

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

THE CONSTITUTION PARTY OF)
PENNSYLVANIA, THE GREEN PARTY)
OF PENNSYLVANIA, THE LIBERTARIAN)
PARTY OF PENNSYLVANIA, JOE)
MURPHY, JAMES N. CLYMER, CARL J.)
ROMANELLI, THOMAS ROBERT)
STEVENS and KEN KRAWCHUK,)

Plaintiffs,

v.

CAROL AICHELE, JONATHAN M.)
MARKS and LINDA L. KELLY,)

Defendants.

Case No. 5:12-CV-02726

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO
DISMISS THE COMPLAINT**

In their Motion to Dismiss ("Mot."), Defendants Carol Aichele, Johnathan Marks and Linda Kelly (together, "the Secretary") fail to address the merits of the claims alleged in the Complaint filed by Plaintiffs Constitution Party of Pennsylvania ("CPPA"), Green Party of Pennsylvania ("GPPA"), Libertarian Party of Pennsylvania ("LPPA"), Joe Murphy, James N. Clymer, Carl J. Romanelli, Thomas Robert Stevens and Ken Krawchuk (together, "the Minor Parties"). They also fail to address the facts and law relating to those claims. The Secretary's motion therefore fails, as a matter of law, to provide any basis for dismissal of this case, and it should be denied.

The entire premise of the Secretary's motion is that this case is no different, in any material respect, from a case the Court decided in 2010. Mot. at 2 (citing *Constitutional Party of Pa. v. Cortes* ("Cortes"), 712 F. Supp. 2d 387 (E.D. Pa. 2010)). That premise is demonstrably false, for at least three reasons.

First, the claims alleged in the Minor Parties' Complaint were never raised – much less ruled upon – in *Cortes*. Contrary to the Secretary's contention, therefore, the Court has not decided any issues relating to them.

Second, in 2011, the Supreme Court of Pennsylvania held that one of the provisions challenged in this case, 25 P.S. § 2937 ("Section 2937"), authorizes the imposition of costs against candidates who defend the nomination petitions they are required to submit pursuant to the other challenged provision, 25 P.S. § 2911(b) ("Section 2911(b)"), even if the candidates do not engage in "fraud," "bad faith," or any other misconduct. *See In Re: Farnese*, 17 A.2d 357, 372 (Pa. 2011). State law governing the Minor Parties' claims has therefore materially changed.

Third, the Minor Parties have submitted extensive evidence in support of their claims, as set forth in 13 sworn declarations attached to the Complaint as Exhibit A, which demonstrates the undue burdens the challenged provisions impose on the Minor Parties. Such evidence was not available to the Court when *Cortes* was decided. Therefore, the Minor Parties' claims in this case also arise from new facts and rely on new evidence.

Accordingly, as set forth below, the Minor Parties' Complaint states valid claims, and there is no basis in law for dismissing them.

BACKGROUND

The Minor Parties initiated *Cortes* in 2009, and sought, *inter alia*, prospective declaratory and injunctive relief from Section 2937 as applied to them. *See Cortes*, 712 F. Supp. 2d 387. Specifically, the Minor Parties sought a declaration that Section 2937 is unconstitutional insofar as it authorizes the imposition of costs against candidates who defend nomination petitions they are required to submit pursuant to Section 2911(b). The Court dismissed the case on standing and

ripeness grounds, concluding that any decision on the merits would be an improper “advisory opinion,” because the Minor Parties did not currently have nomination petitions pending, and no private party had filed a challenge pursuant to Section 2937. *See Cortes*, 712 F. Supp. at 398.

This action was commenced in May 2012, while the Minor Parties’ 2012 petition drives were underway. Since then, each Minor Party successfully completed its petition drive and submitted to the Secretary nomination petitions containing signatures far exceeding the number required by Section 2911(b). (Doc. # 13.) On August, 8, 2012, pursuant to Section 2937, private parties challenged the nomination petitions submitted by Plaintiff CPPA and Plaintiff LPPA. *See In Re: Nomination Paper of Virgil H. Goode*, No. 508 M.D. 2012 (Pa. Commw. 2012) (CPPA challenge); *In Re: Nomination Paper of Margaret K. Robertson*, No. 507 M.D. 2012 (Pa. Commw. 2012) (LPPA challenge). The attorney representing the challengers in each proceeding is the same attorney referenced in the Complaint, who informed Plaintiff LPPA that his clients would seek “\$92,255 to \$106,455” in costs if they did not immediately withdraw their 2010 nomination petitions. Complaint ¶ 33.

