IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-3205

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THE CONSTITUTION PARTY OF PENNSYLVANIA, THE GREEN PARTY OF PENNSYLVANIA, THE LIBERTARIAN PARTY OF PENNSYLVANIA, HILLARY A. KANE, MICHAEL J. ROBERTSON and WES THOMPSON,
Appellants

v.

PEDRO A. CORTÉS, CHET HARHUT, THOMAS CORBETT, CHARLES W. JOHNS, MICHAEL F. KRIMMEL, the JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA and the JUDGES OF THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR APPELLEES CORTÉS, HARHUT AND CORBETT

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED JULY 16, 2010

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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 July 16, 2010, and the notice of appeal was filed on July 20, 2010.

STATEMENT OF ISSUES

I. Whether The District Court Adequately Addressed The Claims Raised By Minor Parties In Their Amended Complaint In Rendering Its Decision?

This issue was raised by Minor Parties in their motion for reconsideration of the district court's decision to dismiss the amended complaint. (Plaintiff's Motion for Reconsideration, 4/15/2010) Judge Stengel stated in his Memorandum and Order denying Minor Parties' motion for reconsideration that all three counts of the amended complaint were deficient and that his analysis of Count II applied to Counts I and III also. He held that Minor Parties lacked standing and that none of their claims were ripe. (Memorandum and Order, 7/16/2010; A26-A34)

II. Whether Minor Parties Have Standing To Challenge The Constitutionality Of Section 2937 Of The Pennsylvania Election Code?[1]

This issue was raised *sua sponte* by the district court in its decision to dismiss the amended complaint. (Memorandum and Order, 4/1/2010; A3-A26) Judge Stengel in his original decision dismissing the amended complaint and in his decision denying reconsideration held that the Minor Parties lacked standing to

[1] For purposes of simplicity and consistency with Appellants' pleadings and brief, the section numbers of the Election Code referenced in this brief are those assigned to each section in Title 25 of *Purdon's Pennsylvania Statutes Annotated*, rather than the sections officially designated by statute. *See* n.6, *infra*.

challenge the constitutionality of Section 2937. (Memorandum and Order at 10-15, 4/1/2010; A13-A18) (Memorandum and Order, 7/16/2010; A26-A34)

III. Whether Minor Parties' Claims Are Ripe For Purposes Of The Case Or Controversy Requirement Under Article III Of The Constitution?

This issue was raised *sua sponte* by the district court in its decision to dismiss the amended complaint. (Memorandum and Order, 4/1/2010; A3-A26). Judge Stengel in his original decision dismissing the amended complaint and in his decision denying reconsideration held that Minor Parties' claims were not ripe for purposes of establishing a case or controversy as required under Article III, § 2 of the Constitution. (Memorandum and Order at 15-20, 4/1/2010; A18-A23) (Memorandum and Order, 7/16/2010; A26-A34).

STATEMENT OF THE CASE

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 district court dismissed the amended complaint because Appellants lacked standing and their constitutional claims were not ripe for adjudication. The district court denied Appellants' motion for reconsideration and this appeal followed.

Appellants 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)[2] and its chair, Michael J. Robertson (collectively, "Minor Parties").[3]

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[2] 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. Despite the technical and legally precise definition of "political bodies" under Pennsylvania law, they may be referred to informally as "independents", "independent political parties", or "minor political parties." The Libertarian Party is currently a certified minor political party based on votes cast for its statewide candidates in the 2008 General Election; but because the Libertarian Party had no statewide candidates in the 2010 General Election, the Libertarian Party (like the (continued…)

(Amended Complaint at ¶¶ 1-6). Appellees are Basil L. Merenda, Secretary of the Commonwealth of Pennsylvania;[4] Chet Harhut, Commissioner of the Pennsylvania Department of State's Bureau of Commissions, Elections, and Legislation; and Thomas Corbett, Attorney General of the Commonwealth of Pennsylvania (collectively, "Executive Officials"). (Amended Complaint at ¶¶ 7-9). In addition to the Executive Officials, the following members of the Pennsylvania judiciary were also named as defendants in the district court: the Justices and Prothonotary of the Pennsylvania Supreme Court, and the Judges and Chief Clerk of the

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Constitution Party and Green Party) will be classified as a political body during 2011 and 2012. 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. 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.

