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**UNITED STATES COURT OF APPEALS**

*for the*

**THIRD CIRCUIT**

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Case No. 13-1952

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CONSTITUTION PARTY OF PENNSYLVANIA, GREEN PARTY OF PENNSYLVANIA,  
LIBERTARIAN PARTY OF PENNSYLVANIA, JOE MURPHY, JAMES CLYMER, CARL  
ROMANELLI, THOMAS ROBERT STEVENS AND KEN KRAWCHUK,

*Appellants,*

- v. -

CAROL AICHELE, JONATHAN M. MARKS AND LINDA L. KELLY,

*Appellees.*

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ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA AT NO 5:12-CV-02726-LS

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**BRIEF ON BEHALF OF APPELLANTS AND  
JOINT APPENDIX VOLUME I OF II (JA 1-20)**

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## **STATEMENT OF JURISDICTION**

This case was filed in the United States District Court for the Eastern District of Pennsylvania, pursuant to 42 U.S.C. § 1983. Plaintiff-Appellants are the Constitution Party of Pennsylvania (“CPPA”), the Green Party of Pennsylvania (“GPPA”), the Libertarian Party of Pennsylvania (“LPPA”), Joe Murphy, James Clymer, Carl Romanelli, Thomas Robert Stevens and Ken Krawchuk (collectively, the “Minor Parties”). Defendant-Appellees are Pennsylvania Secretary of State Carol Aichele, Pennsylvania Commissioner of Elections Jonathan M. Marks and Pennsylvania Attorney General Linda L. Kelly (collectively, the “Secretary”). The Defendants are named in their official capacities only.

The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. It dismissed the case in a memorandum opinion and final order entered on March 8, 2013, which disposed of all parties’ claims. JA 3-20. The Minor Parties timely noticed this appeal on April 3, 2013. JA 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

The Minor Parties asserted facial and as-applied challenges to the constitutionality of two provisions of Pennsylvania's election code. In support of their claims, they attached 13 declarations to their Complaint, which provide detailed evidence of the injury the challenged provisions cause them. They submitted four more declarations during the pendency of the proceedings, to apprise the District Court of the injury they were incurring in the current election cycle. The Secretary did not dispute any of the Minor Parties' factual allegations or evidence, but instead asserted that they fail to establish a constitutional violation, and moved to dismiss on the ground that the Minor Parties lack standing. The District Court expressly concluded that it need not accept the Minor Parties' undisputed allegations as true, and granted the motion.

The question presented for review is:

Whether the District Court erred by dismissing this case under Federal Rule of Civil Procedure 12(b)(1), on the ground that the Minor Parties lack standing?

The Secretary challenged the Minor Parties' standing in a motion to dismiss pursuant to Rule 12(b)(1), (5) and (6) filed July 25, 2012. JA 27 (Dckt. No. 8). The District Court granted the motion in its March 8, 2013 opinion and order. JA 11-19.

## STATEMENT OF RELATED CASES

In April 2009, some of the Plaintiff-Appellants in this case filed a case in the Federal District Court for the Eastern District of Pennsylvania, which challenged the constitutionality of one of the statutory provisions challenged herein. *See Constitution Party of Pennsylvania v. Cortes*, 712 F. Supp. 2d 387 (E.D. Pa. 2010). The District Court dismissed the case on standing and ripeness grounds, *see id.*, and this Court affirmed in an unreported opinion. *See Constitution Party of Pennsylvania v. Cortes*, No. 10-3205 (3rd Cir. May 19, 2011).

## STATEMENT OF THE CASE

This case raises a constitutional challenge to the statutory scheme by which Pennsylvania regulates non-major party candidates' access to the ballot. Unlike any other state in the nation, Pennsylvania requires such candidates not only to submit nomination petitions with a specific number of signatures, but also to shoulder the financial burden of validating them. It does so by permitting private parties to challenge the validity of nomination petitions submitted to the Secretary. To defend such a challenge, candidates must supply their own workers, at their own expense, to verify each signature. Further, at the conclusion of the proceedings, the defending candidates may be ordered to pay the challenger's costs, even if they are not found to have engaged in fraud, bad faith or misconduct of any kind.



On its face, Pennsylvania's statutory scheme raises grave doubt as to its constitutionality. The Supreme Court long ago made clear that states may not make the ability to pay fees or costs a condition of participating in elections, in its decisions striking down poll taxes and mandatory filing fees. *See infra* at Part I.B. Since then, federal courts have routinely invalidated election laws that impose financial burdens on candidates, voters or political parties without providing a non-monetary alternative. Several cases specifically hold that states may not require candidates to pay the cost of verifying signatures on nomination petitions they are required by law to submit. *See id.*

The logic of the foregoing cases applies here with equal force: Pennsylvania may not, consistent with Supreme Court precedent, require the Minor Parties to submit nomination petitions, and to assume the financial burden of validating them. Based on that legal theory, the Minor Parties' Complaint asserts three claims for relief from the provision requiring them to submit nomination petitions, *see* 25 P.S. § 2911(b), and the provision authorizing private parties to challenge them and collect costs. *See* 25 P.S. § 2937.<sup>1</sup> Count I asserts that Section 2911(b) and Section 2937 violate the Minor Parties' freedoms of speech, petition, assembly and association for political purposes, as guaranteed by the First and Fourteenth Amendments, by imposing substantial financial burdens on them if they defend

<sup>1</sup> Pennsylvania statutes are cited by reference to Purdon's Pennsylvania Statutes.

nomination petitions they are required by law to submit. JA 46-47 (Comp. ¶¶ 48-56). Count II asserts that Section 2911(b) and Section 2937 violate the Minor Parties' right to equal protection of the law, as guaranteed by the Fourteenth Amendment, by requiring them to bear the expense of validating nomination petitions with tens of thousands of signatures, whereas candidates of the Republican and Democratic parties are placed on the ballot automatically, by means of publicly funded primary elections. JA 47-48 (Comp. ¶¶ 57-65). Count III asserts that Section 2937 is unconstitutional on its face, because it authorizes the imposition of costs against candidates, even if they do not engage in fraud, bad faith or other misconduct, and thus chills the Minor Parties' free exercise of their rights to speech, petition, assembly and association for political purposes. JA 48-49 (Comp. ¶¶ 66-72). In their prayer for relief, the Minor Parties request a declaratory judgment holding Section 2911(b) and Section 2937 unconstitutional as applied, a declaratory judgment holding Section 2937 unconstitutional on its face, an injunction enjoining the Secretary from enforcing the signature requirement imposed by Section 2911(b), and such other relief as may be proper. JA 50.

The District Court disposed of the Complaint without reaching the merits of the Minor Parties' claims. Instead, it dismissed the case pursuant to Rule 12(b)(1), holding that the Minor Parties lack standing. JA 11-12, 19. In reaching this

conclusion, the District Court expressly declined to presume the truth of the allegations in the Minor Parties' Complaint, JA 12, and disregarded almost all the evidence they submitted in 17 supporting declarations. Providing scant analysis to support its holding, the District Court simply concluded that it was "not persuaded" by the Minor Parties' allegations. JA 16. Finally, the District Court relied heavily on this Court's unreported decision in *Cortes*, JA 18, but disregarded crucial distinctions in the case at bar, which render the analysis in that case inapposite.

### **STATEMENT OF FACTS**

This action was commenced on May 17, 2012, when the Minor Parties filed their three-count Complaint asserting as-applied challenges to Section 2911(b) and Section 2937, and a facial challenge to Section 2937. JA 31-50. In support of their claims, the Minor Parties attached 13 declarations to their Complaint, which provide detailed evidence of the injury Pennsylvania's statutory scheme causes them. JA 51-97. In particular, the declarations include multiple examples of Minor Party candidates who were compelled to withdraw nomination petitions, despite their good faith belief that they had complied with Section 2911(b), because they could not assume the financial burden of defending a challenge filed pursuant to Section 2937. The Minor Parties submitted four more declarations while the case was pending below, to apprise the District Court of injury they were sustaining in

the ongoing 2012 election.

### **The Parties**

Plaintiff-Appellants are CPPA, GPPA and LPPA, the three established political parties or bodies in Pennsylvania, other than the Republican and Democratic parties. JA 31-33 (Comp. ¶¶ 1-3). They are joined by the party chairs of CPPA, GPPA and LPPA, each of whom has a duty to build party support and recruit candidates to run as the party's nominees. JA 34-35 (Comp. ¶¶ 4, 6-7). In addition, they are joined by individual members and voter-supporters of each party, who have previously run for office as nominees of CPPA, GPPA and LPPA, and who intend to do so again. JA 34-35 (Comp. ¶¶ 5,6,8).