On the same day their petitions were challenged, August 8, 2012, the Minor Parties filed in this Court a Motion for Temporary Restraining Order or Preliminary Injunction. (Doc. # 12.) In view of the imminent threat that the filing of a challenge pursuant to Section 2937 would cause them irreparable injury, and their substantial compliance with Section 2911(b), the Minor Parties have requested that the Court enjoin the Secretary from enforcing the Section 2911(b) signature requirement as applied to them. (Doc. # 12.) That motion is pending.

On August 10, 2012, Plaintiffs CPPA and LPPA were each ordered to ensure that “20 individuals, in addition to counsel,” were present on their behalf each day of the challenge

proceedings, for the purpose of “review[ing] the challenged signatures” and “tabulat[ing] the number of signatures stipulated to be valid and those stipulated to be invalid.” *See In Re: Goode*, No. 508 M.D. 2012; *In Re: Robertson*, No. 507 M.D. 2012. Eleven days later, on August 21, 2012, Plaintiff CPPA was compelled to withdraw its nomination petitions, primarily because it could not continue to supply 20 workers to review the petitions each day, nor could it risk the imposition of costs against it under Section 2937 if it failed to do so. First Declaration of James N. Clymer (“Clymer Dec.”) ¶¶ 6-8; *see, e.g., In Re: Nomination Paper of Marakay Rogers*, 942 A.2d 915, 923-26 (Pa. Commw. 2008) (finding candidate’s failure to supply requisite number of workers constituted “bad faith”).

Plaintiff LPPA continues to defend against the challenge to its 2012 nomination petitions, and to incur the costs of doing so. Meanwhile, no challenge was filed to Plaintiff GPPA’s nomination petitions, and its candidates will appear on Pennsylvania’s 2012 general election ballot.

No other state in the nation requires that candidates, voters or political parties assume a substantial financial burden – or any financial burden whatsoever – as a necessary condition of their participation in elections. Further, well-settled precedent of the Supreme Court and lower federal courts unequivocally establishes that any statutory scheme imposing such burdens is unconstitutional if, like Pennsylvania’s, it fails to provide a non-monetary alternative. The Minor Parties therefore challenge Pennsylvania’s statutory scheme on the ground that Pennsylvania cannot constitutionally require them to submit nomination petitions pursuant to Section 2911(b), and to shoulder the financial burden of validating the petitions under Section 2937. Count I of the Complaint thus alleges that the foregoing provisions, as applied, violate the Minor Parties’

freedoms of speech, petition and association, and their right to due process. Complaint ¶¶ 48-56. Count II alleges the challenged provisions are unconstitutional on equal protection grounds. Complaint ¶¶ 57-65. Finally, Count III alleges that Section 2937 is unconstitutional on its face. Complaint ¶¶ 66-72.

In support of these claims, the Minor Parties have submitted evidence demonstrating that in 2010, Plaintiff LPPA was compelled to withdraw its nomination petitions due to a challenger's explicit threat to seek "\$92,255 to \$106,455" in costs if it did not. Complaint ¶¶ 32-33 (citing declarations). Additional evidence demonstrates that other Minor Party candidates have been compelled to withdraw under similar duress. Complaint ¶¶ 35-37, 41 (citing declarations). Finally, in the current election cycle, Plaintiff CPPA was compelled to withdraw its nomination petitions due to the undue burdens Pennsylvania's statutory scheme imposes, while Plaintiff LPPA continues to defend itself in ongoing proceedings initiated pursuant to Section 2937. *See supra* at 4. Such allegations and evidence establish a set of facts that, if proven, entitles the Minor Parties to the relief requested in the Complaint.

