No. 09-2227

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Pennsylvania
Case No. 1:08-cv-01626-YK
Chief Judge Yvette Kane

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

JAMES N. CLYMER
Counsel of Record
CLYMER & MUSSER, P.C.
Pennsylvania Bar No. 27151
408 West Chestnut Street
Lancaster, Pennsylvania, 17603
(717) 299-7101
(717) 299-5115 – facsimile
Email: jim@clymerlaw.com

LEONARD G. BROWN, III
CLYMER & MUSSER, P.C.
Pennsylvania Bar No. 83207
408 West Chestnut Street
Lancaster, Pennsylvania 17603
(717) 299-7101
(717) 299-5115 – facsimile
Email: len.brown@clymerlaw.com

Attorneys for Plaintiffs-Appellants

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APPELLANTS' REPLY

The core of this appeal is whether the United States Constitution means what it says when the framers wrote "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to vote for President. *U.S. Const.*, art. II, § 1, cl. 2. The language of article II is unambiguous. Only the Legislature, not the executive or the judiciary, may create the manner whereby the state appoints its electors.

Here, the District Court erred in entering a final order that allows the Secretary of the Commonwealth of Pennsylvania to continue regulating the deadline for ballot-access in federal elections. Article II, section 1 of the United States Constitution explicitly reserves to the state legislature the duty to regulate federal elections, and precedent has not detailed any exceptions to this clear enumeration. The arbitrary date selected by Secretary Cortes directly violates the United States Constitution.

The Appellants, Chuck Baldwin, the Constitution Party's 2008 candidate for President of the United States, Darrell R. Castle, the Party's vice presidential nominee and Thompson and Panyard, members of the Constitution Party and registered voters who supported Baldwin's and Castle's candidacies, (collectively referred to as "the Constitution Party") seek a reversal of District Judge Kane's order. (*Appendix*, vol. II, p. 4.) The Constitution Party is not asking this court to

set any deadline (which would itself contradict art. II, § 1, cl. 2). But the effect of this reversal would be to follow the deadline established by the Pennsylvania legislature.

Appellee Secretary of the Commonwealth of Pennsylvania Pedro Cortes ("the Secretary") asserts that he is being generous to adhere to the consent decree rather than following the law of Pennsylvania. He contends that by changing the statutorily established date in the election laws he has done nothing material or beyond his powers under the election code and that the General Assembly has delegated to him power over such action.

The Secretary admits that "it would be preferable for the Legislature to enact a new deadline for the filing of nomination" and cites no authority for the Secretary to set his own deadline that is at odds with the legislatively established date. (Brief Appellee at 18) In fact, Pennsylvania General Assembly has defined the bounds of the Secretary's power as follows: "The Secretary of the Commonwealth shall exercise in the manner provided by this act all powers granted to him by this act." 25 P.S. § 2621. The "manner provided by this act" for receipt of nominating petitions was May 2, 2008, not August 1, 2008.

This court recognized that not only is it "preferable" but that the General Assembly, not the Secretary, has the responsibility to address ballot access, a significant part of which includes the date of filing nominating petitions. *See*

Rogers v. Cortes, 426 F. Supp. 2d 232, 242 (M.D. Pa. 2006) ("we strongly urge the General Assembly to consider enactments that will simultaneously meet the identified state interests but also allow for a less ponderous means of ballot access for minor political parties in Pennsylvania."); *Rogers v. Corbett*, 468 F.3d 188, 198 (3d Cir. 2006) ("[W]e will "affirm" the suggestion of the District Court that the Pennsylvania General Assembly 'consider enactments that will simultaneously meet the identified state interests but also allow for a less ponderous means of ballot access for minor political parties in Pennsylvania.'").[1]

Section 1 of Article II of the United States Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" to vote for President. *U.S. Const.*, art. II, § 1, cl. 2. This clause dictates that *only* Pennsylvania's legislature can prescribe the manner of electing the President of the United States. Selecting a new date is entirely unjustified, is certainly a material change, and cannot be upheld under the federal Constitution.

This issue also arose in *Bush v. Gore*, 531 U.S. 98 (2000), where the Court ultimately ruled that Florida's method of counting votes for President violated the Equal Protection Clause of the federal Constitution. In the lead-up to that decision,

[1] It is the hope of the Constitution Party that, as a result of this Court upholding the United States Constitution and reversing the order of District Judge Kane below, the Pennsylvania General Assembly will follow the admonition of this court and the federal court for the Middle District of Pennsylvania.

the Supreme Court in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), first addressed whether the Florida Supreme Court's interpretation of Florida's election laws strayed beyond what Article II, section 1 allowed. "As a general rule," it stated:

> This Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

Id. at 76. Because it was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2," *Id.* at 78, the Court accordingly vacated the Florida Supreme Court's interpretation of the election code and remanded for further proceedings. *Id.*

When the case returned to the Supreme Court, the Chief Justice concluded that the Florida Supreme Court violated Article II, section 1 by deviating from the directions of the Florida Legislature: "[In] a Presidential election, the clearly expressed intent of the legislature must prevail." *Id.* Chief Justice Rehnquist concluded that "in a Presidential election the clearly expressed intent of the legislature must prevail. " *Id.* at 121.