Defendants are Secretary of State Carol Aichele, Commissioner of Elections Jonathan M. Marks and Attorney General Linda L. Kelly. JA 35-36 (Comp. ¶¶ 9-11). They serve as Pennsylvania's chief elections officials and its chief law enforcement official, and are named in their official capacities only. *Id.* Secretary Aichele, in particular, has ultimate authority over enforcement of Pennsylvania's Election Code, including the provisions the Minor Parties challenge. JA 35 (Comp. ¶ 9).

### **Pennsylvania's Statutory Scheme**

The Pennsylvania Election Code distinguishes between political parties and

minor political parties. JA 36-37 (Comp. ¶¶ 14-15). Political parties nominate their candidates by means of publicly-funded primary elections, the winner of which automatically appears on the general election ballot. JA 37 (Comp. ¶ 16). Only the Republican Party and the Democratic Party meet the statutory definition of “political party,” and consequently only they are permitted to hold publicly-funded primary elections. JA 37 (Comp. ¶ 17).

Candidates of all other political parties or bodies and independent candidates may appear on the general election ballot only by submitting nomination petitions to the Secretary pursuant to Section 2911(b). JA 37 (Comp. ¶ 18). The Secretary must review the nomination petitions to determine whether they contain the number of signatures required by Section 2911(b), and whether they are facially defective in any way. JA 38 (Comp. ¶ 21); *see* 25 P.S. § 2936. Once the Secretary accepts the nomination petitions, they are deemed valid unless a private party files a challenge pursuant to Section 2937. JA 38 (Comp. ¶¶ 21-22).

To place their nominees for statewide office on the ballot pursuant to Section 2911(b), the Minor Parties are required to valid signatures equal in number to two percent of the entire vote cast for any candidate elected to statewide office in the prior election. JA 37 (Comp. ¶ 18). In recent elections, this number has ranged from 19,056 valid signatures to as many as 67,070 valid signatures. JA 37 (Comp.

¶ 19). By contrast, Republican and Democratic candidates only need to submit, at most, 2,000 valid signatures to appear on the primary election ballot, and the primary winner automatically appears on the general election ballot. JA 37-38 (Comp. ¶ 20); *see* 25 P.S. § 2872.1.

### **Pennsylvania's Statutory Scheme as Applied to the Minor Parties**

CPPA, GPPA and LPPA were all qualified minor parties in 2002, 2004 and 2006, because each party had a candidate on the preceding general election ballot who polled the requisite number of votes. JA 38-39 (Comp. ¶¶ 23). Following the 2004 election, two independent candidates were ordered to pay \$81,102.19 in costs to the parties who challenged their nomination petitions pursuant to Section 2937. JA 39 (Comp. ¶ 24) (citing *In re: Nomination Paper of Ralph Nader*, 905 A.2d 450 (Pa. 2006)). Although Section 2937 was enacted in 1937, this was the first reported case in which a candidate was ordered to pay costs under the statute. *Id.*

In the 2006 election, the threat of incurring costs pursuant to Section 2937 had an immediate chilling effect, and caused several Minor Party candidates either to withhold or withdraw their nomination petitions. JA 39 (Comp. ¶ 25). Such candidates include Hagan Smith, CPPA's nominee for Governor; Marakay Rogers and Christina Valente, GPPA's nominees for Governor and Lieutenant Governor, respectively; and Plaintiff Krawchuk, LPPA's nominee for U.S. Senate. JA 39

(Comp. ¶ 25) (citing First Clymer Dec. ¶ 6; Murphy Dec. ¶ 6; Kane Dec. ¶ 8; Valente Dec. ¶ 5; Robertson Dec. ¶ 5; Krawchuck Dec. ¶ 5). Only one Minor Party candidate for statewide office in 2006, Plaintiff Romanelli, the GPPA nominee for U.S. Senate, was willing to submit and defend the nomination petitions required by Section 2911(b). JA 39 (Comp. ¶ 26). Mr. Romanelli did so based on his good faith belief that the 93,829 total signatures he submitted satisfied Section 2911(b)'s requirement of 67,070 valid signatures. *Id.* Mr. Romanelli was nevertheless removed from the ballot following a challenge pursuant to Section 2937, and he was ordered to pay his challengers \$80,407.56 in costs and fees. *Id.* (citing Romanelli Dec. ¶ 5). A primary basis for the imposition of costs against Mr. Romanelli in 2006 was his inability to supply the requisite number of workers. *See In Re Rogers*, 942 A.2d 915, 923-26 (Pa. Commw. 2008).

Because no minor party candidate for statewide office appeared on Pennsylvania's 2006 general election ballot, CPPA, GPPA and LPPA all lost their status as qualified minor parties following the 2006 election. JA 40 (Comp. ¶ 27); *see* 25 P.S. 2831(a).

In 2008, LPPA submitted nomination petitions with more than the 24,666 signatures required by Section 2911(b). JA 40 (Comp. ¶ 29). No challenge was filed, and LPPA's candidates appeared on the 2008 general election ballot. *Id.*

Although CPPA and GPPA regularly complied with Section 2911(b) in the preceding election cycles, they were unable to do so in 2008, primarily because their supporters believed that any petition drive would inevitably result in a financial burden the parties were unable to bear, including the assessment of costs against their nominees. JA 40 (Comp. ¶ 30) (citing First Clymer Dec. ¶ 7; Murphy Dec. ¶ 7; Kane Dec. ¶¶ 11, 13-15; Romanelli Dec. ¶ 10).

In 2010, the Minor Parties again submitted nomination petitions pursuant to Section 2911(b), and each one was challenged pursuant to Section 2937. JA 40 (Comp. ¶ 30). Democratic candidates or their allies filed challenges against GPPA and its 2010 nominees, while Republican candidates or their allies filed challenges against LPPA and its 2010 nominees. *Id.* In some cases, the challengers made explicit threats to seek costs pursuant to Section 2937, unless the Minor Parties immediately withdrew their nomination petitions. *Id.*

For example, after challenging LPPA's nomination petitions, an attorney representing three voters aided by and affiliated with the Pennsylvania Republican Party explicitly threatened to seek "\$92,255 to \$106,455" in fees and costs if LPPA and its nominees did not immediately withdraw their nomination petitions. JA 41 (Comp. ¶ 32). On August 16, 2010, the challengers' attorney sent LPPA's attorney an email stating the following:



Following up on our conversation earlier this evening, I do not have exact figures on what our costs will be if this signature count continues and my clients are required to complete the review and/or move forward with a hearing. However, a rough estimate would be \$92,255 to \$106,455 which would include costs such as legal fees, travel and lodging, compensable time for reviewers/support staff, process servers' fees and expenses, hearing preparation, lay and expert witness fees and costs, photocopies, meals, legal research and conference call expenses, to name a few. These costs are comparable to the costs awarded in recent years by the Commonwealth Court in similar nomination paper challenges, including *In re: Nomination Papers of Nader* and *In re: Nomination Papers of Rogers (Romanelli)* which, as you know, were assessed not only against the candidates but also their lawyers and their law firms.

Please let me know if you need any further information in order to discuss with your clients a withdrawal of their candidacy for Governor, Lieutenant Governor and United States Senator. As I stated, the sooner that your clients agree to withdraw, the more likely my clients will agree to not pursue recovery of all their costs incurred in pursuing this matter.

JA 41-42 (Comp. ¶ 33) (citing Robertson Dec. ¶ 9).

As a result of this threat, and on the advice of counsel, LPPA and its nominees withdrew their nomination petitions the next day, August 17, 2010. JA 42 (Comp. ¶ 34). They did so despite their belief that the petitions included more than the 19,056 valid signatures required by Section 1911(b), because they were unable to assume the risk of incurring costs pursuant to Section 2937. *Id.* (citing Robertson Dec. ¶¶ 8-10; Rogers Dec. ¶¶ 5-6; Valleley Dec. ¶¶ 5-6; Jamison Dec. ¶¶ 5-6).