ARGUMENT

I. Each Count of the Complaint States a Valid Claim for Relief.

A. Count I States a Claim Because Pennsylvania May Not Require the Minor Parties to Shoulder the Costs of Validating Nomination Petitions They Are Required By Law to Submit.

The Supreme Court has long recognized that states "may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (holding requirement that voters either pay poll tax or file certificate of residence unconstitutional). The Court has thus held that states may not condition citizens' participation in

an election upon their ability to pay fees or taxes. *See Lubin v. Panish*, 415 U.S. 709 (1974) (holding filing fees for candidates unconstitutional in the absence of non-monetary alternatives); *Bullock v. Carter*, 405 U.S. 134 (1972) (holding non-trivial filing fees for candidates unconstitutional); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional). Under this line of cases, Pennsylvania’s statutory scheme is unconstitutional, because it requires the Minor Parties to “shoulder the costs” of validating nomination petitions they are required by law to submit, and thus violates the First and Fourteenth Amendments. *Bullock*, 405 U.S. at 149; *see* 25 P.S. §§ 2911(b), 2937.

Following the Supreme Court’s decisions in *Bullock* and *Lubin*, federal courts have, without exception, struck down statutory schemes that impose financial burdens on candidates, voters or political parties, without providing them with a non-monetary alternative for participating in elections. *See, e.g., Belitskus v. Pizzigrilli*, 343 F.3d 632 (3rd Cir. 2003) (enjoining enforcement of Pennsylvania’s mandatory filing fees); *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289 (8th Cir. 1995) (holding that Arkansas cannot require political parties to hold and pay for primary elections); *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (declaring unduly burdensome nomination petition signature verification fees unconstitutional); *Dixon v. Maryland State Bd. of Elections*, 878 F.2d 776 (4th Cir. 1989) (declaring mandatory filing fee of \$150 for non-indigent write-in candidates unconstitutional); *McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373 (M.D. N.C. 1994) (declaring five-cent per signature verification fee unconstitutional), *aff’d on other grounds*, 65 F.3d 1215 (4th Cir. 1995); *Clean-Up ’84 v. Heinrich*, 590 F. Supp. 928 (M.D. Fl. 1984) (declaring ten-cent per signature verification fee unconstitutional), *aff’d on other grounds*, 759 F.2d 1511 (11th Cir.1985). By

contrast with this great weight of authority, the Minor Parties are unaware of a single case upholding a statutory scheme such as Pennsylvania's, which requires that candidates shoulder the costs of validating nomination petitions they are required by law to submit. *See* 25 P.S. §§ 2911(b), 2937.

The signature verification cases cited above are closely analogous to the instant case. In *Clean-Up '84*, for example, the District Court held that a ten-cent per signature fee Florida charged to validate petitions violated the First Amendment rights of plaintiffs who sought to place an initiative on the ballot. *See Clean-Up '84*, 590 F. Supp. at 933. Recognizing that “denial of ballot access to a candidate has a profound effect on his supporters and their right to vote,” the Court found that such denial similarly burdened proponents of a ballot initiative. *Id.* “The lack of any alternative to payment of the signature verification charges forecloses access to the ballot for a large group of citizens and renders ineffective their advocacy of the issue they desire to put before the voters,” the Court reasoned. *Id.* Relying on *Lubin* and *Bullock*, the Court thus concluded that “where the signature verification charge admittedly places an undue burden on petitioners’ resources, the only reasonable alternative is for the State to bear the cost of signature verification.” *Id.* Accordingly, the Court enjoined enforcement of the signature verifications fees. *See id.* at 933-34.

Similarly, in *McLaughlin*, a candidate, voter and minor political party alleged that North Carolina’s five-cent per signature verification fee was unconstitutional on its face and as applied (in conjunction with a notarization requirement). *See McLaughlin*, 850 F. Supp. at 376. As in *Clean-Up '84*, the District Court relied primarily on *Lubin* and *Bullock*, and agreed:

The permissibility of a signature verification fee standing alone raises serious constitutional questions. A requirement of fee payment in order to gain ballot access may

eliminate candidates and thus impacts not just on candidates but on voters as well. The political tradition in this country is to greet with hospitality all candidates irrespective of their economic status. Thus, a system which selects candidates based solely on the ability to pay a fee without providing alternative means for ballot access will violate the Constitution. ... Costs which appear to be simply concomitant of the State's legislative choice to hold an election are not costs which a state may charge to candidates.

