UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al. Appellants, v. PEDRO A. CORTES, et al., Appellees.	App. No. 10-3205 Dist. Ct. No. 09-cv-01691

APPELLANTS' PETITION FOR PANEL REHEARING

Pursuant to Fed. R. App. P. 40, Appellants Constitution Party of Pennsylvania, Green Party of Pennsylvania, Libertarian Party of Pennsylvania, and their respective Chairs Wes Thompson, Hillary A. Kane and Michael J. Robertson (the "Minor Parties") respectfully move for panel rehearing of the Court's Opinion and Order entered on May 19, 2011 ("Slip Op."), which affirmed the District Court's dismissal of this case pursuant to Fed. R. Civ. P. 12(b)(6). The Court's Opinion and Order is attached hereto as Exhibit A.

ARGUMENT

This case raises important issues that deserve to be taken seriously. Minor Party and independent candidates in Pennsylvania currently face financial jeopardy if they defend their right to run for public office, because they can be ordered to pay the costs of challenge proceedings initiated by their political opponents. Twice in recent elections, such candidates have been ordered to pay more than $80,000 to their challengers. Who would dare run that risk? Who could afford it? Only the very brave, or perhaps the very wealthy. And yet, this Court concludes that the Minor Parties lack standing to seek declaratory relief in this case, because they fail to allege "causation" between their so-called "recruitment difficulties" and the threat facing their candidates.

The Court is in error for the reasons set forth below. But the Court also mischaracterizes the gravamen of the Minor Parties' claims. The Minor Parties do not complain of "recruitment difficulties" – on the contrary, their candidates are ready and willing to run, provided that they will not risk losing house and home in the process. Thus, when the Minor Parties' candidates withdraw their nomination petitions, it is not a "voluntary choice," as the Court asserts, but rather a necessity to avoid the risk of financial ruin. In 2010, for example, the Libertarian Party candidates withdrew under the explicit threat that their challengers would seek

"$92,255 to $106,455" in costs if they did not. *See* Email From Ronald L. Hicks, Jr. to Marc Antony Arrigo (August 16, 2010) (attached as Exhibit B). The basis for the Minor Parties' claims, therefore, is that Pennsylvania makes it all but impossible for them to place candidates on the ballot, and severely penalizes those who try.

Apart from submitting nomination petitions, the Minor Parties' only alternative for presenting their candidates to Pennsylvania voters is to mount write-in campaigns. But elections officials routinely refuse to count and report their valid write-in votes, thus disenfranchising their voter-supporters. Frozen out of the electoral process and relegated to the status of second-class citizens, the Minor Parties seek relief from the federal courts. Inexplicably, this Court concludes that there is "no hardship" in forcing them to "wait" until their votes go uncounted – even though that has already happened. Meanwhile, the Minor Parties remain frozen out, and Pennsylvania voters are denied their free choice of candidates.

I. The Court Improperly Affirmed Dismissal of Count II, In Violation of Rule 12(b)(6), By Rejecting the Minor Parties' Allegations and Drawing Speculative Inferences Against Them.

It is undisputed that 25 P.S. § 2937 ("Section 2937") threatens the Minor Parties with severe penalties for engaging in quintessentially protected conduct – the filing of nomination petitions to run for public office. This Court nevertheless

declines to rule on the merits of the Minor Parties' Count II claim for declaratory relief, on the ground that their allegations "most clearly fail to establish causation." Slip Op. at 7. That conclusion is false, and demonstrably so. Furthermore, the Court could not possibly have reached such a conclusion, had it not rejected the Minor Parties' allegations and drawn speculative inferences against them, in clear violation of the well-settled standard governing motions to dismiss under Rule 12(b)(6). *See D.P. Enters. v. Bucks Cnty. Cmty. Coll.*, 725 F.2d 943, 944 (3rd Cir. 1984) (in reviewing the dismissal of a complaint pursuant to Rule 12(b)(6), "factual allegations are to be accepted as true," and "reasonable factual inferences will be drawn to aid the pleader").

As the Court recognized, the Minor Parties allege that Section 2937 injures them by preventing their candidates from accessing the ballot. Slip Op. at 7. It is undisputed that this injury is sufficient to confer standing on the Minor Parties. *See Belitskus v. Pizzingrilli*, 343 F.3d 632, 641 (3rd Cir. 2003). Having identified this injury, however, the Court immediately determined that the Minor Parties make "no allegation" except "conclusory assertions" to establish that Section 2937 is its cause. Slip Op. at 7. But the Court reached this conclusion without addressing a single allegation in the Amended Complaint – a glaring omission, given that the Court's disposition of this entire case depends on the supposed insufficiency of

those allegations.