[3] Although the Constitution Party and the Green Party are technically considered "political bodies" and not "minor parties" under Pennsylvania's Election Code, *see supra* note 2, for simplicity, we refer to all of the Appellants as "Minor Parties" in this brief.

[4] Pedro A. Cortés was Secretary of the Commonwealth when this case was commenced in the district court. He has since left office. The Governor appointed Basil L. Merenda as Secretary of the Commonwealth on September 27, 2010, following his confirmation by the Senate of Pennsylvania. Since Cortés was sued in his official capacity, Merenda is now automatically substituted as a party to this action. *See* F.R.A.P. 43(c)(2).

Commonwealth Court (collectively, "Judicial Officials").[5] (Amended Complaint at ¶¶ 10-13).

Minor Parties filed an amended complaint on June 19, 2009. They allege that Pennsylvania's Election Code substantially burdens "minor party" candidates in three ways. First, they allege that 25 P.S. § 2872.2 (Section 912.2 of the Election Code),[7] is unconstitutional as applied because it treats major party candidates (Democratic and Republican) differently from minor party candidates. Major party candidates have their names placed on the ballot through the primary

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[5] Appellees Merenda, 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 Officials are represented separately by counsel from the Administrative Office of Pennsylvania Courts.

[7] Minor Parties in their amended 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 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.

system. However, minor party candidates must obtain signatures on nomination papers to be placed on the ballot. Minor Parties allege that this violates their rights under the First and Fourteenth Amendments since minor party candidates may be subject to costs and fees (including attorney's fees) under 25 P.S. § 2937 (Section 977 of the Election Code), if their nomination papers are later determined to be deficient. Minor Parties seek a declaratory judgment that Section 2872.2 is unconstitutional as applied. (Count I of the Amended Complaint at ¶¶ 42-50).

Second, Minor Parties allege that 25 P.S. § 2937 (Section 977 of the Election Code) is unconstitutional as applied because it permits Judiciary Officials 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. Minor Parties seek a declaratory judgment that Section 2937 is unconstitutional as applied. (Count II of the Amended Complaint at ¶¶ 51-58).

Third, Minor Parties allege that minor party candidates are 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). Minor Parties seek an injunction requiring Appellees Merenda and Harhut to ensure that all write-in-votes are properly certified and reported as required by 25 P.S. § 3155. (Count III of the Amended Complaint at ¶¶ 59-64).

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 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 (*i.e.*, minor political parties and political bodies) must file nomination papers to have their names placed on the General or Municipal Election ballot.[8] These

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[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. §§ (continued…)

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).

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

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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.

Pennsylvania then reviews any objections and determines whether the name of the 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. 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] 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] *See 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. Minor Parties allege that county election officials "routinely" fail to count write-in votes. (Amended Complaint at ¶ 62). Minor Parties 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.

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[12] In 2008, the Office of Attorney General charged twelve members or 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 Pennsylvania Supreme Court affirmed Commonwealth Court's order assessing costs in *Romanelli*, No. 6 MAP 2009, 602 Pa. 196, 979 A.2d 839 (2009). It also affirmed Commonwealth Court's order assessing costs in *Nader*, No. 94 MAP 2008, 603 Pa. 139, 982 A.2d 1220 (2009).

Krawchuck (senatorial candidate of the Libertarian Party). (Amended Complaint at ¶ 38). Minor Parties 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)

STATEMENT OF RELATED CASES

This case has not previously been before the Court. There are no pending or completed cases to which it is related.