Similarly, Melvin Packer, GPPA's 2010 nominee for U.S. Senate, withdrew

his nomination petitions after Joe Sestak, the 2010 Democratic nominee for U.S. Senate, challenged them pursuant to Section 2937. JA 42 (Comp. ¶ 35). Mr. Packer did so despite his belief that the petitions included more than the 19,056 valid signatures required by Section 2911(b), because he was unable to assume the risk of incurring costs pursuant to Section 2937. *Id.* (citing Packer Dec. ¶¶ 4-6). On August 13, 2010, Mr. Packer filed a letter withdrawing his nomination petitions, which stated his belief that he had “no other choice,” due to the “financial risks” he faced if he defended Mr. Sestak’s challenge and incurred costs pursuant to Section 2937. JA 42 (Comp. ¶ 36) (citing Packer Dec. ¶ 7).

CPPA’s 2010 nominee for Governor, John Krupa, also declined to submit his nomination petitions, due to the threat of incurring costs pursuant to Section 2937. JA 43 (Comp. ¶ 37) (citing Clymer Dec. ¶ 6). Nomination petition challenges were also filed against “tea party” and independent candidates in 2010, causing them to withdraw rather than assume the risk of incurring such costs. JA 43 (Comp. ¶ 37). As a result, no candidate for statewide office, except the Republican and Democrat, appeared on Pennsylvania’s 2010 general election ballot. *Id.*

On March 29, 2011, the Supreme Court of Pennsylvania entered a decision clarifying the standard under which costs may be assessed pursuant to Section 2937. *See In Re Farnese*, 17 A.3d 357 (Pa. 2011). Expressly rejecting the

“heightened rule” that costs may be assessed only where a party is found to have engaged in “fraud, bad faith, intention or gross misconduct,” the Court held instead that costs may be imposed whenever it would be “just,” based on “the particular facts, the nature of the litigation, and other considerations as may appear relevant.” JA 43 (Comp. ¶ 38 (*quoting In Re Farnese*, 17 A.3d 357, 370-72 (Pa. 2011))).

### **The 2012 Election and the Proceedings Below**

When the Minor Parties commenced this action, in May 2012, they were in the midst of their 2012 petition drive. JA 26. During the pendency of the proceedings below, each Minor Party successfully completed its petition drive and submitted to the Secretary nomination petitions containing signatures exceeding the number required by Section 2911(b). JA 27 (Dckt. No. 13.). On August, 8, 2012, private parties challenged the CPPA and LPPA nomination petitions pursuant to Section 2937. JA 7; *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 who informed LPPA that his clients would seek “\$92,255 to \$106,455” in costs if they did not immediately withdraw their 2010 nomination petitions. JA 41-42 (Comp. ¶ 33).

Based on this imminent threat, the Minor Parties filed a Motion for Temporary Restraining Order or Preliminary Injunction filed on August 8, 2012 – the same day the CPPA and LPPA nomination petitions were challenged. JA 27 (Dckt. No. 12). The Minor Parties requested that the District Court enjoin the Secretary from enforcing the Section 2911(b) signature requirement against them, because they had substantially complied with it, and because in the absence of such relief, “they will be forced to withdraw their nomination petitions and forego participation in Pennsylvania’s 2012 general election.” *Id.*

Seven months passed before the District Court ruled on the Minor Parties’ emergency motion for preliminary relief. Then, on March 8, 2013, the District Court denied the motion as moot. JA 20. In the interim, CPPA had been forced to withdraw from the 2012 election, because it was unable to comply with an order directing that it “shall have present 20 individuals, in addition to counsel” during each day of the challenge proceedings, for the purpose of verifying the signatures on the CPPA nomination petitions, and because it could not afford to incur additional costs pursuant to Section 2937. *See* Third Clymer Dec. ¶¶ 7-14 (Dckt. No. 23-1). Meanwhile, LPPA successfully defended the challenge to its nomination petitions – but only by incurring the substantial expense of complying with an order identical to the one that precipitated CPPA’s withdrawal. JA 7. Thus,

although the District Court found it “interesting” that no petition challenges were pending when it denied the Minor Parties’ motion for preliminary relief, that is only because both CPPA and LPPA had already sustained the injury they sought to avoid.

### **STANDARD OF REVIEW**

This Court exercises plenary review over the District Court’s dismissal of the Minor Parties’ Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *See In Re: Schering-Plough Corp.*, 678 F.3d 235, 243 (3rd Cir. 2012) (citing *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007)). To determine whether a plaintiff has standing, the Court “must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the complaining party.” *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir. 2003). Although the plaintiff bears the burden of establishing the elements of standing, “each element must be supported ... with the manner and degree of evidence required at the successive stages of the litigation.” *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 838 (3rd Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice,” because the Court presumes “that general

allegations embrace those specific facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561. Only in response to a summary judgment motion must a plaintiff “set forth by affidavit or other evidence specific facts,” and even then, such facts “will be taken to be true.” *Id.* (citing Fed. R. Civ. P. 56(e)).

### **SUMMARY OF ARGUMENT**

The Minor Parties have standing to seek relief from Pennsylvania’s statutory scheme regulating minor party candidates’ access to the ballot. When they filed this case, in the midst of their 2012 petition drive, the Minor Parties face a real, imminent and direct threat of sustaining a substantial financial burden as a result of the operation of Section 2911(b) and Section 2937. That threat was realized while this action was pending, when both CPPA and LPPA had challenges filed against them, and were forced by the Secretary to incur the expense of providing 20 individuals each day of the proceedings to verify the validity of the signatures on their petitions, ultimately causing CPPA to withdraw due to an inability to bear this expense. The Minor Parties’ Complaint presents a substantial controversy, that is not abstract or hypothetical, in which the Secretary and the Minor Parties have adverse legal interests. Therefore, the Minor Parties have standing to seek declaratory relief.

The District Court improperly dismissed this case pursuant to Rule 12(b)(1),

by incorrectly treating the Secretary's facial challenge to the Minor Parties' standing under Rule 12(b)(1) as a factual challenge. Based on this error, the District Court failed to accept the Minor Parties' allegations and substantial evidence as true. The Minor Parties plainly alleged sufficient facts to establish standing to pursue their claims, supported by voluminous evidence in the record, including 17 declarations in support of the Complaint, attesting to multiple instances in which the Minor Parties were compelled to withdraw their nomination petitions under financial duress. Therefore, the District Court violated Rule 12(b)(1), and its decision should be reversed. Finally, the District Court erred by concluding the Minor Parties lack standing to assert their claim that Section 2937 is unconstitutional on its face.

## **ARGUMENT**

### **I. THE MINOR PARTIES HAVE STANDING TO SEEK RELIEF FROM PENNSYLVANIA'S STATUTORY SCHEME REGULATING MINOR PARTY CANDIDATES' ACCESS TO THE BALLOT.**

Pennsylvania's statutory scheme regulating minor party candidates' access to the ballot caused the Minor Parties injury before they instituted this action; it caused them injury while the case was pending in the court below; and it will cause them injury again in future elections, unless they obtain the relief they seek in this case. The District Court's conclusion that the Minor Parties lack standing to assert

their claims under the facts and evidence adduced in this case – at the pleading stage, when no evidence is required – is tantamount to holding Section 2911(b) and Section 2937 immune from judicial review. This was error.

**A. The Minor Parties Satisfy Each Element of Standing.**

To establish standing, plaintiffs must show: 1) that they have suffered an injury; 2) that there is a causal connection between the injury and the defendant's conduct; and 3) that the injury is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The injury must be “concrete and particularized” and “actual or imminent,” *id.* at 560, but it “need not be actualized.” *Davis v. FEC*, 554 U.S. 724, 734 (2008). Instead, “a party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.” *Id.*

In this case, the allegations and evidence show that the Minor Parties have incurred a concrete and particular injury, and that they face a real and immediate prospective injury. At the time the Complaint was filed, *see Lujan*, 504 U.S. at 571 n.4, the Minor Parties were in the midst of their 2012 petition drives, which they successfully completed while the case was pending before the District Court. JA 7. The subsequent challenges to the CPPA and LPPA petitions caused both parties substantial financial injury, including the expense of providing 20 individuals each day of the proceedings to verify the validity of the signatures on their petitions. *See*



Third Clymer Dec. ¶¶ 7-14 (Dckt. No. 23-1). In addition, CPPA was ultimately forced to withdraw from the 2012 election, because it could not afford the continued expense of defending the challenge. *See id.* Based on these facts alone, the Minor Parties have alleged a sufficiently concrete and particular injury. *See Lujan*, 504 U.S. at 560.