Id. at 388-89 (citations and quotation marks omitted). Like the Court in *Clean-Up '84*, the Court thus declared the challenged fee unconstitutional and granted the plaintiffs injunctive relief. *See id.* at 376.

Pennsylvania's statutory scheme suffers from the same constitutional defects as those struck down in *Clean-Up '84* and *McLaughlin*. Rather than requiring that the Minor Parties pay state officials a fee for each signature they verify, Pennsylvania simply requires that the Minor Parties perform such work themselves. In 2012, for example, Plaintiffs CPPA and LPPA were each required to provide no fewer than 20 workers for that purpose, on a daily basis. *See In Re: Nomination Paper of Goode*, No. 508 M.D. 2012 (order entered August 10, 2012); *In Re: Nomination Paper of Robertson*, No. 507 M.D. 2012 (same). After shouldering this burden for ten days, the CPPA could no longer afford to do so, and was compelled to withdraw its nomination petitions, while the LPPA persists at great expense. *See id.*

Clean-Up '84 and *McLaughlin* cannot be distinguished from this case on the ground that they involved payment of a mandatory fee for the validation of signatures on petitions. Here, too, Pennsylvania imposes a mandatory burden on the Minor Parties, by requiring that they supply their own workers to perform such labor. *See id.* In effect, Pennsylvania outsources the cost of validating nomination petitions to the candidates who are required by law to submit them. *See* 25 P.S. §§ 2911(b), 2937. No less than Florida in *Clean-Up '84* and North Carolina in *McLaughlin*, therefore, Pennsylvania violates the Minor Parties' First and Fourteenth Amendment rights by

requiring that they “shoulder the costs” of its “legislative choice” to require them to submit nomination petitions in the first instance. *Bullock*, 405 U.S. at 147-49 (rejecting assertion that states may “shift” such costs to candidates or voters).

Pennsylvania’s statutory scheme also violates the Minor Parties’ First and Fourteenth Amendment rights by requiring that they assume the risk of paying not only their own costs in defending their nomination petitions, but also those of the private parties who challenge them pursuant to Section 2937. It makes no difference that the Minor Parties might avoid the imposition of such costs. As set forth *infra* at Part I.C, the critical fact rendering Section 2937 unconstitutional is that the Minor Parties must assume the risk, *ex ante*, that costs will be imposed against them if they defend nomination petitions they are required to submit pursuant to Section 2911(b). Because the Minor Parties have no alternative means of accessing the general election ballot, which permits them to avoid the assumption of such risk, Pennsylvania’s statutory scheme is unconstitutional as applied to them.

B. Count II States A Claim Because Only Minor Party and Independent Candidates Must Submit Nomination Petitions to Access Pennsylvania’s General Election Ballot and Assume the Financial Burden of Validating Them.

Pennsylvania’s statutory scheme is also unconstitutional as applied to the Minor Parties because it imposes an unequal burden on them, in violation of the Equal Protection Clause of the Fourteenth Amendment. In both *Clean-Up ’84* and *McLaughlin*, the signature verification fees were held to violate the Equal Protection Clause because they applied to minor parties but not to major parties. *See Clean-Up ’84*, 590 F. Supp. at 931; *McLaughlin*, 850 F. Supp. at 389. Once again, Pennsylvania’s statutory scheme suffers from the same defect. Whereas major party candidates access the general election ballot by means of publicly funded primary elections,

minor party and independent candidates can do so only by submitting nomination petitions, and thus, minor party and independent candidates alone must assume the costs of validating such petitions. *See* 25 P.S. §§ 2882, 2911(b).

Major party candidates do submit nomination petitions to appear on the primary election ballot, but at most, they need only 2,000 valid signatures. *See* 25 P.S. § 2872.1. Under Section 2911(b), by contrast, the Minor Parties must submit tens of thousands of valid signatures. Complaint ¶¶ 18-19. The substantive burden Section 2911(b) imposes on the Minor Parties is therefore objectively greater – often over ten times greater – than the substantive burden imposed on major party candidates in the primary election. Complaint ¶ 19.