While not addressed by the Secretary in his responsive brief, the same issue arose in the context of congressional elections in *Lance v. Coffman*, 549 U.S. 437 (2007), where a state court drew Colorado's congressional districts in the absence of a legislative plan. Not long after the state court's action, the legislature passed a new plan, which was duly challenged before the Colorado Supreme Court. Those favoring the judicial plan argued that Colorado's constitution prohibited a mid-census apportionment. Those who supported the legislative plan argued that Article I, section 4 of the federal Constitution precluded a state court from drawing districts for congressional elections. The Colorado Supreme Court ruled in favor of the judicial plan in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (2003) (en banc). Specifically, it found that judicial apportionment did not offend the Elections Clause of Article I, section 4 of the United States Constitution. *Id.* at 1231.

Following the dismissal of a collateral challenge filed by voters in federal court, the Supreme Court was asked in *Lance v. Coffman*, *supra*, to overturn the state court's apportionment plan. The Supreme Court, however, was prevented from reaching the merits of the Elections Clause question by the appellants' lack of standing. *Id.* at 1198.

Lance v. Coffman demonstrates that the Secretary's policy here presents a serious federal constitutional question under Article II. The Court has made it

clear on a number of occasions that the federal Constitution's use of the term "State Legislature" means exactly that. It does not mean "legislative power," nor does it countenance "legislative delegation."

In another case not addressed by the Secretary, Justice Stevens (joined by Justice Ginsburg) pointed out that "The vicissitudes of state nomenclature . . . do not necessarily control the meaning of the Federal Constitution." *California Democratic Party v. Jones*, 530 U.S. 567, 603 (2000)(Stevens, J., dissenting) "Moreover, the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to 'the Legislature' is not so broad as to encompass the general 'legislative power of this State.'" *Id.*

The Court in *Hawke v. Smith*, 253 U.S. 221 (1920), rejected Ohio's claim that the ratification of a proposed federal Constitutional amendment by the Ohio Legislature was subject to the popular referendum process applied to all other laws. Article V of the United States Constitution provides that amendments proposed by the Congress can either be ratified by state conventions or legislatures: "The method of ratification is left to the choice of Congress." *Id.* at 226. Regardless, the Court observed in *Hawke*, "[b]oth methods of ratification, by Legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people." *Id.* at 226-27. The Court specifically rejected the claim that "the federal Constitution requires

ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment." *Id.* at 229. "This argument is fallacious in this-ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment." *Id.* Similarly, as ratification must be by a State's legislature and the legislature alone, so must the constitutional duty of the legislature to regulate federal elections be carried out by the legislature and the legislature alone. It cannot be delegated to an executive agency.

CONCLUSION

The Court should reverse the order of the District Court and enjoin the Secretary of the Commonwealth of Pennsylvania from usurping the legislature's prerogative to regulate the deadline for Nomination Papers for the federal election ballot.

Respectfully submitted this 24th day of August 2009,

JAMES N. CLYMER
Counsel of Record
Pennsylvania Bar No. 27151
CLYMER & MUSSER, P.C.
408 West Chestnut Street
Lancaster, PA, 17603
(717) 299-7101
(717) 299-5115—facsimile

LEONARD G. BROWN, III
Pennsylvania Bar No. 83207
CLYMER & MUSSER, P.C.
408 West Chestnut Street
Lancaster, PA 17603
(717) 299-7101
(717) 299-5115—facsimile

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 31.1(c)

I certify that the text of the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical.

I further certify that this brief complies with L.A.R. 31.1(c) in that prior to it being electronically mailed to the Court today, it was scanned by the following virus detection software and found to be free from computer viruses:

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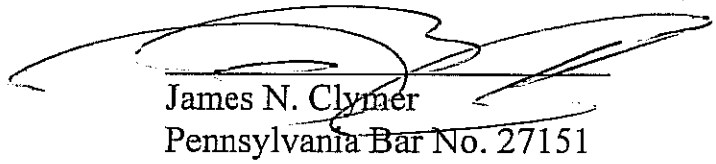

James N. Clymer
Pennsylvania Bar No. 27151
CLYMER & MUSSER, P.C.
408 West Chestnut Street
Lancaster, PA, 17603

Attorney for Plaintiffs-Appellants

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