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

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al. Plaintiffs, v. PEDRO A. CORTES, et al., Defendants.	)	CIVIL ACTION No. 09-cv-01691

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS THE AMENDED COMPLAINT FILED BY DEFENDANT CORBETT, DEFENDANT CORTES AND DEFENDANT HARHUT

The Constitution Party of Pennsylvania, the Green Party of Pennsylvania, the Libertarian Party of Pennsylvania and their respective chairpersons Wes Thompson, Hillary Kane and Mik Robertson ("Plaintiffs") oppose the motion to dismiss the Amended Complaint filed by Attorney General Tom Corbett, Secretary of State Pedro Cortes and Bureau of Commissions, Elections and Legislation Commissioner Chet Harhut ("Defendants"). Defendants contend that the Amended Complaint fails to state claims under 42 U.S.C. § 1983, because the challenged provisions of the Pennsylvania Election Code do not violate Plaintiffs' constitutional rights. Defendants further contend that they are not proper parties to defend Plaintiffs' claims.

As set forth below, the Amended Complaint alleges the requisite constitutional violations. Further, Defendants are proper parties to defend Plaintiffs' claims under 42 U.S.C. § 1983. Accordingly, Defendants' motion should be denied, because it fails to establish any basis for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

Oral argument is requested pursuant to this Court's Civil Rule 7.1(f).

ARGUMENT

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *See Cradle of Liberty Council, Inc. v. City of Philadelphia*, 2008 U.S. Dist. LEXIS 74515 *11 (E.D. Pa. 2008) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). In ruling upon such a motion, a court must accept all allegations in the complaint as true, and draw all reasonable inferences in the plaintiffs' favor. *See id.* at *12. To withstand dismissal, therefore a complaint need only include a "short and plain statement…showing that the pleader is entitled to relief." *Id.* Because the Amended Complaint clearly meets this liberal pleading standard, Defendants' motion must be denied.

I. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1983 BY ALLEGING THAT SECTION 2872.2 ARBITRARILY DISCRIMINATES AGAINST THEM AND SEVERELY BURDENS THEIR ABILITY TO PARTICIPATE IN PENNSYLVANIA'S ELECTORAL PROCESS.

To state a claim under 42 U.S.C. § 1983, plaintiffs must allege a violation of their constitutional rights under color of state law. *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1264 (3rd Cir. 1994).

Plaintiffs state a claim under42 U.S.C. § 1983 in Count I of the Amended Complaint by alleging that 25 P.S. § 2872.2 ("Section 2872.2") arbitrarily discriminates against them and severely burdens their ability to participate in Pennsylvania's electoral process. Amended Complaint ("Am. Comp.") ¶¶ 43-50. Specifically, Section 2872.2 subjects Plaintiffs to the burden and expense of submitting nomination petitions to place their candidates on the ballot in each election cycle, even if their candidates <u>won</u> the previous election for statewide office, as long as each Plaintiff political party's membership accounts for less than fifteen percent of registered voters. Am. Comp. ¶ 43. Further, in conjunction with other provisions of the Pennsylvania Election Code ("Election Code"), Section 2872.2 strongly deters or functionally bars Plaintiffs from participating in Pennsylvania's electoral process, by subjecting their candidates to severe financial burdens and disenfranchising their voter-supporters. Am. Comp. ¶¶ 44-50; *see infra* Part II-III. Plaintiffs thus state a claim under 42 U.S.C. § 1983 by alleging that Section 2872.2 violates their constitutional rights under color of state law. *See Jordan*, 20 F.3d at 1264.

Defendants' motion to dismiss fails as a matter of law with respect to Count I, because Defendants never address the merits of Plaintiffs' challenge to Section 2872.2. *Compare* Am. Comp. ¶¶ 43-50 *with* Defendants' Motion ("Def. Mot.") 9-10. Defendants simply do not defend Plaintiffs' claim that the fifteen percent requirement imposed by Section 2872.2 violates their constitutional rights, independently and in conjunction with other provisions of the Election Code. Consequently, Defendants' motion cannot support dismissal of Count I under Rule 12(b)(6).