The unequal substantive burden Pennsylvania’s statutory scheme imposes on the Minor Parties is exacerbated by the unilateral procedures it establishes. Major party nominees automatically appear on the general election ballot, once they are chosen by means of the primary election, therefore they cannot be challenged pursuant to Section 2937. *See* 25 P.S. § 2882. Section 2937 thus authorizes the major parties to challenge the Minor Parties’ participation in the general election, but it does not authorize the Minor Parties to challenge the major parties’ participation in that same election.

The major parties have aggressively exploited the unequal advantage Pennsylvania’s statutory scheme confers upon them. Not only do they routinely challenge the Minor Parties’ nomination petitions pursuant to Section 2937, but also, they explicitly threaten to impose substantial costs on the Minor Parties if the Minor Parties do not immediately withdraw their petitions and forego participation in Pennsylvania’s general election. Complaint ¶¶ 31-37, 41 (citing declarations). The amount of the threatened costs – more than \$100,000 – is sufficient to

pose a substantial deterrent to the wealthiest of parties, and for the Minor Parties, it operates as an all but prohibitive bar. Complaint ¶¶ 32-37. Although the Minor Parties need not prove, at the pleading stage, that the imposition of such costs would constitute an undue burden, they have nonetheless submitted concrete evidence in support of this allegation. Complaint ¶ 41 (citing declarations).

In *Clean-Up '84*, the District Court found it “crucial” that the plaintiffs would suffer “an undue burden” if they paid the challenged signature verification fees. *Clean-Up '84*, 590 F. Supp. at 931. In effect, the Court found, such fees made it practically impossible for the plaintiffs to place their initiative on the ballot, no matter how many signatures they collected, because they could not afford to pay the required fees. *See id.* Here, too, the Minor Parties cannot afford to pay more than \$100,000 in costs to defend their right to participate in Pennsylvania’s general election, nor can they afford to assume the risk of incurring such costs. Complaint ¶ 41 (citing declarations). Further, the risk that the Minor Parties will actually incur such costs cannot be discounted as mere conjecture, because private party challengers have repeatedly made concrete and specific threats to that effect in recent elections – and Plaintiff LPPA is currently facing such a threat in the 2012 election. Complaint ¶¶ 31, 41 (citing declarations); *see In Re: Robertson*, No. 507 M.D. 2012. These threats are credible, moreover, because the Supreme Court of Pennsylvania has clarified that costs may be imposed against the Minor Parties under Section 2937 even if they do not engage in “fraud,” “bad faith” or other misconduct. *See infra* Part I.C (discussing *In Re: Farnese*, 17 A.2d 357).

In sum, Pennsylvania’s statutory scheme imposes three unequal burdens on the Minor Parties’ ability to access the general election ballot. First, the Minor Parties must shoulder the

costs of validating nomination petitions, while the major parties nominate by means of publicly funded primary elections. Second, the Minor Parties must submit ten times as many signatures, or more, as the major party candidates need in the primary election. And third, the Minor Parties must assume the risk of incurring \$100,000 or more in costs if their nomination petitions are challenged, while the major party nominees are guaranteed placement on the general election ballot, once they are selected in the primary election. As the Supreme Court has observed, “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.” *Bullock*, 405 U.S. at 144. Pennsylvania’s statutory scheme therefore violates the Minor Parties’ right to equal protection, because it makes “an electoral standard” of their ability to assume a financial burden. *Clean-Up* ‘84, 590 F. Supp. at 932 (quoting *Harper*, 383 U.S. at 666); *see also Lubin*, 415 U.S. at 719 (“ballot access must be genuinely open to all, subject to reasonable requirements”) (citation omitted).

C. Count III States a Claim Because Section 2937 Is Overbroad and Impermissibly Burdens Quintessentially Protected First Amendment Conduct.

