisions contained in Section 2937, there would be nothing to prevent the filing of frivolous, fraudulent, and/or patently deficient nomination papers by minor party candidates. While minor party candidates do have a constitutionally protected right to have their names placed on the ballot, other candidates and the voters at large have a similar right to make sure that the election laws are complied with. Section 2937 is fair to both minor party candidates and those who challenge their nomination papers. It gives the courts the authority to award costs to those who successfully challenge the filing of nomination papers as well as costs to the candidate if the challenge is unsuccessful.

The authority granted to Pennsylvania's court's under Section 2937 is similar to powers that both federal and state courts already possess. Rule 11 provides for the imposition of sanctions in federal court, including attorney's fees,

for making claims or arguments that are frivolous or lack any reasonable evidentiary support. Fed. R. Civ. P. No. 11. The Pennsylvania Rules of Civil Procedure have a similar provision. *See* Pa. R. Civ. P. No. 1023.1. Moreover, the courts have an inherent authority under our constitutional system to control proceedings before them as necessary for the efficient operation of the judiciary, outweighing any minimal chilling effect on the First Amendment rights of minor party candidates. In *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), the United States Supreme Court stated that a court may – even absent any statutory authority – “assess attorney’s fees when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Id.* at 45-46 (quoting *Alyeska v. Pipeline Sercice Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975)). *See also* *Gillette Foods Inc. v. Bayernwald-Fruchteverwertung*, 977 F.2d 809, 813 (3d Cir. 1992).

There is no question that minor party candidates seeking to be placed on the ballot are engaged in protected activity under the First Amendment. Moreover, there is a general right to access the courts and petition the government which gives First Amendment protection to all citizens. *See Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997). Accordingly, if the plaintiffs’ position were correct, the ability of the courts to impose sanctions in all cases would be undermined and

rendered impotent since they might create a “chilling” effect for others who seek to enforce their rights before the courts. However, the courts’ power to impose sanctions has been upheld even where it has been claimed that the plaintiff’s constitutional rights have been violated. *See Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers*, 855 F.2d 1080, 1091 (3d Cir. 1988) (upholding sanctions of attorneys fees under Rule 11 in *Bivens* action as not “violat[ing] public policy concerns by chilling attorney incentives to file civil rights cases” where complaint was legally frivolous). There is simply no reason why courts should be foreclosed from imposing sanctions or costs in election cases while they are permitted to do so in all other types of cases.

Plaintiffs point to two recent cases in which attorney fees have been awarded pursuant to Section 2937 to show the chilling effect posed to minor party candidates. *See Nader* and *Romanelli*. However, in *Nader*, the imposition of costs was based on the factual determination that the campaign’s signature gathering “involved fraud and deception of massive proportions.”¹⁵ *Nader*, 588 Pa. at 466, 905 A.2d at 460. Similarly, in *Romanelli*, the Commonwealth Court found

¹⁵ The Commonwealth Court found that in addition to the nomination papers containing many obviously fictitious names such as “Mickey Mouse” and “Fred Flintstone”, thousands of other names were “created at random and then randomly assigned either existent or non-existent addresses by the circulators.” *Nader*, 588 Pa. at 458, 905 A.2d at 455.

that candidate Romanelli, through his attorneys, was disingenuous and failed to act in good faith to comply with the court's prior orders regarding certification of signatures. *Romanelli*, 914 A.2d at 469 (“Candidate’s cumulative disingenuousness in these proceedings has crossed the line into bad faith on the part of Candidate and his counsel.”).

In both of these cases, attorney’s fees were imposed, but only after Commonwealth Court determined that the conduct of the minor party candidates was egregious and that they had not acted in good faith. If a candidate is reckless in filing facially deficient nomination papers or repeatedly fails to comply with court orders, he cannot use the First Amendment as a shield from sanctions imposed pursuant to Section 2937, the court’s general powers created by the Legislature, or its inherent powers to control judicial proceedings.¹⁶ There is nothing suggesting that candidates who use due diligence in collecting signatures and file nomination papers that in objective good faith comply with the

¹⁶ The Supreme Court’s balancing of the First Amendment in the context of defamation demonstrates that there are legitimate limitations on an individual’s constitutional rights. Accordingly, some statements are protected as free speech under the First Amendment while others which are made recklessly are not. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964) (protecting negligently false statements to avoid a chilling effect on constitutionally valuable speech); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985) (same). Similarly, while minor party candidates have a definite right to run for public office, they do not have a right to file documents (required in order to be placed on the ballot) that on their face are obviously deficient.

requirements of the Election Code will fall victim to sanctions under Section 2937.¹⁷ Furthermore, as demonstrated by both the *Nader* and *Romanelli* cases, candidates are given a full hearing and the right to appeal to the Pennsylvania Supreme Court before attorney fees or other costs are imposed pursuant to Section 2937. Even if the minor party candidates believe that these cases were wrongly decided, the procedures provided by the Pennsylvania Election Code are more than sufficient to protect their right to due process.¹⁸

¹⁷ Executive Defendants are aware that the plaintiffs believe that the *Rogers* case was wrongly decided and that the existing signature requirements are unfair to minor party candidates. However, this does not justify the filing of nomination papers that are clearly deficient under the law.