Defendants do assert generally that Plaintiffs' challenge to Section 2872.2 is "foreclosed" by a recent decision of the Third Circuit, but this assertion is patently false. Def. Mot. 10 (citing *Rogers v. Corbett*, 468 F.3d 188 (3rd Cir. 2006)). *Rogers* involved a challenge to 25 P.S. § 2911(b) ("Section 2911(b)"), and does not even mention Section 2872.2, except in passing. *See Rogers*, 468 F.3d at 190 n.2, 191. *Rogers* thus presents no bar to Plaintiffs in this action, because (for one reason) the Third Circuit's decision does not constitute a "final judgment" with respect to any claim or issue raised herein. *See Slater v. Borough of Quarryville*, 1995 U.S. Dist. LEXIS 1074, *4-5 (E.D. Pa. 1995) ("In order to invoke either claim preclusion or issue preclusion… there must necessarily be a final judgment by another court of competent jurisdiction").

This Court has addressed the constitutionality of Section 2872.2, albeit in a decision rendered more than 15 years ago, in a different case brought by different parties, which raised different claims and issues. *See Patriot Party of Pennsylvania v. Mitchell*, 826 F. Supp. 926 (E.D. Pa. 1993). Although the Court found Section 2872.2 to be "within the outer limit of the constitutional realm" in *Patriot Party*, the Court did not and could not consider the statute in the context of the severe burdens alleged in the Amended Complaint, which were not in effect when *Patriot Party* was decided. *See id*. at 936-38; Am. Comp. ¶¶ 31-41; 43-50. Moreover, the Court noted that "the 15% rule is demanding," and that "a lower percentage would also further Pennsylvania's interests." *Patriot Party of Pennsylvania*, 826 F. Supp. at 938. In fact, the rule is so restrictive that it would deny ballot access to the Republican Party in Massachusetts, and to the Democratic Party in Utah, if it applied in those states today. *See* Richard Winger, *2008 October Registration Totals*, BALLOT ACCESS NEWS, Vol. 24, No. 8 (Dec. 1, 2008) (listing state vote totals by partisan registration) *available at* http://www.ballot-access.org/2008/120108.html (last visited September 10, 2009). Taken together with the severe burdens alleged in the Amended Complaint, such facts indicate that the 15% rule is in fact "so onerous that it is constitutionally infirm." *Patriot Party of Pennsylvania*, 826 F. Supp. at 937.

Accordingly, far from being "foreclosed" by the prior decisions of the Third Circuit or this Court, Plaintiffs' challenge to Section 2872.2 raises a justiciable claim under Section 1983. Plaintiffs properly challenge the statute's constitutionality based upon facts that no court has considered, and consequently there is no basis for dismissal of Count I under Rule 12(b)(6).

II. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1983 BY ALLEGING THAT SECTION 2937 VIOLATES RIGHTS GUARANTEED TO THEM BY THE FIRST AND FOURTEENTH AMENDMENTS.

Plaintiffs also state a claim under 42 U.S.C. § 1983 by challenging 25 P.S. § 2937 ("Section 2937") in Count II of the Amended Complaint. Plaintiffs allege that Section 2937 impermissibly burdens their rights of political association and voting, arbitrarily discriminates against them, and deprives them of due process, in violation of the First and Fourteenth Amendments. Am. Comp. ¶¶ 51-58; *see Consumer Party v. Davis*, 633 F. Supp. 877, 885 (E.D. Pa. 1986). Plaintiffs thus seek prospective declaratory and injunctive relief from Section 2937 as applied. Am. Comp. ¶¶ 22, 58, 65.

A. Section 2937 Imposes Severe Financial Burdens Upon Plaintiffs' Rights of Speech, Petition and Assembly, in Violation of the First Amendment.

Section 2937 burdens Plaintiffs' associational rights by threatening or actually imposing costs in excess of $80,000 on minor party candidates who submit nomination papers as required by Section 2911(b). Am. Comp. ¶¶ 19, 33, 36. Plaintiffs' associational rights derive from the First Amendment freedoms of speech, petition and assembly, which extend to political parties and their supporters. *See Consumer Party*, 633 F. Supp. at 885 (citing *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975)). Because the "basic function of a political party is to select the candidates for public office to be offered to the voters at general elections," *id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)), Section 2937 burdens Plaintiffs' voting and associational rights by inhibiting their ability "to nominate, support, and vote for candidates who represent their beliefs." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3rd Cir. 1997); *see United States of America v. Berks County*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) (the "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government") (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *Consumer Party*, 633 F. Supp. at 885 (recognizing "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively") (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