SUMMARY OF ARGUMENT

25 Pa. C.S. § 2937 provides that a party which files objections to the nomination papers filed by a minor party candidate may be entitled to an award of fees and other costs. However, Executive Officials do not initiate or otherwise participate in a challenge to a candidate's nomination papers. It is the judiciary which conducts a hearing under Section 2937 and which makes the determination as to whether to award costs. Pennsylvania's judiciary has a long-standing and well recognized authority to impose sanctions which is not eviscerated simply because the underlying proceedings involve rights protected by the First Amendment. Although Minor Parties point to two recent cases from the Pennsylvania Supreme Court (*Nader* and *Romanelli*) in which costs have been awarded under Section 2937, there was a finding of bad faith and improper conduct in both of those cases. This is not the proper forum to re-litigate these prior decisions made by the Pennsylvania Supreme Court.

Executive Officials lack the necessary involvement in Section 2937 proceedings for there to be standing. Moreover, Minor Parties' claims are highly speculative since there is nothing to suggest that minor party candidates will be subject to the assessment of costs in the future (absent evidence of bad faith or other improper conduct). Given the absence of any actual dispute at the present time, the remoteness and uncertainty of any potential future harm, and the overall

lack of involvement of Executive Officials, Minor Parties lack not only standing to bring their claims, but their claims are not ripe as well.

There is not a sufficient case or controversy to establish jurisdiction under Article III, § 2 of the Constitution. Accordingly, the district court's order dismissing the amended complaint for lack of standing and ripeness should be affirmed.

ARGUMENT

I. THE DISTRICT COURT ADEQUATELY ADDRESSED ALL OF THE CLAIMS RAISED BY MINOR PARTIES IN THEIR AMENDED COMPLAINT IN ITS ORIGINAL DECISION GRANTING EXECUTIVE OFFICIALS' MOTION TO DISMISS AND IN ITS DECISION DENYING MINOR PARTIES' MOTION FOR RECONSIDERATION.

***Standard of Review*:** The district court's decision to grant a motion to dismiss is a question of law for which the review is plenary. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009).

The district court determined that it lacked jurisdiction and had to dismiss the amended complaint because Minor Parties could not establish standing and/or their claims were not ripe for adjudication. Minor Parties maintain that the district court's decision should be reversed because the district court failed to address their claims raised in Counts I and III of the amended complaint. However, while Minor Parties may disagree with the conclusions reached by the district court, it is clear that the district court fully addressed **all** of the claims raised in the amended complaint.

In the amended complaint, Minor Parties allege that 25 P.S. § 2872.2, 25 P.S. § 2937, and 25 P.S. § 2963(a) of the Pennsylvania Election Code are unconstitutional as applied to them. Minor Parties' argument as to all three sections is premised on the potential financial burden faced by minor party candidates under Section 2937. While it is true that the district court's analysis focused on Minor Parties' claim under Section 2937 (Count II of the amended

complaint), its reasoning also foreclosed the related claims brought under Counts I and III.

Assuming *arguendo* that the district court's original opinion was ambiguous, the district court on reconsideration clearly expressed its intention that its analysis regarding standing and ripeness apply with equal force to the entire amended complaint. The district court, in denying Minor Parties' motion for reconsideration, concluded as follows:

> Both count I and count III rely, in part, on the allegation that § 2937 places unconstitutional financial burdens on minor party and independent candidates. The memorandum opinion addressing the motions to dismiss found that plaintiffs lacked standing to raise such a claim and that the claim was not ripe. The standing and ripeness analysis applies to all counts of the complaint. Although each count states a separate, discrete basis for the plaintiffs' constitutional challenge to the Pennsylvania Election Code, the standing and ripeness concerns are common to all counts.