Moreover, the Amended Complaint itself refutes the Court's conclusion, because it clearly alleges a "set of facts" in support of the allegation that Section 2937 is the cause of the Minor Parties' injury. *See Bell Atlantic Co. v. Twombly*, 127 S.Ct. 1955, 1969 (2007). Specifically, the Amended Complaint alleges that costs were first imposed under Section 2937 against defending candidates (as opposed to their challengers) in the 2004 general election, when two independent candidates were ordered to pay more than $80,000 following a challenge to their nomination petitions. Am. Comp. ¶ 33. As a result, in the 2006 general election, the Minor Parties' candidates, with one exception, "either refused to submit or else withdrew [their] nomination petitions...due to the threat" that they too would incur such costs. Am. Comp. ¶ 34. Thus, Minor Party candidates Hagan Smith, Marakay Rogers and Ken V. Krawchuk all mounted write-in campaigns, in order to avoid the threat posed by Section 2937. Am. Comp. ¶ 37. Meanwhile, the single Minor Party candidate who submitted nomination petitions in 2006 – Carl Romanelli of the Green Party – was ordered to pay more than $80,000 to his challengers. Am. Comp. ¶ 36. Finally, the Amended Complaint alleges, no challenge was filed to any of the Minor Parties' candidates in the 2008 general election, and consequently, the Minor Parties' candidates appeared on the 2008 general election ballot. Am. Comp.

¶¶ 40-41.

The foregoing allegations, which the Court failed to address, cannot properly be characterized as "conclusory assertions." Slip Op. at 7. Rather, they establish a specific set of facts in support of the Minor Parties' claim that Section 2937, when invoked by their political opponents, prevents them from engaging in protected petitioning conduct. Am. Comp. ¶ 57; *see Twombly*, 127 S.Ct. at 1969. Not only have two candidacies already incurred more than $80,000 in costs under Section 2937, Am. Comp. ¶¶ 33, 36, but also, the Pennsylvania Supreme Court has held that the imposition of such costs is entirely discretionary, and need not be justified by any finding of "fraud" or "bad faith" against a candidate. (Appellants' Second Not. of Supp. Auth. (filed April 4, 2011) (citing *In Re: Nomination Petition of Farnese*, No. 13 EAP 2008 (Pa. March 29, 2011)). Contrary to the Court's unsupported assertion, therefore, the Amended Complaint contains ample facts from which to conclude that Section 2937 chills the Minor Parties' "freedoms of speech, petition, assembly and association for political purposes," in violation of the First and Fourteenth Amendments. Am. Comp. ¶ 57; *see Twombly*, 127 S.Ct. At 1969.

Having rejected the Minor Parties' allegation that Section 2937 is causing them injury – again, without addressing <u>any</u> of the foregoing facts – the Court

suggested several alternative theories to explain why the Minor Parties' candidates might not appear on Pennsylvania's ballot. Slip Op. at 7. But such speculation is a clear violation of the Rule 12(b)(6) standard, which requires that inferences be drawn in the Minor Parties' favor – not against them. *See D.P. Enters.*, 725 F.2d at 944. Had the Court not violated this cardinal rule, the Minor Parties could have proven their allegations by submitting evidence – for example, the August 2010 email threatening to seek "$92,255 to $106,455" in costs from the Libertarians if they did not withdraw their nomination petitions. *See* Ex. B. The Court thus erred by substituting its own conjecture for the allegations in the Amended Complaint, without allowing the Minor Parties to prove those allegations. *See Twombly*, 127 S.Ct. at 1965 ("Rule 12(b)(6) does not countenance … dismissals based on a judge's disbelief of a complaint's factual allegations") (citation omitted).

The Court's assertion that the District Court "could not conclude" that Section 2937 is the cause of the Minor Parties' injury is therefore wrong on the facts and wrong on the law. On the contrary, the District Court was required to accept that allegation as true – as was this Court on appeal – because it was supported by a set of facts which, if proven, establish the "grounds" for the Minor Parties' "entitlement to relief." *See id.* (citation and brackets omitted). Accordingly, the Court should grant rehearing of its affirmance of the District Court's dismissal

of Count II.