In view of well-settled Supreme Court precedents holding that states may not condition participation in elections upon an ability to pay, Defendants make no attempt to defend the constitutionality of the financial burdens that Section 2937 imposes upon minor party candidates. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding poll taxes unconstitutional); *Bullock v. Carter*, 405 U.S. 134 (1972) (holding non-trivial filing fees for candidates unconstitutional); *Lubin v. Panish*, 415 U.S. 709 (1974) (holding filing fees for candidates unconstitutional in the absence of non-monetary alternatives). Such financial burdens grossly exceed those that the Supreme Court struck down in *Bullock* and *Lubin*. *Compare In re: Nomination Paper of Ralph Nader ("Nader II")*, 905 A.2d 450 (Pa. 2006) (assessing costs of $81,102.19) *and In re: Nomination Paper of Marakay Rogers ("Marakay Rogers")*, 942 A.2d 915 (Pa. Commw. 2008) (assessing costs and fees of $80,407.56) *with Bullock*, 405 U.S. 134 (striking down candidate filing fees ranging as high as $9,800) *and Lubin*, 415 U.S. 709 (striking down candidate filing fees ranging as high as $982). Furthermore, the costs assessed against candidates under Section 2937 clearly violates the Supreme Court's conclusion that states cannot require candidates "to shoulder the costs of holding…elections." *Bullock*, 405 U.S. at 149.

It makes no difference that *Bullock* and *Lubin* struck down filing fees, whereas Section 2937 imposes costs arising from nomination petition challenges. The dispositive issue is "the absence of a reasonable alternative means of ballot access." *Belitskus v. Pizzingrilli*, 343 F.3d 632, 647 (3rd Cir. 2003) (citations omitted); Am. Comp. ¶¶ 16-21, 37. In *Belitskus*, the Third Circuit enjoined the enforcement of Pennsylvania's filing fees against candidates who were unable to pay them, on the ground that the Commonwealth's failure to provide an alternative "made economic status a decisive factor in determining ballot access." *Id.* Here, too, Pennsylvania "run[s] afoul of the Supreme Court's ballot access jurisprudence" by requiring minor party candidates to assume the risk of incurring substantial costs if they submit nomination petitions as required by Sections 2872.2 and 2911(b). *Id.*; *see Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289 (8th Cir. 1995) (holding that Arkansas cannot require political parties both to hold and pay for primary elections).

Accordingly, Section 2937 violates Plaintiffs' First Amendment rights of speech, petition and assembly.[1]

B. Section 2937 Burdens Minor Party Candidates Unequally, in Violation of Plaintiffs' Fourteenth Amendment Right to Equal Protection.

Section 2937 also violates Plaintiffs' Fourteenth Amendment right to equal protection, because the statute discriminates against "small political parties and their members and candidates" by imposing severe and unequal financial burdens upon them. *Consumer Party*, 633 F. Supp. at 889. Only minor party candidates must submit nomination petitions to qualify for listing on Pennsylvania's general election ballot. 25 Pa. Cons. Stat. § 2911(b). Major party candidates, by contrast, access the general election ballot by means of publicly funded primary elections. 25 P.S. § 2862. Because Pennsylvania provides no non-monetary alternative, minor party candidates alone must assume the risk of incurring costs pursuant to Section 2937 in order to access Pennsylvania's general election ballot. 25 P.S. §§ 2911(b), 2937. Section 2937 thus violates the Equal Protection Clause by imposing unequal financial burdens on minor party candidates. *See Bullock*, 405 U.S. at 144 ("we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status"); *Lubin*, 415 U.S. at 719 ("ballot access must be genuinely open to all, subject to reasonable requirements") (citation omitted).

Defendants claim that major party candidates "can be subject to costs pursuant to Section 2937," Def. Mot. 11 n.14, but the implication that Section 2937 equally burdens major party candidates is misleading at best. Pennsylvania courts have repeatedly ordered minor party candidates to pay more than $80,000 in costs following challenges brought under Section 2937, but they have never assessed costs of any amount against a major party candidate under the statute. Am. Comp. ¶¶ 26, 32-36. On the contrary, the single case that Defendants cite in support of their claim actually reversed the assessment of such costs.[2] Def. Mot. 11 n. 14 (citing *In re Nominating Petition of Esther Lee*, 578 A.2d 1277, 1279 (Pa. 1990)).