The record is also replete with evidence demonstrating that the Minor Parties incurred similar injury in prior elections. Specifically, the record includes multiple examples of Minor Party candidates who were compelled to withdraw their nomination petitions under financial duress. *See id.* In one case, challengers explicitly threatened to seek as much as \$106,455 in costs if the candidates did not immediately withdraw. JA 41 (Comp. ¶ 32). Such threats are especially credible following the recent decision in *Farnese*, which holds as a matter of law that costs may be assessed against any candidate under Section 2937 – even those who do not engage in fraud, bad faith or misconduct of any kind. *See In Re Farnese*, 17 A.3d at 370-72.

The allegations and evidence in the record further demonstrate that Pennsylvania’s statutory scheme will cause the Minor Parties prospective injury. Each Minor Party intends to submit nomination petitions pursuant to Section 2911(b) in future elections, and each Minor Party will sustain financial injury when

a challenge is filed pursuant to Section 2937. The threat of such injury is sufficiently immediate and direct to confer standing on the Minor Parties. *See Davis*, 554 at 734. The threat was so immediate, in fact, that it became “actualized” while this case was pending before the District Court, *id.*, and it will be actualized again in the absence of prospective relief.

The remaining two elements of standing – causation and redressability – are also satisfied. The Minor Parties’ injury is caused by the requirement that they submit nomination petitions pursuant to Section 2911(b), and in particular by the signature requirement contained therein. Because the Secretary is the state official charged with accepting nomination petitions and reviewing them for conformity with Section 2911(b), *see* 25 P.S. § 2936, the Secretary’s enforcement of Section 2911(b) is the cause of the Minor Parties’ injury. For the same reason, a declaratory judgment holding Section 2911(b) unconstitutional as applied, in conjunction with Section 2937, will redress the Minor Parties’ injury. It will relieve the Minor Parties of the financial burden of validating nomination petitions they are required by law to submit.

As the Supreme Court has recognized, when a “plaintiff is himself an object of the action (or forgone action) at issue ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or

requiring the action will redress it.” *Lujan*, 504 U.S. at 561-62. Such is the case here. Short of rejecting the allegations in the Complaint and disregarding the evidence in the record, as the District Court improperly did, there can be no denying that the Minor Parties have incurred injury as a result of Section 2911(b) and Section 2937. Therefore, they have standing to challenge these provisions. *See id.*

### **B. The Minor Parties Satisfy the Test for Declaratory Relief.**

The foregoing discussion also makes clear that the Minor Parties satisfy the test for obtaining declaratory relief. A party seeking such relief “need not have suffered the full harm expected,” but has standing if “there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *The St. Thomas-St. John Hotel & Tourism Ass’n. v. Virgin Islands*, 218 F.3d 232, 240 (3rd Cir. 2000) (quoting *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643 (3rd Cir.1990)). The purpose of this test is to ensure that a case “present[s] a justiciable controversy rather than ‘abstract, hypothetical or contingent questions.’” *Id.* (quoting *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945)).

The “substantial controversy” at issue in this case is the Minor Parties’ claim

that Pennsylvania's statutory scheme is unconstitutional insofar as it requires them to shoulder the financial burden of validating nomination petitions they are required by law to submit. JA 31-32. There is ample precedent to support that claim. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax of \$1.50 unconstitutional); *Bullock v. Carter*, 405 U.S. 134 (1972) (holding filing fees ranging as high as \$8,900 unconstitutional); *Lubin v. Panish*, 415 U.S. 709 (1974) (holding filing fees of any amount unconstitutional in the absence of non-monetary alternatives); *Belitskus v. Pizzigrilli*, 343 F.3d 632 (3rd Cir. 2003) (enjoining enforcement of Pennsylvania's filing fees against candidates unable to pay them); *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); *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928 (M.D. Fl. 1984) (declaring ten-cent per signature verification fee unconstitutional). In sharp

opposition to the foregoing line of precedent, the Secretary insists that Pennsylvania's statutory scheme is constitutionally permissible. JA 27 (Secretary's Mot. to Dismiss at 11-17) (Dckt. No. 8). This controversy is not abstract, hypothetical or contingent in any way. *See The St-Thomas-St. John Hotel & Tourism Ass'n.*, 218 F.3d at 240.

The Minor Parties and the Secretary also have adverse legal interests. When the Complaint was filed, the Secretary was enforcing the challenged statutory scheme, and the Minor Parties were seeking to avoid its enforcement. Specifically, the Minor Parties seek declaratory and injunctive relief from Section 2911(b), on the ground that its enforcement by the Secretary violates their constitutional rights, by forcing them to incur the cost of defending nomination petitions challenged pursuant to Section 2937. JA 50. As this Court concluded under a closely analogous set of facts, "the parties' interests in this action could not be more adverse." *The St. Thomas-St. John Hotel & Tourism Ass'n.*, 218 F.3d at 240.

The Minor Parties therefore have standing to seek a declaratory judgment holding Section 2911(b) and Section 2937 unconstitutional as applied to them.

## **II. THE DISTRICT COURT IMPROPERLY DISMISSED THIS CASE PURSUANT TO RULE 12(B)(1).**

It is well settled that allegations in a Complaint must be taken as true for purposes of a motion to dismiss pursuant to Rule 12(b)(1). *See Storino*, 322 F.3d at

296 (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Had the District Court adhered to this firmly established principle, it could not have concluded that the Minor Parties lack standing to pursue their claims. Because the District Court expressly declined to presume the truth of the undisputed allegations in the Complaint, however, it granted dismissal under Rule 12(b)(1). This was error.

**A. The District Court Erred By Treating the Secretary’s Facial Challenge to the Minor Parties’ Standing as a Factual Challenge.**

The District Court’s conclusion that the Minor Parties lack standing rests on a single unsupported assertion. According to the District Court, the Secretary asserts “a factual attack challenging the plaintiff’s Article III standing to bring this action.” JA 12. On the basis of this unsupported assertion, the District Court reasoned, “to the extent that certain of the plaintiffs’ jurisdictional allegations are challenged on the facts, those claims receive no presumption of truthfulness.” JA 12. Conspicuously, however, the District Court failed to identify a single allegation – “jurisdictional” or otherwise – that the Secretary actually challenges. The explanation for this omission is evident: the Secretary does not dispute any allegation in the Complaint, nor any allegation in the Minor Parties’ 17 supporting declarations. The District Court is therefore incorrect that the Secretary raises a “factual attack” against the Minor Parties’ standing.<sup>2</sup>

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2 The District Court granted the parties who challenged the Minor Parties’ 2012 nomination petitions leave to intervene, but the motion to dismiss the

This Court has emphasized the “crucial distinction” between a facial attack and a factual attack under Rule 12(b)(1). *See Mortensen v. First Federal Savings and Loan Assoc.*, 549 F.2d 884, 891 (3rd Cir. 1977). A facial attack “concerns ‘an alleged pleading deficiency’ whereas a factual attack concerns ‘the actual failure of a plaintiff’s claims to comport factually with the jurisdictional prerequisites.’” *CNA v. United States*, 535 F.3d 132, 139 (3rd Cir. 2008) (quoting *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007)). The distinction is crucial because, in reviewing a facial attack, “the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.” *In Re: Schering-Plough Corp.*, 678 F.3d 235, 243 (3rd Cir. 2012) (quoting *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)); *see Mortenson*, 549 F.2d at 891 (in reviewing a facial attack under Rule 12(b)(1), “the court must consider the allegations of the complaint as true”).

Although a factual attack would have permitted the District Court to “weigh the evidence and satisfy itself as to the existence of its power to hear the case,” *Mortenson*, 549 F.2d at 891, no such attack was presented here. As this Court has expressly concluded, “a factual jurisdictional proceeding cannot occur until

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challengers filed rested exclusively on abstention grounds, and did not raise a factual dispute. JA 28 (Dckt. Nos. 24, 25).

plaintiff's allegations have been controverted." *Id.* at 892 n.17. More recently, the Court explained that in cases where "the defendants had not answered and the parties had not engaged in discovery," a Rule 12(b)(1) motion is properly construed as presenting a facial – not factual – attack. *Askew v. Church of the Lord Jesus Christ*, 684 F.3d 413, 417 (3rd Cir. 2012). Such is the case here.