II. The Court Improperly Affirmed Dismissal of Count I and Count III, In Violation of Rule 12(b)(6), By Disregarding the Minor Parties' Allegations.

Before addressing the Court's error in affirming dismissal of the claims raised in Count I and Count III, it is necessary to recount the extraordinary procedural posture from which this appeal arises. In the proceedings below, the defendants moved to dismiss the Amended Complaint, but made no attempt to defend the well-pleaded claims raised in Count I and Count III. The District Court nonetheless granted dismissal on all counts, but failed to devote a single word of analysis to the Count I and Count III claims. A-10 – A-25. When the Minor Parties raised this error in a motion for reconsideration, the District Court asserted – for the first time – that its conclusion that the Minor Parties lack standing to bring their Count II claims was also intended to apply to their Count I and Count III claims. A-29. This Court now affirms that decision.

As the Court acknowledged, if the District Court had intended to dismiss the claims in Count I and Count III on standing grounds, then it should have analyzed whether the Minor Parties in fact have standing to bring those claims. Slip Op. at 9. Nevertheless, the Court declined to find error in the District Court's dismissal of Count I, because it concluded that there are "no allegations" in the Amended

Complaint that would change the Court's standing analysis with respect to Count I. But once again, in reaching this conclusion, the Court failed to address the relevant allegations.

Count I expressly alleges that the Minor Parties challenge 25 P.S. 2872.2 ("Section 2872.2") "*independently* and in conjunction with" the other challenged provisions. Am. Comp. ¶ 50 (emphasis added). Further, Count I alleges:

> Section 2872.2 of the Pennsylvania Election Code defines any qualified political party whose membership accounts for less than fifteen percent of registered voters in Pennsylvania as a Minor Party. By distinguishing Minor Party candidates from Major Party candidates, Section 2872.2 subjects Plaintiff Parties to the burden of conducting a new petition drive for each election cycle – even if Plaintiff Party candidates win election to statewide office in the previous election – as long as Plaintiff Parties' membership accounts for less than fifteen percent of registered voters. Section 2872.2 thus arbitrarily discriminates against and imposes a severe and unnecessary burden upon Plaintiff Parties.

Am. Comp. ¶ 43. On their face, these allegations raise an *independent* basis for challenging the 15 percent requirement imposed by Section 2872.2, which has nothing to do with the Count II claims challenging the unconstitutional costs imposed under Section 2937. It necessarily follows, contrary to the Court's conclusion, that the Minor Parties' standing to bring their Count I claims in no way depends on their standing to bring their Count II claims. The injury alleged – the burden of petitioning to access the ballot in each new election cycle, regardless of the Minor Parties' performance in the preceding election – is different; the cause of

that injury – the 15 percent requirement imposed by Section 2872.2 – is different; and likewise, the redressability of that injury – a declaratory judgment holding the 15 percent requirement unconstitutional – is, once again, different. Am. Comp. ¶ 43. The Court's conclusion that the District Court's analysis of Count II applies equally to Count I is therefore error.

Finally, despite conceding that the standing analysis "may differ" with respect to the Minor Parties' Count III claim for an injunction directing Pennsylvania elections officials to count and certify their valid write-in votes, the Court nonetheless affirms dismissal of this claim, too, on the ground that "the ripeness analysis remains the same." Slip Op. at 9. Inexplicably, the Court reasons that "there would be no hardship in forcing the Minor Parties to wait" until their votes go uncounted before they are permitted to seek injunctive relief. Slip Op. at 9. But the Amended Complaint clearly alleges that their votes already have gone uncounted – in both the 2006 and 2008 election cycles. Am. Comp. ¶¶ 38, 41. Further, nine Pennsylvania counties are identified by name, where the Minor Parties' "voter-supporters were disenfranchised as a result." Am. Comp. ¶ 38. The Court's disposition of Count III thus relies on a demonstrably false conclusion, which contradicts the allegations in the Amended Complaint. Rehearing should therefore be granted on Count III, too.

CONCLUSION

For the foregoing reasons, the Minor Parties respectfully request that the Court grant rehearing of its Opinion and Order entered on May 19, 2011. Further, the Minor Parties respectfully request that the Court reverse the District Court's Opinions and Orders dated April 1, 2010 and July 16, 2010, and remand this case to the District Court for further proceedings.

Dated: June 2, 2011

Respectfully submitted,

s/ Oliver B. Hall

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2011, I served the foregoing Petition for Panel Rehearing, on behalf of all Appellants, by the Court's CM/ECF system, upon the following:

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