(Memorandum and Order, 7/16/2010, at 5; A-31)

Minor Parties may believe that the district court erred in its analysis and conclusions regarding the claims raised in this case. However, they simply cannot demonstrate that the district court failed to address their claims in the first place. Moreover, it is their obligation on appeal to explain why the district court's determination is incorrect. In their brief, Minor Parties fail to present any arguments as to why the district court's decision to dismiss Counts I and III of the amended complaint based on standing and ripeness was wrong. Accordingly, they

have waived these issues on appeal.[13] *See Simmons v. City of Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991) ("briefs must contain statement of all issues presented for appeal, together with supporting arguments and citations"), *cert. denied*, 503 U.S. 985 (1992); *Nagle v. Alspach*, 8 F.3d 141, 143 (3d Cir. 1993) ("When an issue is either not set forth in the statement of issues presented or not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal").

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[13] Assuming *arguendo* that Minor Parties have not waived their arguments in support of Counts I and III, these claims are also barred for lack of standing and ripeness since they are ultimately based on the same allegations regarding the imposition of costs under Section 2937 raised in Count II. To the extent that Count I is a broader-based challenge to Pennsylvania's two percent signature requirement, it is foreclosed by this Court's decision in *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006), *cert. denied*, 552 U.S. 826 (2007). In that case, this Court 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 Minor Parties 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*.

II. MINOR PARTIES LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 2937 OF THE ELECTION CODE.

Standard of Review: The district court's decision to grant a motion to dismiss is a question of law for which the review is plenary. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009).

In Count II of their amended complaint, Minor Parties allege that Section 2937 of the Election Code, as applied, violates their rights under the First and Fourteenth Amendments. Section 2937 provides for the objection to nomination papers by third parties. This provision also provides for the assessment of costs in such proceedings as the court "shall deem just." 25 P.S. § 2937. Significantly, decisions regarding challenges to nomination papers and any subsequent assessment of costs are made solely by the judiciary. Executive Officials are not a party in interest to these proceedings and do not have a direct interest in whether a particular candidate is placed on the ballot. Given the complete lack of involvement of Executive Officials in a challenge to nomination papers pursuant to Section 2937, the district court correctly concluded that Minor Parties lack standing.

As the Supreme Court recently articulated in *Sprint Commc'ns Co. v. AP-CC Servs., Inc.*, 554 U.S. 269, 273 (2008):

> Article III, § 2 of the Constitution restricts the federal "judicial Power" to the resolution of "Cases" and "Controversies." That case-or-controversy requirement is satisfied only where a plaintiff has standing.

See also Common Cause of Pennsylvania v. Com. of Pennsylvania, 558 F.3d 249, 257-58 (3d Cir. 2009); *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 146-47 (3d Cir. 2000). To establish standing, a plaintiff must show (1) an injury in fact; (2) the injury is traceable to the defendant's conduct; and (3) the requested relief is likely to redress the injury. *Planned Parenthood*, 220 F.3d at 146-47. Minor Parties cannot demonstrate that they meet the requirements of standing in this case.

A. Minor Parties Cannot Establish An Injury-In-Fact Because The Judiciary's Assessment Of Costs And Fees Against Minor Party Candidates Under 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 candidates seeking nomination by a major party in a primary) and "nomination papers" (filed by minor party candidates seeking to be directly placed on the general election ballot).[14] *In re*

[14] Minor Parties' 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 (continued…)

Nader, 588 Pa. 450, 905 A.2d 450 (2006), *cert. denied*, 549 U.S. 1117 (2007). While Minor Parties 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 minimal, and is 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

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successfully challenged, he can be subject to costs pursuant to Section 2937. *See In re Lee*, 525 Pa. 155, 578 A.2d 1277 (1990).

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 to the candidate if the challenge is unsuccessful.[15]

The authority granted to Pennsylvania's courts 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 inherent

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[15] Minor Parties rely on *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), for the proposition that Section 2937 constitutes an impermissible barrier to ballot access. However, the *Bullock* and *Lubin* line of cases is clearly distinguishable from the present case. In *Bullock* and *Lubin*, the state created an absolute barrier to ballot access by requiring a filing fee before a candidate could be placed on the ballot. Section 2937 is not a filing fee at all. Rather, it grants the judiciary the authority to award costs in favor of those who successfully challenge a candidate's nomination papers. It has no application where a candidate obtains the necessary number of valid signatures to be placed on the ballot. Moreover, in the *Nader* and *Romanelli* cases upon which Minor Parties rely in their amended complaint, the state courts imposed costs only after determining that the candidates acted in bad faith. Minor Parties cannot insulate themselves from the authority of state courts to impose sanctions on the grounds that being a candidate and running for public office is an activity entitled to protection under the First Amendment.