The Secretary's motion to dismiss does not controvert any of the Minor Parties' allegations. JA 27 (Secretary's Mot. to Dismiss at 11-17) (Dckt. No. 8). Rather, the Secretary asserts that, assuming the Minor Parties' allegations are true, Pennsylvania's statutory scheme does not violate their rights under the First and Fourteenth Amendments. *Id.* The Secretary contends, in other words, that the Minor Parties' Complaint "lack[s] sufficient factual allegations to establish standing," which must be construed as a facial attack under Rule 12(b)(1). *In Re: Schering-Plough Corp.*, 678 F.3d at 243. Consequently, the District Court was obligated to accept the allegations in the Complaint and its supporting declarations as true, and construe them in the light most favorable to the Minor Parties. *See id.*

**B. Had the District Court Applied the Proper Standard Under Rule 12(b)(1), It Could Not Have Concluded That the Minor Parties Lack Standing.**

The District Court's determination that the Minor Parties lack standing rests squarely on its error in treating the Secretary's facial attack as a factual attack



under Rule 12(b)(1). The District Court specifically concluded that the Minor Parties fail to allege the injury and causation elements of standing. It could not have reached that conclusion, however, if it had accepted the Minor Parties' allegations and evidence as true, as it was required to do.

Most important, the District Court summarily rejected the Minor Parties' allegations of injury as "conjectural or hypothetical." JA 16. But the Secretary does not dispute that when challenges are filed against the Minor Parties' nomination petitions pursuant to Section 2937, the Minor Parties – not the Secretary – must shoulder the financial burden of validating them. *See* 25 P.S. §§ 2936, 2937. The District Court was therefore obligated to accept this undisputed allegation as true. *See In Re: Schering-Plough Corp.*, 678 F.3d at 243. Moreover, this burden is not conjectural or hypothetical, but precisely the sort of harm that is often held to confer standing in the political context. *See Belitskus*, 343 F.3d at 641.

As the Minor Parties explain on page 1 of their Complaint, they allege that Pennsylvania's ballot access scheme is unconstitutional because it forces them "to assume the risk of incurring substantial financial burdens if they defend nomination petitions they are required by law to submit." JA 31. The Minor Parties actually incurred this injury in the 2012 election cycle, while this case was pending before the District Court, when both CPPA and LPPA were ordered to provide 20

workers each day to validate their nomination petitions. *See In Re Goode*, No. 508 M.D. 2012 (order entered August 10, 2012); *In Re Robertson*, No. 507 M.D. 2012 (same). As a direct result of this financial burden, CPPA was forced to withdraw from the election. *See Third Clymer Dec.* ¶¶ 7-14 (Dckt. No. 23-1). Although the District Court disregarded these facts, they are plainly sufficient to demonstrate injury in fact for standing purposes. *See Belitskus*, 343 F.3d at 641.

To the limited extent that the District Court addressed the Minor Parties' allegations of injury, it rejected them on the ground that it was "not persuaded" – in clear violation of the applicable standard under Rule 12(b)(1). JA 16. The District Court specifically asserted that the threat of incurring costs under Section 2937 is "speculative, hypothetical, and conjectural, and not real, immediate and direct as required for standing." JA 17. In reciting these terms, however, the District Court pointedly failed to address the voluminous evidence in the record that contradicts its conclusory assertion. The Minor Parties submitted 17 declarations in support of the Complaint, attesting to multiple instances in which they were compelled to withdraw their nomination petitions under financial duress. To cite just one example, a challenger explicitly threatened to seek up to \$106,455 in costs unless the Minor Parties withdrew their nomination petitions immediately. JA 41-42 (Comp. ¶ 33). Such a threat is plainly sufficient to establish the Minor Parties'

standing to seek prospective relief. *Davis*, 554 U.S. at 734.

Having disregarded the relevant allegations and evidence, the District Court asserted only one basis for its conclusion that the Minor Parties fail to allege the requisite injury. According to the District Court, the Minor Parties “make no allegation a court will assess costs against a candidate who acted in good faith.” JA 17. That is incorrect. In their Complaint, the Minor Parties expressly allege that “Section 2937 authorizes the imposition of costs against candidates even if they do not engage in fraud, bad faith or other misconduct.” JA 49 (Comp. ¶ 70). Furthermore, the Supreme Court of Pennsylvania has affirmed that costs may be assessed against candidates who do not engage in fraud, bad faith or misconduct of any kind. *See In Re Farnese*, 17 A.3d at 371-72. The District Court’s sole rationale for concluding that the Minor Parties do not allege the requisite injury is therefore wrong as a matter of fact and as a matter of law.

The District Court’s brief discussion of causation is equally flawed. In the District Court’s view, the Minor Parties’ injury boils down to “recruitment difficulties,” which cannot be traced to the Secretary. JA 17. But the District Court mischaracterizes the gravamen of the Minor Parties’ claims. The Minor Parties’ injury arises from the financial burden Pennsylvania’s statutory scheme imposes on them, by requiring candidates to shoulder the cost of validating the signatures on

their nomination petitions. JA 31. This burden is directly traceable to the Secretary, because the Secretary is the state official who enforces the signature requirement imposed by Section 2911(b). *See* 25 P.S. § 2936.

The only authority the District Court cited for its conclusion that the Minor Parties' injury is not traceable to the Secretary is this Court's unreported decision in *Cortes*. JA 18. The District Court disregarded several crucial distinctions in the case at bar, however, which render the standing analysis in *Cortes* inapposite. Most obvious is that *Cortes* did not involve a challenge to Section 2911(b). *See Constitution Party of PA v. Cortes*, 433 Fed. Appx. 89, 93 (3rd Cir. 2011). In addition, *Cortes* was decided without the benefit of the evidence contained in the 17 declarations submitted herein. And finally, since *Cortes* was decided, the Supreme Court of Pennsylvania entered its decision in *Farnese*, which constitutes an intervening change in Pennsylvania law. *See In Re Farnese*, 17 A.3d at 371-72. The District Court's reliance on *Cortes* is therefore misplaced, because the factual basis, legal basis and controlling law of this case are all different. Furthermore, because the challenged action in this case – enforcement of the Section 2911(b) signature requirement – is directly traceable to the Secretary, the concerns this Court raised in *Cortes* are not implicated.

In sum, the Minor Parties allege sufficient facts to establish standing to

pursue their claims. The District Court reached the opposite conclusion only because it expressly declined to accept the Minor Parties' allegations and evidence as true. In doing so, the District Court violated Rule 12(b)(1), and its decision should be reversed.

**C. The District Court Erred By Concluding the Minor Parties Lack Standing to Assert Their Claim That Section 2937 Is Unconstitutional on Its Face.**

In Count III of their Complaint, the Minor Parties assert a claim that Section 2937 is unconstitutional on its face, which the District Court failed to address. JA 48-49 (Comp. ¶¶ 66-72). The gravamen of this claim is that Section 2937 is overbroad, and chills protected First Amendment conduct, because it authorizes the imposition of costs against candidates who submit nomination petitions as required by Section 2911(b), even if they do not engage in fraud, bad faith or misconduct of any kind. JA 49 (Comp. ¶ 70). The District Court's assertion that the "identical analysis" applies to this claim, for purposes of standing, is clear error. As this Court has recognized, the standing and ripeness doctrines are "relaxed" with respect to First Amendment claims for declaratory relief, because "even in the absence of a fully concrete dispute, unconstitutional statutes or ordinances tend to chill protected expression among those who forbear speaking because of the law's very existence." *Peachlum v. City of York*, 333 F.3d 429, 434 (3rd Cir. 2003) (citation

omitted). Therefore, the District Court should also be reversed, because it failed to rule on the merits of the Minor Parties facial challenge to Section 2937.

## **CONCLUSION**

For the foregoing reasons, the decision of the District Court should be reversed, and this case should be remanded for further proceedings.

Dated: October 3, 2013

Respectfully submitted,

/s/ Oliver B. Hall

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## **CERTIFICATE OF BAR MEMBERSHIP**

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

/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 contains no more than 14,000 words, and is 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. AVG Anti-Virus version 2014 has been run on the file containing the electronic version of this brief and no viruses have been detected.

