
UNITED STATES COURT OF APPEALS

for the

THIRD CIRCUIT

Case No. 10-3205

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. CORTES, 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,

Appellees.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA AT NO 5:09-CV-01691-LS

**REPLY BRIEF OF APPELLANTS TO BRIEF OF APPELLEES CORTES, HARHUT
AND CORBETT**

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
Attorneys for Appellant
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
(202) 248-9345 (fx)
oliverhall@competitivedemocracy.org

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CITATIONS.....ii

ARGUMENT.....1

CONCLUSION.....3

CERTIFICATE OF COUNSEL

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

Cases

In re Justices of the Supreme Court of Puerto Rico,
695 F.2d 17 (1st Cir. 1982).....4

Statutes

25 P.S. 2872.2.....1
25 P.S. § 2937.....2, 3
42 Pa. C.S. § 2503.....3

Rules

Fed. R. Civ. P. 11..... 3
Pa. R. Civ. P. 1023.1.....3

ARGUMENT

The brief filed by Appellees Pedro Cortes, Chet Harhut and Thomas Corbett (the “Executive Appellees”) primarily consists of discussion that repeats the points made in the brief filed by Appellees Charles Johns, Michael Krimmell, the Justices of the Supreme Court of Pennsylvania and the Judges of the Commonwealth of Pennsylvania (the “Judicial Appellees”). Therefore, Appellants Constitution Party of Pennsylvania, Green Party of Pennsylvania, Libertarian Party of Pennsylvania, Wes Thompson, Hillary Kane and Michael Robertson (the “Minor Parties”) incorporate herein and rely upon their Reply to the Brief of the Judicial Appellees. In addition, the Minor Parties make the following brief points.

First, just as the District Court completely failed to address the claims raised in Count I and Count III of the Minor Parties’ Amended Complaint, so too the Executive Appellees fail to offer any defense of those claims on this appeal. Indeed, as the Minor Parties argued before the District Court, the Executive Appellees did not even defend the Minor Parties’ Count I claim that the fifteen percent requirement imposed by 25 P.S. 2872.2 violates their constitutional rights in the proceedings below. A-63. Likewise, the Executive Appellees did not defend the Minor Parties’ Count III claim for injunctive relief relating to the computing and certifying of write-in votes, except to assert that they are not the proper parties to defend that claim. A-74.

Now, because the Executive Appellees failed to defend the Minor Parties' Count I and Count III claims, and because the District Court failed to rule on them, the Executive Appellees assert that the Minor Parties "waived" these issues on appeal. Brief of Ex. Appellees at 19. This assertion borders on the absurd. The Minor Parties not only raised these issues in the proceedings below, but also squarely argued them. A-63 – A-64, A-74. Consequently, the Minor Parties did not waive their claims in Count I and Count III.

Second, in their discussion of the Minor Parties' Count II claims for declaratory relief from 25 P.S. § 2937 ("Section 2937"), the Executive Appellees repeatedly conflate the costs assessed thereunder with sanctions. Brief of Ex. Appellees at 22-27. Thus, the Executive Appellees assert, without the costs assessed under Section 2937, "there would be nothing to prevent the filing of frivolous, fraudulent, and/or patently deficient nomination papers by minor party candidates." Brief of Ex. Appellees at 22. On the very next page, however, the Executive Defendants contradict this assertion by citing several sources of authority, including Fed. R. Civ. P. 11, Pa. R. Civ. P. 1023.1, and the courts' inherent powers, all of which authorize courts to impose sanctions as necessary and appropriate – including in a nomination petition challenge brought under Section 2937. Brief of Ex. Appellees at 23-24.

Simply put, the costs assessed under Section 2937 are not necessary to deter frivolous or fraudulent filings by minor parties. Rather, Pa. R. Civ. P. 1023.1 already performs that function, as do the courts' inherent powers, as well as applicable statutory provisions. *E.g.*, 42 Pa. C.S. § 2503 (authorizing the assessment of attorneys' fees for arbitrary, vexatious or bad faith conduct). Indeed, as the Minor Parties argued below, a primary reason why Section 2937 runs afoul of the Constitution is that it authorizes the assessment of costs against any candidate who defends nomination petitions that are found to be deficient, whether or not the candidate acts vexatiously or in bad faith. A-69 – A-70 (citing cases striking down statutes that “fail to distinguish between the legitimate exercise of First Amendment freedoms and conduct that is properly subject to sanctions”).

Third, the Executive Appellees claim that they “do not have a direct interest” in this case, Brief of Ex. Appellees at 20, but again they contradict themselves in their subsequent discussion. “Executive Officials Merenda [formerly Appellee Cortes] and Harhut are the Commonwealth officials with primary responsibility over the administration of the Election Code,” the Executive Appellees admit. Brief of Ex. Appellees at 30 n.21. As such, the Executive Appellees have the institutional obligation to defend the statutes challenged herein, each of which is a provision of the Election Code that they administer. *See In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 21-22 (1st Cir. 1982)).

CONCLUSION

For the foregoing reasons, and those set forth in their opening brief, Appellants, the Constitution Party of Pennsylvania, the Green Party of Pennsylvania, the Libertarian Party of Pennsylvania, Hillary A. Kane, Michael J. Robertson and Wes Thompson, respectfully request that the decision below be reversed in its entirety, and that this matter be remanded to the United States District Court for the Eastern District of Pennsylvania.

Dated: January 7, 2011

Respectfully submitted,

/s/ Oliver B. Hall

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
(202) 248-9345 (fx)
oliverhall@competitivedemocracy.org

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to Third Circuit Local Appellate Rule 46.1 that the attorney whose name appears on the foregoing Appellate Brief, Oliver B. Hall, is a member of the bar of this Court.

Dated: January 7, 2011

/s/ Oliver B. Hall

Oliver B. Hall

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a) AND L.A.R. 31.1

This brief complies with the word limit requirements of F.R.A.P. 32(a) because:

- a. The brief is 764 words, and prepared in Times New Roman, 14 Point Font.

This brief complies with the electronic filing requirements of L.A.R. 31.1(c) because:

- a. The text of this electronic brief is identical to the text of the paper copies;
- b. Symantec AntiVirus version 10.0 has been run on the file containing the electronic version of this brief and no viruses have been detected.

/s/ Oliver B. Hall

Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2011, I served a copy of the foregoing Reply Brief of Appellants, on behalf of all Plaintiff-Appellants, by the Court's ECF system, and by First Class Mail, upon the following:

MICHAEL DALEY, ESQUIRE
Attorney I.D. No. PA 77212
Supreme Court of Pennsylvania
Administrative Office of PA Courts
1515 Market Street, Suite 1414
Philadelphia, PA 19102
legaldepartment@pacourts.us
(215) 560-6300, Fax: (215) 560-5486

*Attorney for Defendants Justices of the
Supreme Court of Pennsylvania, Judges
of the Commonwealth Court of Pennsylvania,
Charles Johns and Michael Krimmel*

HOWARD G. HOPKIRK
Office of the Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA, 17120

*Attorney for Defendants Pedro Cortes,
Chet Harhut and Tom Corbett*

/s/Oliver B. Hall