There is no question that the Constitution permits Pennsylvania to enact reasonable ballot access restrictions that impose different requirements on major party, minor party and independent candidates. *See American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 715 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971). Section 2937 goes one fatal step further, however, by authorizing the imposition of substantial financial costs upon candidates who attempt in good faith to comply with those requirements. As such, the statute is unconstitutional on its face, because it penalizes citizens who engage in quintessentially

protected First Amendment conduct. *See Clean-Up '84*, 759 F. 2d 1511, 1513 (11th Cir. 1985) (the “solicitation of signatures for petitions” for the purpose of “communication of ideas to voters” are both protected forms of “political expression” and “political association”) (citations omitted).

The Pennsylvania Supreme Court recently clarified the standard under which costs may be imposed against candidates who submit nomination petitions pursuant to Section 2911(b). *See In Re Farnese*, 17 A.3d 357. Expressly rejecting the “heightened rule” that such costs may be imposed only where a party is found to have engaged in “fraud, bad faith, intention, or gross misconduct,” the Court clarified instead that costs may be assessed whenever it is deemed “just,” based on “the particular facts, the nature of the litigation, and other considerations as may appear relevant.” *Id.* at 370-72. Thus, candidates who defend their nomination petitions when challenged pursuant to Section 2937 may be required to pay costs even if they are not found to have engaged in any wrongdoing. The Constitution does not permit such infringement on core First Amendment freedoms.

A statute is unconstitutional on its face if it is “unconstitutional in every conceivable application,” or it “seeks to prohibit such a broad range of protected conduct” that it is “overbroad.”” *Clean-Up '84*, 759 F. 2d at 1513 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)). The touchstone of such a statute is that it poses “an unacceptable risk of the suppression of ideas.” *City Council*, 466 U.S. at 797. Under the “overbreadth” doctrine, therefore, statutes may be struck down as facially unconstitutional if they have “such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected.” *Id.* at 798 (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940)). The

requisite showing is that there is “a realistic danger” that the challenged statute “will significantly compromise recognized protections of parties not before the Court.” *Id.* at 801.

Here, the Minor Parties have made that allegation. In addition, the Minor Parties have exceeded their burden at the pleading stage, but submitting evidence that Pennsylvania’s statutory scheme is causing citizens to refrain from circulating, submitting and defending nomination petitions, and to abandon their efforts to associate for political purposes within Pennsylvania’s electoral arena, due to the threat that such activities may be thwarted or even penalized as a result of the enforcement of Section 2937. Complaint ¶¶ 31-37, 41 (citing declarations). The statute infringes upon core protected First Amendment conduct, and is therefore unconstitutional on its face.

II. The Secretary’s Motion Should Be Denied Because the Secretary Fails to Provide Grounds for Dismissal of the Complaint.

A. Plaintiffs Have Standing to Seek Injunctive Relief.

The Secretary incorrectly asserts that the Court has “already addressed” the “precise issue” of whether the Minor Parties have standing to seek injunctive relief from Section 2937. Mot. at 6 (citing *Cortes*, 712 F. Supp. 2d. at 396-98). Even if that were true – and it is not – the Minor Parties do not seek injunctive relief from Section 2937. Rather, in their Complaint and in their motion for preliminary relief (Doc. # 12.), the Minor Parties seek relief from the enforcement of the Section 2911(b) signature requirement, as applied to them. Complaint ¶ 73. Thus, the Secretary argues against a claim the Minor Parties do not make.

The Secretary’s assertion is also incorrect because the Minor Parties’ claim for injunctive relief arises from new facts and relies on new evidence that was not before the Court in *Cortes*. Specifically, when the Minor Parties commenced this action and requested such relief, they were

in the midst of their 2012 nomination petition drives. Complaint ¶¶ 42, 44, 46. Further, when the Minor Parties moved for preliminary injunctive relief from the Section 2911(b) signature requirement, they had each submitted nomination petitions as required by that provision. (Doc. # 12.) Those facts alone render *Cortes* inapplicable, because the Court's rationale in *Cortes* was expressly premised on the fact that the Minor Parties had not submitted nomination petitions, and that no challenges had been filed against them pursuant to Section 2937. *See Cortes*, 712 F. Supp. at 398.