/s/ Oliver B. Hall

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Oliver B. Hall



## **CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of October 2013, I served a copy of the foregoing Brief of Appellant, including the attached Joint Appendix Volume I of II, on behalf of all Plaintiff-Appellants, by the Court's CM/ECF system, and by First Class Mail, upon the following:

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\_\_\_\_\_  
Oliver B. Hall

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**UNITED STATES COURT OF APPEALS**

*for the*

**THIRD CIRCUIT**

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Case No. 13-1952

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CONSTITUTION PARTY OF PENNSYLVANIA, GREEN PARTY OF PENNSYLVANIA,  
LIBERTARIAN PARTY OF PENNSYLVANIA, JOE MURPHY, JAMES CLYMER, CARL  
ROMANELLI, THOMAS ROBERT STEVENS AND KEN KRAWCHUK,

*Appellants,*

- v. -

CAROL AICHELE, JONATHAN M. MARKS AND LINDA L. KELLY,

*Appellees.*

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ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA AT NO 5:12-CV-02726-LS

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**JOINT APPENDIX VOLUME I OF II (JA 1- 20)**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of April, 2013, I caused the foregoing Notice of Appeal to be served via the Court's CM/ECF system, upon all counsel of record in this matter, including the following:

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

<b>CONSTITUTION PARTY, et al.,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiffs<sup>1</sup></b>	:	
	:	
<b>vs.</b>	:	<b>NO. 12-2726</b>
	:	
<b>CAROL AICHELE, et al.,</b>	:	
<b>Defendants<sup>2</sup></b>	:	

**MEMORANDUM**

**STENGEL, J.**

**March 8, 2013**

For the second time in recent years, the plaintiffs brought an action alleging Pennsylvania's ballot access scheme violates rights guaranteed by the United States Constitution by forcing them to assume the risk of incurring substantial financial burdens if they defend nomination petitions they are required by law to submit.<sup>3</sup> The plaintiffs

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<sup>1</sup> The plaintiffs are the Constitution Party of Pennsylvania and its chairman, Joe Murphy; the Green Party of Pennsylvania and its chairman, Carl Romanelli; the Libertarian Party of Pennsylvania and its chairman, Thomas Robert Stevens; James Clymer, a member of the Constitution Party; and Ken Krawchuk, a former candidate of the Libertarian Party. Since the filing of this action, the Constitution Party has decided to withdraw its nomination papers. The Green Party has not had its nomination papers challenged at all.

<sup>2</sup> The defendants include Carol Aichele, the Secretary of Pennsylvania; Jonathan Marks, the Commissioner of the Bureau of Commissions, Elections, and Legislation; and Linda Kelly, the Attorney General of Pennsylvania. On September 11, 2012, I granted the motion of six individuals to intervene as defendants in this action who had already filed timely objections in the Commonwealth Court of Pennsylvania to the nomination papers submitted by some of the plaintiffs. See Document #24. Those defendants are: Carol Sides, Richard J. Tems, Louis Nudi, Damon Kegerise, Anne Layng, and Judith Guise.

<sup>3</sup> I dismissed the previous case (5:09-cv-01691) finding that the plaintiffs had failed to present a case or controversy, as required by Article III of the Constitution. See The Constitution Party of PA, et al. v. Cortes, et al., 712 F.Supp. 2d 387 (E.D. Pa. 2010). The Third Circuit agreed and affirmed the dismissal. See The Constitution Party of PA, et al. v. Cortes, et al., 433 Fed. Appx. 89 (3d Cir. 2011).

specifically allege that 25 P.S. § 2911(b), the provision requiring the submission of nomination petitions, and 25 P.S. § 2937, the provision authorizing the imposition of costs against candidates who defend such petitions, are unconstitutional as applied to them. The plaintiffs further allege that Section 2937 is unconstitutional on its face. They seek prospective declaratory relief and prospective injunctive relief only. The defendants filed a motion to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. The intervenor-defendants filed a separate motion to dismiss and, in addition to their own arguments, incorporated the arguments set forth in the defendants' motion. After the plaintiffs responded, I held a hearing on the motions. For the following reasons, I will grant the motions to dismiss.

## **I. BACKGROUND**

Under Pennsylvania law, a political body is qualified as a political party when one of its candidates obtains a two percent level of support in the preceding general election.

Specifically, 25 P.S. § 2831(a) defines a political party as:

Any party or political body, one of whose candidates at the general election next preceding the primary polled in each of at least ten counties of the State not less than two percentum of the largest entire vote cast in each of said counties for any elected candidate, and polled a total vote in the State equal to at least two per centum of the largest entire vote cast in the State for any elected candidate, is hereby declared to be a political party within the State.

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. Based on voter registrations, the Democratic Party and the Republican Party are the only major

political parties in Pennsylvania at this time. The major political parties generally place their candidates on the November ballot through the publically-funded primary process. See 25 P.S. § 2862. Candidates who seek to appear on the Republican or Democratic primary election ballot must submit 2,000 valid signatures. See 25 P.S. § 2872.1. The winner of the primary election automatically appears on the general election ballot. See P.S. § 2882.

The second track for candidates to be placed on the November ballot is by filing nomination petitions with the Secretary of the Commonwealth. See 25 P.S. § 2872.2. All candidates who are not members of a major political party (e.g., minor political parties,<sup>4</sup> political bodies, and independents) must file nomination petitions to have their names placed on the general or municipal election ballot. Id. These 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 which included statewide candidates. See 25 P.S. § 2911(b).<sup>5</sup>

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<sup>4</sup> Minor political parties are political parties with registered membership of less than fifteen percent of the combined state-wide registration for all political parties as of the close of the registration period immediately preceding the most recent November election. 25 P.S. § 2872.2.

<sup>5</sup> Title 25 of the Pennsylvania Statutes, Section 2911(b) provides: Where the nomination is for any office to be filled by the electors of the State at large, the number of qualified electors of the State signing such nomination paper shall be at least equal to two per centum of the largest entire vote cast for any elected candidate in the State at large at the last preceding election at which State-wide candidates were voted for. In the case of all other nominations, the number of qualified electors of the electoral district signing such nomination papers shall be at least equal to two per centum of the largest entire vote cast for any officer, except a judge of a court of record, elected at the last preceding election in said electoral district for which said nomination papers are to be filed, and shall be not less than the number of signers required for nomination petitions for party candidates for the same office. In cases where a new electoral district shall have been created, the number of qualified electors signing such nomination papers, for candidates to be



By statute, the first day to circulate nomination papers is the tenth Wednesday prior to the primary. Nomination petitions must be filed with the Secretary on or before August 1st of each election year. See 25 P.S. § 2913(a). The Secretary must examine the petitions and reject them if they contain material errors apparent on their face, if they contain material alterations, or if they lack the number of signatures required. See 25 P.S. § 2936. Nomination petitions accepted by the Secretary of the Commonwealth are deemed valid unless a private party files a petition challenging them and asking that they be set aside. The private parties have seven days to file objections challenging the validity of the signatures collected. See 25 P.S. § 2937. The Commonwealth Court of Pennsylvania then reviews any objections and determines whether the name of the candidate should be placed on the ballot or stricken. Id. Any party aggrieved by the decision of Commonwealth Court may then file an appeal as of right to the Supreme Court of Pennsylvania. Title 25 of the Pennsylvania Statute, Section 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.” If the private parties lose, however, the candidate can receive costs from the challenger. See In re Farnese, 948 A.2d 215 (Pa. Commw. 2008) (assessing costs against private individuals who unsuccessfully challenge a candidate’s petition).

From February to July 2012, the minor parties collected signatures on nomination papers to qualify their candidates for placement on the ballot for the November 6, 2012

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elected at the first election held after the creation of such district, shall be at least equal to two per centum of the largest vote cast in the several election districts, which are included in the district newly created, for any officer elected in the last preceding election.

General Election. To qualify for placement on that ballot, these minor parties were required under the Pennsylvania Election Code to submit nomination papers which contain at least 20,601 signatures. See 25 P.S. § 2911(b).

On August 1, 2012, the plaintiffs submitted the signatures that they had gathered seeking to nominate certain candidates. In reviewing these signatures, the intervening defendants allegedly discovered extensive irregularities and possible fraud. Accordingly, on August 8, 2012, they filed two separate challenges to the signatures with the Commonwealth Court, asking the court to set aside the nomination papers on the basis of pervasive fraud in the signature-collection process. One challenge involved the nomination papers of nominees of the Libertarian Party of PA, see In Re: Nomination Papers of Margaret K. Robertson, et al., 507 MD 2012 (Pa. Commw. 2012), and the second challenge involved the nomination papers of nominees of the Constitution Party of PA, see In Re: Nomination Papers of Virgil H. Goode, et al., 508 MD 2012 (Pa. Commw. 2012). No such challenge was brought against the nomination papers of nominees of the Green Party of PA. It is interesting to note that on October 10, 2012, the Commonwealth Court of Pennsylvania, finding that the Libertarian Party had presented 20,730 valid signatures, dismissed the petition to set aside the party's nomination papers, and ordered the Secretary of the Commonwealth to certify the candidacy of the candidates for that party. Robertson, et al., 507 MD 2012. After a stipulated petition to withdraw the nomination papers in the case challenging the nomination papers of the Constitution Party, the Commonwealth Court ordered the Secretary of the Commonwealth to strike the names of that party's nominees from the general election

ballot. Virgil H. Goode, et al., 508 MD 2012. Thus, at this juncture, it is impossible that any of the plaintiffs will be assessed costs and fees, as the court “shall deem just,” as a result of the recent challenges to their nominating papers.