Because major party candidates need not submit signatures to access the general election ballot, Section 2937 does not even threaten major party candidates with the possibility of incurring the financial burdens imposed upon minor party candidates. 25 P.S. 2862. Although major party candidates do submit signatures to access the primary election ballot, the signature requirements are much lower than those for minor party candidates. *Compare* 25. P.S. § 2872.1 ("Section 2872.1") (requiring major party primary candidates for statewide office to submit 2,000 signatures) *with* 25. P.S. § 2911(b) (requiring minor party candidates for statewide office to submit signatures equal in number to two percent of the entire vote cast for any winning candidate in the preceding general election). In 2006, for example, minor party candidates for statewide office were required to submit 67,070 signatures. *See Marakay Rogers*, 914 A.2d at 458. Major party candidates need not submit or defend such large numbers of signatures, and

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[1] The unconstitutional burden imposed upon Plaintiffs' First Amendment rights by Section 2937 is discussed more fully in Part I of Plaintiffs' Response in Opposition to the Motion to Dismiss the Amended Complaint Filed By Defendant Justices, Defendant Judges and Defendants Johns and Krimmel, which was filed on July 20, 2009, and is incorporated herein by reference.

consequently, they simply do not face the same threat under Section 2937. 25. P.S. §§ 2872.1; 2911(b).

Finally, to the extent that Section 2937 might burden major party candidates in a primary election challenge, that potential is alleviated by the fact that primary election nomination petitions cannot be challenged by anyone who is not a party member. *See In the Matter of the Nomination Petition of Gary M. Samms*, 674 A.2d 240, 242 (Pa. 1996). Thus, major party candidates need not defend – or pay costs arising from – massive challenges brought by political opponents in a general election. *See id.* Minor party candidates, by contrast, regularly defend – and pay costs arising from – such challenges. Am. Comp. ¶¶ 31-36.

In an effort to redeem Section 2937 from its violation of the Equal Protection Clause, Defendants suggest that the statute is "fair" to minor party candidates, because it "gives the courts the authority to award…costs to the candidate if [a] challenge is unsuccessful. Def. Mot. 12. Defendants cite no case in which a prevailing candidate has been awarded such costs, but even if they could, such authority would be unavailing. A statute that runs afoul of the Equal Protection Clause cannot be saved from constitutional infirmity simply by showing that it also might confer a potential benefit.

Accordingly, Section 2937 violates Plaintiffs' Fourteenth Amendment right to equal protection.

C. Section 2937 Penalizes Constitutionally Protected Conduct Without Notice, in Violation of Plaintiffs' Fourteenth Amendment Right to Due Process.

[2] Defendants also misread the other Pennsylvania Supreme Court decision that they cite. Def. Mot. 11 (citing *Nader II*, 905 A.2d 450). The issue in *Nader II* was not whether Section 2937 authorizes the assessment of costs against both major party and minor party candidates, as Defendants suggest, but rather whether the statute authorizes costs to be taxed against defending candidates in nomination petition challenges, or only against the challengers themselves. *See Nader II*, 905 A.2d at 461-62 (Saylor, J. dissenting) (concluding that Section 2937, "by its terms," does not authorize the assessment of costs against defending candidates).

Finally, Section 2937 is unconstitutional as applied because it penalizes candidates, without notice, for engaging in constitutionally protected conduct. Under Section 2937, a trial court can impose costs "in its discretion when it deems it just."[3] *Nader II*, 905 A.2d at 460. The statute thus makes no distinction between the legitimate exercise of First Amendment freedoms and conduct that is properly subject to sanctions. *See De Jonge v. State of Oregon*, 299 U.S. 353, 364-65 (1937). Under this expansive formulation, Section 2937 becomes "a penal statute susceptible of sweeping and improper application," which authorizes courts to penalize candidates who "seek through lawful means to achieve legitimate political ends" by filing nomination petitions in order to run for public office. *N.A.A.C.P. v. Button*, 371 U.S. 415, 433-34 (1963).

Further, because Section 2937 does not "aim specifically at evils within the allowable area of State control," the statute lends itself to harsh and discriminatory enforcement. *Thornhill v. State of Alabama*, 310 U.S. 88, 98 (1940). For example, the costs assessed against minor party candidates under Section 2937 exceed many times over the express statutory limit for costs assessed against candidates who knowingly make false statements regarding their eligibility or qualifications. *See* 25 P.S. 3502.1 (authorizing costs "in an amount up to" $10,000). The assessment of costs under Section 2937, which is entirely discretionary and requires no finding of wrongdoing, therefore violates the fundamental due process principle that a state must provide "fair notice" if conduct may occasion criminal sanctions or civil penalties. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

[3] In adopting its novel construction of Section 2937 in *Nader II*, Am. Comp. ¶¶ 26, 33, the majority entirely failed to address the view of both dissenting Justices that Section 2937, "by its terms," does not authorize the assessment of costs against candidates under any circumstances, but only against challengers. *See Nader II*, 905 A.2d at 461-62 (Saylor, J. dissenting).