The Secretary errs yet again by asserting, in direct contravention of the Pennsylvania Supreme Court's decision in *Farnese*, that Pennsylvania's statutory scheme poses no threat to the Minor Parties unless they "commit fraud or act in bad faith." Mot. at 7. The Pennsylvania Supreme Court could hardly have used more clear and direct language when it concluded, "We thus reject the heightened rule" that costs may be imposed under Section 2937 only "where fraud, bad faith, or gross misconduct is proven." *In Re Farnese*, 17 A.3d at 372. The Secretary is therefore wrong to insist that Pennsylvania's statutory scheme poses no imminent threat to the Minor Parties.

Finally, the Secretary also errs by citing the wrong legal standard to support the contention that the Minor Parties lack standing to bring their First Amendment claims. *E.g.*, Mot. at 6 (citing *Berg v. Obama*, 586 F. 3d 234 (3rd Cir. 2009)); Mot. at 7 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). Neither *Berg* nor *Lujan* involved First Amendment claims. The Secretary thus overlooks the Supreme Court's long line of First Amendment jurisprudence establishing special solicitude for plaintiffs, such as the Minor Parties, who seek prospective relief from overbroad statutes. *See, e.g., City Council*, 466 U.S. 789; *Thornhill*, 310 U.S. 88.

As a result of the foregoing errors, the Secretary's assertion that the Minor Parties lack standing is wrong at each step of the analysis.

1. The Minor Parties Have Alleged Injury-in-Fact.

The Minor Parties satisfy the injury in fact element by alleging that they face the threat of incurring substantial costs if they defend nomination petitions they are required by law to submit. *See* 25 P.S. §§ 2911(b), 2937. Contrary to the Secretary's contention, the Minor Parties face this threat even if they do not engage in "fraud," "bad faith" or any other misconduct. *See In Re Farnese*, 17 A.3d at 372. Further, the Secretary is wrong, as a matter of law, that "such a threat cannot support Article III standing." Mot. at 7. As the 11th Circuit has explained:

The state misconceives the overbreadth inquiry. The danger in an overbroad statute is not that actual enforcement will occur or is likely to occur, but that third parties, not before the court, may feel inhibited in utilizing their protected first amendment communications because of the existence of the overly broad statute.

Clean-Up '84, 759 F. 2d at 1514 (citing *City Council*, 466 U.S. at 799). It is therefore "no answer" to a facial challenge to insist, as the Secretary does, Mot. at 7 n.6, that the statute has not been enforced in an unconstitutional manner. *Clean-Up '84*, 759 F. 2d at 1514. Here, there is a "realistic danger" that it will be under *Farnese*, and that is all that is required. *City Council*, 466 U.S. at 801; *see also Frissell v. Rizzo*, 597 F.2d 840, 845 (3rd Cir. 1979) (the "chilling impact of money damages" on protected First Amendment conduct "is a constitutional commonplace").

The Minor Parties also satisfy the injury in fact element by alleging that they have been compelled to withdraw their nomination petitions due to the threat of incurring costs pursuant to Section 2937. Complaint ¶¶ 31-37, 41; *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

Finally, the allegations that the Minor Parties must supply their own workers, at their own expense, to validate nomination petitions they are required by law to submit also constitutes injury in fact. *See Frissell*, 597 F.2d at 845.

2. The Minor Parties Have Alleged Traceability.

The Minor Parties satisfy the traceability element by alleging that the Secretary's enforcement of Section 2911(b) causes their injuries set forth above. Complaint ¶¶ 40-47. The Secretary's assertions to the contrary are mistaken because they rest on the Secretary's erroneous belief that the Minor Parties seek to enjoin Section 2937. Because the Minor Parties seek relief from Section 2911(b), and because the Secretary enforces that provision, *see* 25 P.S. §§2913(a), 2936, the Minor Parties allege traceability.

3. The Minor Parties Allege Redressability.

The Minor Parties satisfy the redressability element because the injunctive relief they request – an order enjoining the Secretary from enforcing the Section 2911(b) signature requirement as applied – would enable them to avoid the injuries set forth above. Specifically, the Minor Parties would not be obliged to incur the costs of validating the signatures on their nomination petitions, and they would not be obliged to assume the risk of incurring their challengers' costs under Section 2937. *Cf. Clean-Up '84*, 590 F. Supp. at 934 (granting injunction against enforcement of signature verification fee); *McLaughlin*, 850 F. Supp. at 376 (same). Plaintiff CPPA, in particular, would not be obliged to withdraw from the 2012 general election. *See In Re: Goode*, No. 508 M.D. 2012.