The complaint alleges that the application of Section 2911(b) and Section 2937 has severely impacted the plaintiffs and continues to impose severe burdens on them. The plaintiffs and their nominees have allegedly been compelled under financial duress to withdraw nomination petitions submitted under Section 2911(b), despite their good faith belief the petitions included enough valid signatures, because they cannot afford to assume the risk of incurring costs pursuant to Section 2937. It further alleges that the challenged provisions have thus prevented the plaintiffs from participating freely in Pennsylvania’s past elections.

For example, the complaint alleges that following the 2004 election, Ralph Nader and his running mate, two independent candidates, were ordered to pay \$81,102.19 in costs to the parties who challenged their nomination petitions pursuant to Section 2937. See In re: Nomination Paper of Ralph Nader, 905 A.2d 450 (Pa. 2006). In the 2006 election, the threat of incurring costs pursuant to Section 2937 caused several minor party candidates either to withhold or withdraw the nomination petitions required by Section 2911(b). Only one minor party candidate for statewide office in 2006 was willing to submit and defend the nomination petitions, doing so based on his good faith belief that the 93,829 total signatures he submitted satisfied Section 2911(b)’s requirement of 67,070 valid signatures. After his nomination petitions were successfully challenged in Commonwealth Court pursuant to Section 2937, Green Party candidate for Senate Carl Romanelli and his legal

counsel were assessed fees and costs of \$80,407.56. Mr. Romanelli was removed from the ballot. In re: Rogers, 942 A.2d 915 (Pa. Commw. 2008); see also In re: Rogers, 914 A.2d 457, 463 (Pa. Commw. 2007) (finding that fees were warranted as Mr. Romanelli had been disingenuous with the court and failed to comply with the court's Order).

The complaint further alleges that Democratic candidates or their allies filed challenges against the Green Party of PA and its 2010 nominees, while Republican candidates or their allies filed challenges against the Libertarian Party of PA and its 2010 nominees. In some cases, the challengers allegedly made explicit threats to seek costs pursuant to Section 2937, unless the plaintiffs immediately withdrew their nomination petitions. For example, after challenging the Libertarian Party of PA's nomination petitions, an attorney representing three voters aided by and affiliated with the Pennsylvania Republican Party allegedly threatened to seek "\$92,255 to \$106,455" in fees and costs if the party and its nominees did not immediately withdraw their nomination petitions. As a result of this threat, and on the advice of counsel, the Libertarian Party of PA and its nominees withdrew their nomination petitions the next day, August 17, 2010.

Similarly, a 2010 Green Party of PA nominee withdrew his nomination petitions after they were challenged by a Democratic nominee for the same office. He did so despite his belief that the petitions included more than the amount of valid signatures required by Section 2911(b), because he was unable to assume the risk of incurring costs pursuant to Section 2937. On August 13, 2010, the nominee filed a letter withdrawing his nomination petitions, which stated his belief that he had "no other choice," due to the

“financial risks” he faced if he defended the challenge and incurred costs pursuant to Section 2937.

A 2010 Constitution Party of PA nominee also declined to submit his nomination petitions in order to avoid the threat of incurring costs pursuant to Section 2937.

Nomination petition challenges were also filed against “tea party” and independent candidates in 2010, causing them to withdraw rather than assume the risk of incurring such costs. As a result, no candidate for statewide office, except the Republican and Democratic nominees, appeared on Pennsylvania’s 2010 general election ballot.

Finally, the complaint alleges that the Constitution Party of PA, the Green Party of PA, and the Libertarian Party of PA each have member-supporters who want to seek public office as their parties’ nominees in future elections, but who cannot afford to incur costs pursuant to Section 2937. In addition, their member-supporters are allegedly increasingly reluctant to dedicate the time and resources necessary to conduct a successful petition drive, because they know that the filing of a challenge pursuant to Section 2937 may force the petitions to be withdrawn, whether or not they include enough valid signatures to comply with Section 2911(b). In fact, the plaintiffs attach several “declarations” of those involved with the minor parties which describe the general reluctance to participate in elections because of the assessments of costs and fees in previous elections.

The plaintiffs insist that because Pennsylvania law provides no alternative means for them to place their nominees on the general election ballot, Section 2911(b) and Section 2937 interfere with their core functions of presenting their candidates to the

electorate and building support for their parties' platforms, and with their goal of building viable minor political parties.

In their prayer for relief in the current case, the plaintiffs seek a declaratory judgment holding 25 P.S. § 2911(b) and 25 P.S. § 2937 unconstitutional as applied to the plaintiffs. Next, they seek a declaratory judgment holding 25 P.S. § 2937 unconstitutional on its face. Finally, the plaintiffs seek an injunction enjoining the defendants and any other official of the Commonwealth of Pennsylvania from enforcing the signature requirement imposed by 25 P.S. § 2911(b).

## II. LEGAL STANDARD

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a court must grant a motion to dismiss if it lacks subject-matter jurisdiction to hear a claim. “A motion to dismiss for want of standing is also properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter.” Ballentine v. U.S., 486 F.3d 806, 810 (3d Cir. 2007). A 12(b)(1) motion to dismiss may be treated as either a “facial or factual challenge to the court’s subject matter jurisdiction.” Gould Electronics Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000). Under a facial attack, the movant challenges the legal sufficiency of the claim and the court considers only “the allegations of the complaint and documents referenced therein and attached thereto in the light most favorable to the plaintiff.” Id. In reviewing a factual attack, however, the challenge is to the actual alleged jurisdictional facts. Thus, a court is free in that instance to consider evidence outside the pleadings. Id. Finally, once a 12(b)(1) challenge is raised, the burden shifts and the plaintiff must demonstrate the existence of subject-matter jurisdiction. PBGC v. White, 998 F.2d 1192,

1196 (3d Cir. 2000). Here, the defendants bring a factual attack challenging the plaintiffs' Article III standing to bring this action and its ripeness, thereby stripping this court of its subject matter jurisdiction. Thus, to the extent that certain of the plaintiffs' jurisdictional allegations are challenged on the facts, those claims receive no presumption of truthfulness.

Under Rule 12(b)(6), a court must grant a motion to dismiss if the plaintiff fails "to state a claim upon which relief can be granted." In deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true the well-pleaded allegations of the complaint and draw all reasonable inferences in the plaintiff's favor. Brown v. Card Serv. Ctr., 464 F.3d 450, 452 (3d Cir. 2006). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). The plaintiffs' claims are brought under 42 U.S.C. § 1983, therefore this court has jurisdiction under 28 U.S.C. § 1331.

### **III. DISCUSSION**

Article III of the United States Constitution limits the power of federal courts to resolve cases or controversies. "A declaratory judgment or injunction can issue only when the constitutional standing requirements of a 'case' or 'controversy' are met." St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. U.S. Virgin Islands, 218 F.3d 232, 241 (3d Cir. 2000). Requests for declaratory relief cannot hinge solely on hypothetical or contingent questions. Id. The case or controversy requirement is met when "there is a

substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Id. Courts ensure that the case or controversy requirement is met by following several justiciability doctrines, including standing, ripeness, mootness, the political question doctrine, and the prohibition on advisory opinions. Toll Bros., Inc. v. Twp. of Readington, 555 F.3d 131, 143 (3d Cir. 2009). These justiciability doctrines “state fundamental limits on federal judicial power in our system of government.” Allen v. Wright, 468 U.S. 737, 750 (1984). “The Article III doctrine that requires a litigant to have ‘standing’ to invoke the power of a federal court is perhaps the most important of these doctrines.” Id.; see also Sprint Communications Co. v. APCC Servs., Inc., 554 U.S. 269, 273 (2008) (the “case-or-controversy requirement is satisfied only where a plaintiff has standing”).