¹⁸ Plaintiffs allege that Section 2937 “chills” candidates from filing nomination papers because of the possibility that they will be subjected to sanctions. Yet, the only two cited examples of costs and fees being assessed by the courts are in cases where the candidates were found to have engaged in egregious conduct. The First Amendment does not entitle minor party candidates to a declaratory judgment which allows them to file nomination papers in bad faith and prohibits the judiciary from imposing sanctions for such conduct. Section 2937 permits judges to consider such things as the good faith basis of filing the nomination papers, as well as the candidate’s financial ability to pay any sanctions imposed. As in all instances where judges impose sanctions, established principles of due process must be observed. However, plaintiffs cannot demonstrate that Section 2937 is unconstitutional as applied to them or that the procedural safeguards under Pennsylvania’s Election Code are not sufficient to protect their rights. *See Aiello v. City of Wilmington*, 623 F.2d 845 (3d Cir. 1980) (“If [the frequency of impermissible applications] is relatively low, it may be more appropriate to guard against the statute’s conceivably impermissible applications through case-by-case adjudication rather than through facial invalidation.”).

2. Even If The Judiciary Defendants Were Applying Section 2937 In A Manner Which Violates The Constitutional Rights Of Minor Party Candidates, Plaintiffs Cannot State A Claim Against The Executive Defendants Since They Are Not Personally Involved In This Process.

The Plaintiffs allege that their rights under the First and Fourteenth Amendments are being violated by the application of Section 2937 to them. Assuming *arguendo* that this is true, the Executive Defendants have no involvement in the matters complained of. Objections to nomination papers are filed with the Commonwealth Court by third parties. The Executive Defendants do

This Court should not declare Section 2937 invalid based on the presumption that Pennsylvania's courts will not interpret it in accordance with the Fourteenth Amendment. Comity also requires that it accept the factual determinations made by the Commonwealth Court in *Nader* and *Romanelli* unless vacated by the Pennsylvania Supreme Court or the United States Supreme Court. To the extent that Plaintiffs are attempting to use this case to collaterally attack those decisions, this Court should abstain from involving itself in those cases. *See Guarino v. Larsen*, 11 F.3d 1151, 1156-57 (3d Cir. 1993) ("Just as federal courts should presume that pending state court proceedings can correctly resolve federal questions, they should also presume that completed state court proceedings have correctly resolved these questions"). In particular, it is unclear why the criminal charges brought by the Office of Attorney General regarding the misappropriation of funds in connection with the filing of objections to the nomination papers in the *Nader* and *Romanelli* cases would negate the decisions reached by the Commonwealth Court. In any case, the resolution of that issue is best left to the state courts. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). More importantly, it is difficult to see any relevance that the allegations regarding criminal activity surrounding the 2004 and 2006 elections have to the filing of nomination papers for future elections and whether the possible imposition of costs and fees by the judiciary would constitute a violation of the plaintiffs' constitutional rights.

not initiate a hearing on objections and do not participate as a party in those matters.

In order to bring a claim pursuant to Section 1983, the official sued must have some type of personal involvement in the matters complained of. *See Rouse v. Plantier*, 182 F.3d 192 (3d Cir. 1999); *Rizzo v. Goode*, 423 U.S. 362 (1976). Although Defendants Cortés and Harhut are the Commonwealth officials with primary responsibility over the administration of the Election Code, determinations regarding objections to nomination papers, and the granting of costs pursuant to Section 2937 are matters delegated by statute exclusively to the judiciary. The principles governing the separation of powers, the independence of the judiciary, and due process would surely be violated if Executive Defendants could simply ignore or override the Pennsylvania Supreme Court's interpretation of the meaning of Section 2937 or the factual determinations made by the Commonwealth Court. Accordingly, all claims that the Executive Defendants have violated the constitutional rights of the plaintiffs by the judiciary's imposition of costs and fees against them pursuant to Section 2937 should be dismissed.

C. COUNTY ELECTION OFFICIALS, NOT DEFENDANTS CORTÉS AND HARHUT, HAVE THE AUTHORITY TO COUNT WRITE-IN VOTES UNDER PENNSYLVANIA'S ELECTION CODE.

Plaintiffs also claim that county election officials are not properly computing and reporting write-in-votes as required by 25 P.S. § 3155 (Section 1405 of the Election Code). Executive defendants will assume for purposes of their motion to dismiss that these allegations are true. However, any claim which they may have should be directed toward the specific counties and county election officials that they maintain are failing to perform their duties under the Election Code.¹⁹

Under 25 P.S. § 2642(k), the county boards of elections have the power and duty to compute and certify election returns. While Defendants Cortés and Harhut receive election returns from the counties, *see* 25 P.S. § 2621, they do not have the authority to take over the legislatively created responsibilities of local election officials. There is a presumption that local government officials are acting in accordance with the Election Code and the Constitution. If plaintiffs' allegations regarding the conduct of county election officials in counting write-in votes from certain counties in Pennsylvania are true, they should take action against the

¹⁹ Undoubtedly, it would be easier for plaintiffs to obtain relief if they could sue one or two state officials instead of having to litigate against officials from multiple counties. However, the fact that it may be inconvenient to sue officials from multiple counties does not make Defendants Cortés and Harhut proper defendants for the claims raised by the plaintiffs here.

officials responsible. The Executive Defendants simply lack the personal involvement in the counting of write-in ballots at the precinct or county level to be proper defendants. Furthermore, they lack the authority to take over responsibility for the counting of write-in votes (a function of county government).

Accordingly, the claim that Executive Defendants must ensure that write-in votes are properly counted and certified by county boards of elections should be dismissed.

IV. CONCLUSION

For the reasons enumerated above, defendants Cortés, Harhut, and Corbett's motion to dismiss the amended complaint should be granted.

Respectfully submitted,

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DATE: August 24, 2009

CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General, hereby certify that on August 24, 2009, I caused to be served the foregoing **BRIEF OF DEFENDANTS PEDRO A. CORTÉS, CHET HARHUT, AND THOMAS CORBETT IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT** via e-mail through the Eastern District's electronic case filing system to the following individuals:

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