The Secretary's contention that the Minor Parties fail to allege redressability is incorrect for the reasons set forth *supra* at Part II.A. Simply put, the Secretary is wrong that the Minor

Parties “have failed to allege any new facts” in this case. Mot. at 9. Instead, the Secretary fails to address those facts. Nonetheless, such facts are in the Complaint, and the 13 sworn declarations attached thereto, and they establish that the Minor Parties’ injuries will be redressed by a favorable decision in this case.

B. The Minor Parties Have Standing to Seek Declaratory Relief.

The Secretary’s assertion that the Minor Parties lack standing to seek declaratory relief in this matter is also incorrect for the reasons set forth *supra* at Part II.A. In particular, the Secretary’s reliance on *Cortes* is misplaced, Mot. at 9, because that case did not involve a facial challenge to Section 2937. The Secretary is also wrong that the Minor Parties do not raise any “new allegations” to support that challenge. Mot. at 10. Most important, as previously established, the Pennsylvania Supreme Court’s decision in *Farnese* constitutes a material change in state law. *See supra* at Part I.C. *Farnese* demonstrates that the Minor Parties face a “real and immediate threat” from Section 2937, and therefore, they have standing to seek declaratory relief. *Salvation Army v. N.J. Dept. of Community Affairs*, 919 F.2d 183, 192 (1990).

C. This Matter Is Ripe for Adjudication.

The Secretary’s contention that this matter is not ripe is wrong for the same reasons the Secretary’s assertions regarding standing are wrong: the Secretary misconceives the basis of the Minor Parties’ claims, misstates the facts, and misrepresents the law. *See supra* Part II.A.

In addition, the Secretary again applies an incorrect legal standard with respect to the ripeness doctrine. As a threshold matter, the Secretary’s assertion that the Minor Parties have “failed to establish a pending challenge” is false. Mot. at 10; *see In Re: Goode*, No. 508 M.D. 2012; *In Re: Robertson*, No. 507 M.D. 2012. Regardless, it also is not relevant, because the

Third Circuit has expressly adopted a “relaxed ripeness standard for First Amendment cases.” *Pennsylvania Family Institute, Inc. v. Celluci*, 489 F. Supp. 2d 460, 477 (E.D. Pa. 2007) (citing *Peachlum v. City of York*, 333 F.3d 429, 434 (3rd Cir. 2003)). Under that standard, the Third Circuit has made clear, “an individual against whom no enforcement action has been taken can still challenge a regulation.” *Peachlum*, 333 F.3d at 438.

The Secretary is therefore incorrect that the Minor Parties’ claims are not ripe.

CONCLUSION

For the foregoing reasons, the Secretary's motion to dismiss should be denied.

Dated: August 27, 2012

Mark R. Brown
Newton D. Baker/Baker &
Hostetler Professor of Law
Capital University
614-236-6590 (ph)
614-236-6956 (fx)
MBrown@law.capital.edu

Respectfully submitted,

/s/ Oliver B. Hall
Oliver B. Hall
(Motion for Admission Pending)
Center for Competitive Democracy
1835 16th Street NW #5
Washington, D.C. 20009
(202) 248-9294 (ph)
(202) 248-9345 (fx)
oliverhall@competitivedemocracy.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2012, I caused the foregoing Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss the Complaint to be served electronically, via the Court's CM/ECF system, upon the following:

Sean A. Kirkpatrick
Deputy Attorney General
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
skirkpatrick@attorneygeneral.gov

Counsel for Defendants

Ronald L. Hicks, Jr.
Meyer, Unkovic & Scott, LLP
535 Smithfield Street
1300 Oliver Building
Pittsburgh, PA 15222

Counsel for Applicants to Intervene as Defendants

/s/ Oliver B. Hall
Oliver B. Hall
Counsel for Plaintiffs