### **A. Standing**

The doctrine of standing helps identify which disputes are justiciable under the case or controversy requirement. “As an incident to the elaboration of this bedrock [case or controversy] requirement, this court has always required that a litigant have “standing” to challenge the action sought to be adjudicated in the lawsuit.” Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). At a minimum, three elements are needed to establish constitutional standing under Article III: (1) injury-in-fact, (2) causation (or traceability), and (3) redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). An injury-in-fact is an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Id. at 560-561. Second, there must be a causal



connection between the injury and the offending conduct. Id. Thus, the injury must be “fairly traceable” to the challenged action of the defendant. Id. Finally, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Id. at 561.

The fact that this action includes a request for declaratory judgment does not eliminate the requirement of standing -- rather, “[a] declaratory judgment may issue only where the constitutional standing requirements of a justiciable controversy are satisfied.” National Ass’n For Stock Car Auto Racing, Inc. v. Scharle, 184 Fed. Appx. 270, 274 (3d Cir. 2006); see also St. Thomas-St. John Hotel & Tourism Ass’n, 218 F.3d at 240 (“A declaratory judgment or injunction can issue only when the constitutional standing requirements of a case or controversy are met”).

In the declaratory judgment context, the Third Circuit Court of Appeals has acknowledged that declaratory judgments are “frequently sought before injury has actually happened” and that in those cases standing requirements are satisfied when “there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643, 647 (3d Cir. 1990) (quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)).

Here, in considering the issue of standing, the identical analysis applies to all three counts in this complaint. In Count One, the plaintiffs request a declaratory judgment pursuant to 42 U.S.C. § 1983 holding 25 P.S. §§ 2911(b) and 2937 unconstitutional as applied. They allege that Section 2911(b) and Section 2937 violate their freedoms of

speech, petition, assembly and association for political purposes, and their right to due process of law, as guaranteed by the First and Fourteenth Amendments, by imposing or threatening to impose substantial financial burdens on them, without limitation, if they defend nomination petitions they are required by law to submit.

In Count Two of the complaint, the plaintiffs request a declaratory judgment pursuant to 42 U.S.C. § 1983 holding 25 P.S. §§ 2911(b) and § 2937 unconstitutional as applied. They allege that both sections violate their right to equal protection of law, as guaranteed by the Fourteenth Amendment, to place nominees on the general election ballot pursuant to Section 2911(b), by requiring them to submit nomination petitions with tens of thousands of valid signatures, when the Republican and Democratic candidates for statewide office must submit at most 2,000 signatures. The plaintiffs allege that they are further injured because private parties may challenge their nomination petitions, forcing them to assume the risk of incurring costs or to withdraw from the general election.

In Count Three, the plaintiffs request a declaratory judgment pursuant to 42 U.S.C. § 1983 holding 25 P.S. § 2937 unconstitutional on its face. They allege that Section 2937 chills their free exercise of their rights to speech, petition, assembly, and association for political purposes by requiring them to assume the risk of incurring substantial financial burdens if they defend nomination petitions they are required to submit pursuant to Section 2911(b).

“A plaintiff seeking a declaratory judgment must possess constitutional standing but need not have suffered ‘the full harm expected.’” Khodara Environmental, Inc., v.

Blakey, 376 F.3d 187, 193 (3d Cir. 2004) (quoting The St. Thomas-St. John Hotel & Tourism Ass’n, 218 F.3d at 240). A plaintiff seeking a declaratory judgment “has Article III standing if ‘there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” Id.; see also Davis v. FEC, 554 U.S. 724, 734 (2008) (“the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct”).

When this complaint was filed, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 n.4 (1992) (the existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed), the injury the plaintiffs alleged could not be considered a “real, immediate, and direct injury.” The complaint does not present a “substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” In fact, the threat of injury they allege is far from actual or imminent. For example, the plaintiffs allege that potential candidates’ right to ballot access is chilled because of the *possibility* of assessed costs. Even though declarations were attached to the complaint indicating a reluctance to participate in the elections, the threat of assessed cost remains “conjectural or hypothetical.”

I am also not persuaded by the plaintiffs’ argument that because non-major party candidates have been assessed costs in the past, their future candidates will be assessed costs. In the two cases assessing sanctions against non-major party candidates, the Pennsylvania courts found that the candidates had participated in fraud, bad faith, or

similar inappropriate conduct prior to assessing costs. Nader, 905 A.2d at 455; Rogers, 942 A.2d 915, 930-931 (Pa. Super. 2008). The plaintiffs make no allegation a court will access costs against a candidate who acted in good faith. See Pa. Prison Soc’y v. Cortes, 508 F.3d 156, 167 (3d Cir. 2007) (the plaintiff failed to establish an injury-in-fact where it did not establish a sufficient likelihood it would be personally injured by the amendments). Thus, the plaintiffs’ alleged injury is speculative, hypothetical, and conjectural, and not real, immediate, and direct as required for standing.

Even if such an injury were established here, there would be no causal connection between the injury and the challenged action of the defendants. To establish causation or traceability “[t]he plaintiff must establish that the defendant’s challenged actions, and not the actions of some third party, caused the plaintiff’s injury.” Toll Bros., Inc., 555 F.3d at 142 (citing Lujan, 504 U.S. at 560). Unlike the injury-in-fact prong, which “focuses on whether the plaintiff suffered harm, . . . the traceability prong focuses on who inflicted that harm.” Id. An indirect causal relationship will suffice if “there is ‘a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant.’” Id. (quoting Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000)).

The hypothetical injury that the plaintiffs claim is that the possibility of being assessed costs and fees has made it more difficult to recruit candidates to place on the ballot, and to keep candidates from withdrawing their nominating petitions when challenged. The complaint and its attached declarations contain nothing more than

conclusory assertions blaming the imposition of fees and costs for the recruitment difficulties.

As the Court of Appeals for the Third Circuit stated in the minor parties' previous case:

“The District Court could not conclude that the increased difficulty in recruitment is caused by the potential imposition of fees and not by a change in general public opinion, a change in the effectiveness of recruitment strategies or party leadership, or any multitude of other factors that could result in a minor party fielding a candidate for election on one year and failing to do so in a subsequent year. In other words, the District Court could not conclude ‘that the defendant’s challenged actions, and not the actions of some third party, caused the plaintiff’s injury.’”

The Constitution Party of PA, et al. v. Pedro A. Cortes, et al., 433 Fed. Appx. 89, 93 (3d Cir. 2011). The court further stated that “any injury that occurred as a result of individuals withdrawing their nominating petitions was caused by those individuals’ voluntary choice to withdraw their petitions, and not by any action on the part of defendants.” Id. The same analysis still holds true here. Although the plaintiffs blame their recruitment difficulties on the possibility of being assessed fees and costs, they provide nothing more than conjecture and conclusory assertions as support. As the Third Circuit noted, “any multitude of other factors” could result in a potential candidate’s reluctance to proceed in an election. Id. The declarations attached to the complaint refer to the Pennsylvania courts’ previous assessments of costs and fees in recent years after challenges to the nomination papers, yet make no allegation that a court would assess costs against a candidate who acted in good

faith. See Pa. Prison Soc’y v. Cortes, 508 F.3d at 167. Thus, even if an injury were established here, the plaintiffs have not established causation.

Having concluded that no injury or causation can be established here, I need not consider the issue of redressability or whether the plaintiffs’ claims are ripe. Constitution Party of PA, 433 Fed. Appx. at 93. Without all three elements of standing, there is no case or controversy as is required by Article III of the United States Constitution. Id. Accordingly, I find that this court is without jurisdiction to hear this case, and will grant the defendants’ motions to dismiss.

An appropriate Order follows.

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

<b>CONSTITUTION PARTY, et al.,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiffs</b>	:	
	:	
<b>vs.</b>	:	<b>NO. 12-2726</b>
	:	
<b>CAROL AICHELE, et al.,</b>	:	
<b>Defendants</b>	:	

**ORDER**

**AND NOW**, this 8th day of March, 2013, upon consideration of the defendants' motion to dismiss (Document #8), the intervenor-defendants' motion to dismiss (Document #25), the responses of the plaintiffs thereto, and after a hearing on the motions, **IT IS HEREBY ORDERED** that the motions are **GRANTED**.

**IT IS FURTHER ORDERED** that the plaintiffs' motion for preliminary injunction (Document #12), is **DENIED AS MOOT**.

The Clerk of Court is directed to mark this case **CLOSED** for statistical purposes.

**BY THE COURT:**

/s/ Lawrence F. Stengel  
**LAWRENCE F. STENGEL, J.**