Defendants contend that the costs assessed under Section 2937 are necessary to prevent minor party candidates from filing "frivolous," "fraudulent" or "deficient" nomination petitions, but Defendants themselves recognize that courts already possess both statutory and inherent power to do so, irrespective of Section 2937. Def. Mot. 12. Plainly, therefore, Section 2937 is not necessary for this purpose. Defendants also contend that the assessment of more than $80,000 in costs against two different candidacies under Section 2937 was justified by findings that the candidates' conduct was "egregious," Def. Mot. 15, yet Defendants fail to "see any relevance" to Defendant Corbett's own allegations that the challenges in those cases were produced by means of a criminal conspiracy. Def. Mot. 17 n.18; *see* Harrisburg Grand Jury Presentment 1, 54-59 (filed July 10, 2008) *available at* http://www.attorneygeneral.gov/uploadedFiles/Press/Harrisburg-Bonus-GJ-Presentment.pdf (last visited Sept. 9, 2009). The relevance of such allegations, however, is clear: they provide further evidence of the harsh and discriminatory enforcement of Section 2937. *See Thornhill*, 310 U.S. at 98.

This Court need not second guess the findings of another court in order to take notice of the sort of conduct that qualifies as "egregious" when committed by a minor party candidate defending a challenge under Section 2937. In *Marakay Rogers*, for example, the trial court's finding of "bad faith" was based primarily on the candidate's lack of resources to defend the challenge proceedings in nine courtrooms simultaneously. *See In Re: Nomination Paper of Marakay Rogers*, 942 A.2d 915, 923-26 (Pa. Commw. 2008). In *Nader II*, the supposed "fraud" in the nomination petitions amounted to a handful of fictitious signatures – equal to 1.3 percent of the total – resulting from undetected pranks or sabotage. *See In Re: Nomination Paper of Ralph Nader*, 860 A.2d 1, 8 n.13 (finding "no evidence that the candidates were specifically aware of fraud or misrepresentation at the time of their submissions”). In both cases, however, undisputed allegations of criminal misconduct by parties who prepared the challenges was deemed irrelevant to the assessment of costs under Section 2937. Am. Comp. Exbt. A-B. Therefore, *Marakay Rogers* and *Nader II* do not support, but undermine, Defendants’ claim that Section 2937 poses no threat to candidates who submit nomination petitions in good faith.

Accordingly, Section 2937 violates Plaintiffs’ Fourteenth Amendment right to due process.

D. Defendants Are Properly Named in Their Official Capacities to Defend Plaintiffs’ Challenge to Section 2937 Under 42 U.S.C. § 1983.

Defendants seek dismissal of Plaintiffs’ claims in Count II based upon a misreading of precedent. Defendants claim that they are not proper parties to defend Plaintiffs’ challenge to Section 2937, because they purportedly lack “personal involvement” in the matter. Def. Mot. 18 (citing *Rouse v. Plantier*, 182 F.3d 192 (3rd Cir. 1999); *Rizzo v. Goode*, 423 U.S. 362 (1976)). Neither *Rouse* nor *Rizzo* support this claim. Indeed, those cases do not even address the issue of whether state officials were proper parties to defend a case or controversy arising under 42 U.S.C. § 1983. *See Rouse*, 182 F.3d at 196 (“The only issue in this appeal is appeal is whether the defendants are entitled to summary judgment based on qualified immunity”); *Rizzo*, 423 U.S. at 372-73 (finding that plaintiffs lacked the requisite personal stake in the outcome where the lower court improperly attempted to resolve a “controversy” between the entire citizenry of Philadelphia and certain elected officials). Whatever *Rouse* and *Rizzo* may hold, therefore, they do <u>not</u> stand for Defendants’ “personal involvement” standard.

In cases where the constitutionality of a statute is challenged, the proper focus for purposes of the Article III case or controversy requirement is whether “a ‘real and immediate’ threat of enforcement against the plaintiff” exists. *Lewis v. Rendell*, 501 F. Supp. 2d 671, 680

(E.D. Pa. 2007) (quoting *Salvation Army v. Dep't of Comm. Affairs of State of N.J.*, 919 F.2d 183, 192 (3d Cir. 1990)). Thus, Plaintiffs need not allege Defendants' 'personal involvement' in order to challenge the validity of Section 2937, but only that an official "has either enforced, or threatened to enforce, the statute against [them]." *Id.* (quoting *1st Westco Corp. v. School Dist.*, 6 F.3d 108, 113 (3d Cir. 1993)). The Amended Complaint clearly meets this standard. Am. Comp. ¶¶ 21, 26-28, 57.