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 Service 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 that gives First Amendment protection to all citizens. *See Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997). Accordingly, if Minor Parties' 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 might 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 attorney's 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.

Minor Parties point to two recent cases in which attorney's fees have been awarded pursuant to Section 2937 in an effort to allege 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."[16] *Nader*, 588 Pa. at 466, 905 A.2d at 460. Similarly, in *Romanelli*, Commonwealth Court found 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.").

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[16] 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.

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.[17] 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 requirements of the Election Code will fall victim to sanctions under Section 2937.[18] Furthermore, as demonstrated by both the *Nader* and *Romanelli* cases,

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[17] 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.

[18] Executive Defendants are aware that Minor Parties believe that the *Rogers* case was wrongly decided and that the existing signature requirements are (continued…)

candidates are given a full hearing and the right to appeal to the Pennsylvania Supreme Court before attorney's fees or other costs are imposed pursuant to Section 2937. Even if Minor Parties 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.[19]

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unfair to minor party candidates. However, this does not justify the filing of nomination papers that are clearly deficient under the law.

[19] Minor Parties 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 that 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, Minor Parties 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.").

Minor Parties may be technically correct that the *Rooker-Feldman* doctrine does not apply in this case because of a lack of identity of the parties. However, other principles relating to comity and federalism require that this Court accept the factual determinations made by Commonwealth Court in *Nader* and *Romanelli* unless vacated by the Pennsylvania Supreme Court or the United States Supreme (continued…)

B. Even If Judiciary Officials Were Applying Section 2937 In A Manner That Violates The Constitutional Rights Of Minor Party Candidates, Executive Officials Are Not Personally Involved In This Process.

Minor Parties 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, Executive Defendants have no involvement in the matters complained of and Minor Parties cannot trace to them any harm they have allegedly sustained. Objections to nomination papers are filed with Commonwealth Court by third parties. Executive Defendants do not initiate a hearing on objections and do not participate as a party in those matters. Any hearing regarding objections, as well as any decision to impose costs, is conducted by the judiciary. Executive Officials have no involvement with the collection of

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Court. To the extent that Minor Parties 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"). To the extent that Minor Parties are merely attempting to obtain prospective relief, 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.

any costs assessed pursuant to Section 2937, as they would be payable to third parties.[20]

As the district court correctly noted, "[t]he plaintiff must establish that the defendant's challenged actions, and not the actions of some third party, caused the plaintiff's injury." *See* Memorandum Opinion, 3/31/10, at 11; A14 (citing *Toll Bros., Inc. v. Twp. of Redington*, 555 F.3d 131, 137 (3d Cir. 2009)). In this case, the Minor Parties cannot demonstrate the traceability prong required to establish standing. Accordingly, the district court correctly determined that Minor Parties lack standing, and the amended complaint was properly dismissed.[21]

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[20] In Count III of the amended complaint, Minor Parties 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). We have previously argued that Minor Parties have waived any arguments regarding the dismissal of this claim. Nonetheless, Executive Officials 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, as required by 25 P.S. § 2642(k) & 3155). Accordingly, even if Minor Parties otherwise had a valid claim regarding 25 P.S. § 3155, any order regarding its enforcement issued against Executive Officials would be ineffectual.

[21] The third prong for establishing standing is whether a favorable decision would provide relief that would redress the alleged injury. *See Toll Bros., Inc.*, 555 F.3d at 137-38. This factor also favors dismissal. If the Court were to declare the cost assessment provisions of Section 2937 to be unconstitutional, Executive Officials would have no power to enforce such a decision. As explained *supra*, the judiciary – and not the executive branch – is ultimately responsible for how (continued…)

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT MINOR PARTIES' CLAIMS ARE NOT RIPE.

Standard of Review: The standard of review of the dismissal of a complaint for lack of ripeness is plenary. *NE Hub Partners v. CNG Transmission Corp.*, 239 F.3d 333, 341 (3d Cir. 2001).

The district court correctly concluded that it lacks jurisdiction because Minor Parties' claims are not ripe. The ripeness doctrine requires that "there is a substantial controversy, between parties having adverse legal interests, 'of sufficient immediacy and reality' to justify judicial resolution." *Peachlum v. City of York*, 333 F.3d 429, 434 (3d Cir. 2003) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). In the context of complaints seeking a declaratory judgment, the courts must balance the fact that such cases necessarily involve issues that are in some sense contingent on future actions of the

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Section 2937 is implemented. We would further note that in order to bring a valid 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 Executive Officials Merenda 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 Officials could simply ignore or override the Pennsylvania Supreme Court's interpretation of the meaning of Section 2937 or the factual determinations made by Commonwealth Court.

parties and the requirement that there be an actual case or controversy for purposes of Article III, § 2 of the Constitution.

In *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643, 647 (3d Cir. 1990), this Court pointed to three factors that should be considered in determining whether a declaratory judgment action is sufficiently ripe. These factors are "[1] the adversity of the interest of the parties; [2] the conclusiveness of the judicial judgment; and [3] the practical help, or utility, of that judgment." *Id.* For largely the same reasons that Minor Parties lack standing, their claims are not sufficiently ripe under *Step-Saver*.

Executive Officials simply do not have a sufficiently vested interest in whether costs are assessed against individual candidates under Section 2937 to have an interest that is adverse to that of Minor Parties in this case. Executive Officials are not involved in challenges to nomination papers and do not exercise any independent authority regarding who shall be placed on the ballot under Section 2937. Any order regarding the authority of Executive Officials to impose costs or otherwise enforce the provisions of Section 2937 would ultimately be a

nullity since they are not parties to such proceedings and all such decisions are made by the judiciary.[22]

Moreover, while the Pennsylvania Supreme Court in the *Nader* and *Romanelli* cases upheld the imposition of costs under Section 2937 where there was bad faith and improper conduct by the parties, there is nothing to suggest that costs would be imposed under other circumstances. At the present time, there are no identified candidates seeking office to which Section 2937 would even theoretically apply. The set of facts under which Minor Parties would in fact have their First Amendment rights burdened by the application of Section 2937 remains vague and highly speculative.

Also, for the reasons explained more fully above, the utility of a declaratory judgment would be minimal. Executive Officials lack the authority to prevent the judiciary from assessing costs under Section 2937. Furthermore, since there is nothing to suggest that the courts would impose costs under Section 2937 absent bad faith on the part of a candidate, it is difficult to determine how Minor Parties

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[22] We recognize that the standards governing ripeness are more relaxed in the First Amendment context. *See Peachlum*, 333 F.3d at 434-35. However, such concerns are less acute in this case since it involves an as-applied, as opposed to, a facial challenge. Furthermore, there is simply nothing to suggest that there is even a minimal adversarial relationship between Minor Parties and Executive Officials that would support jurisdiction under Article III, § 2.

would benefit to the extent that they wish to engage in conduct protected by the First Amendment.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

1. I am a member of the bar of this Court.

2. The text of the electronic version of this brief is identical to the text of the paper copies.

3. The following virus detection program — SYBARI ANTIGEN Version 8.00.1470 — was run on the file and no virus was detected.

4. This brief contains 5,923 words within the meaning of Fed. R. App. Proc. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word processing system used to prepare the brief.

/s/ Howard G. Hopkirk
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CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing **BRIEF FOR APPELLEES CORTÉS, HARHUT AND CORBETT** by depositing two copies of the same in the United States mail, first class, postage prepaid, to the following:

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DATE: December 6, 2010