In addition to relying upon an erroneous standard, Defendants' claim that they are not proper parties to defend Plaintiffs' challenge to Section 2937 attempts to prove too much. For if Defendants are not proper parties to defend the statute, as they claim, and if the Judicial Defendants are not proper parties to defend the statute, as they claim in their motion to dismiss the Amended Complaint, then Section 2937 would appear to be immune from review. Given the clear constitutional infirmity of Section 2937 under *Bullock*, *Lubin*, *Belitskus* and other cases cited herein, such a result would be absurd. *See infra* Part II.A-C.

Each of the Defendants in this action is a proper party. *See Lewis*, 501 F. Supp. 2d at 680. Defendants are named in their official capacities only, however, and Plaintiffs do not assert any claims against Defendants in their personal capacities. Am. Comp. ¶¶ 7-13. Accordingly, should the Court determine that an indispensable party is missing from this action, the proper remedy is not the harsh result of dismissal, as Defendants contend, but rather, the Court should grant leave to amend the pleadings to ensure that the proper parties defendant are named. *See, e.g.*, *Chancery Clerk of Chicasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981) (remanding action with directions to "substitute[e] as defendants the [state] officials with executive responsibility for defending the challenged…procedures).

III. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1983 BY ALLEGING THAT DEFENDANTS' FAILURE TO ENFORCE SECTION 3155 DISENFRANCHISES THEIR VOTER-SUPPORTERS.

Plaintiffs state a claim under 42 U.S.C. § 1983 in Count III of the Amended Complaint by alleging that Defendants' failure to ensure that county elections officials compute and certify write-in votes functionally bars Plaintiffs from participating in Pennsylvania's electoral process. Am. Comp. ¶¶ 59-64. Specifically, 25 P.S. 2963(a) ("Section 2963(a)") authorizes voters to cast write-in votes, and 25 P.S. 3155 ("Section 3155") requires county elections officials to compute and certify such votes. Am. Comp. ¶¶ 60-62. Nevertheless, Defendants regularly fail to ensure that such officials comply with Section 3155, thus resulting in the disenfranchisement of Plaintiffs and their voter-supporters. Am. Comp. ¶¶ 62-63.

Defendants' motion to dismiss Count III again relies upon their mistaken view that each Defendant's "personal involvement" must be alleged in order for Plaintiffs to state a claim under 42 U.S.C. § 1983. Def. Mot. 20. On the contrary, Defendants are proper parties to defend Plaintiffs' claims, because they are the officials charged with enforcement of Section 3155. Defendant Cortes is the Commonwealth's chief elections official and has ultimate authority for enforcement of the Pennsylvania Election Code; Defendant Harhut is responsible for overseeing the Commonwealth's electoral process; and Defendant Corbett is the chief legal and law enforcement officer of the Commonwealth. Am. Comp. ¶¶ 7-9. Defendants cannot avoid their official duty simply because county elections officials must count write-in votes in the first instance. Rather, Defendants themselves are ultimately responsible for the enforcement of Section 3155. Am. Comp. ¶¶ 7-9.

Accordingly, Plaintiffs state a claim for injunctive relief to ensure that write-in votes are computed and certified as required by Section 3155.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Amended Complaint should be denied.

Dated: September 10, 2009

Respectfully submitted,

/s/Oliver B. Hall

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THE CONSTITUTION PARTY OF PENNSYLVANIA, et al.	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	No. 09-cv-01691
PEDRO A. CORTES, et al.,	)	
Defendants.	)	

ORDER

And now, this _____ day of _________, 2009, upon consideration of the Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), filed by Defendant Tom Corbett, Defendant Pedro Cortes and Defendant Chet Harhut, it is hereby **ORDERED** that the Motion is **DENIED**.

Dated:

____
Honorable Lawrence F. Stengel
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September 2009, I served a copy of the attached Response In Opposition to the Motion to Dismiss the Amended Complaint Filed By Defendants Corbett, Cortes and Harhut on behalf of all Plaintiffs, by the Court's ECF system, or by first class mail, postage pre-paid, upon the following:

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