

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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**No. 13-1952**

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**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; KEN KRAWCHUK,**

**Appellants**

**v.**

**CAROL AICHELE; JONATHAN M. MARKS; ATTORNEY GENERAL OF  
PENNSYLVANIA**

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**BRIEF FOR APPELLEES**

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APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
ENTERED MARCH 8, 2013

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## **STATEMENT OF JURISDICTION**

This is a civil rights action brought pursuant to 42 U.S.C. § 1983, raising claims based on the First and Fourteenth Amendments to the United States Constitution. In general, as provided in 28 U.S.C. §§ 1331 and 1343, the district courts have subject matter jurisdiction over § 1983 constitutional claims. In this instance, however, the district court concluded that it lacked jurisdiction because the plaintiffs did not have standing to litigate their particular claims (*See* JA3-JA19).

This appeal is from a final order, entered on March 8, 2013 (JA20). The notice of appeal was filed on April 3, 2013 (JA1). This Court has appellate jurisdiction by virtue of 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUE

*Three minor political parties and five individuals sought to challenge the constitutionality of certain provisions of the Pennsylvania Election Code, but their case was dismissed for lack of standing.*

Did the district court correctly conclude that there was no Article III case or controversy between the plaintiffs and the Commonwealth officials they sued, and that dismissal of the case pursuant to Fed.R.Civ.P. 12(b)(1) was therefore warranted?

## STATEMENT OF THE CASE

This is an election-law-related case, brought by some of the same litigants who tried to raise similar ballot-access claims in *Constitution Party of Pennsylvania v. Cortes*, 712 F. Supp.2d 387 (E.D. Pa. 2010), *aff'd*, 433 Fed. Appx. 89 (3d Cir. 2011), but were found not to have standing. The district court reached a comparable conclusion here and dismissed this action. Its ruling should be affirmed.

In the district court, the plaintiffs were The Constitution Party of Pennsylvania, The Green Party of Pennsylvania, The Libertarian Party of Pennsylvania, and five individuals with connections to those parties (JA 32-35 (complaint, ¶¶ 1-8)).<sup>1</sup> Collectively, they refer to themselves as “the Minor Parties” (Brief on Behalf of Appellants [“MP brf.”], at 1), and that convention will be followed in this brief.

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<sup>1</sup> According to the complaint, plaintiff Joe Murphy is a “voter-supporter and chairman” of the Constitution Party; plaintiff James N. Clymer is a “voter-supporter and member” of the Constitution Party who intends to seek public office as a Constitution Party nominee in the future; plaintiff Carl J. Romanelli is a “voter-supporter and chairman” of the Green Party; plaintiff Thomas Robert Stevens is chairman of the Libertarian Party; and plaintiff Ken Krawchuk is a “voter-supporter and former candidate” of the Libertarian party who intends to seek public office as a Libertarian Party nominee in the future (*See* JA34-JA35).

Seeking prospective declaratory and injunctive relief, the Minor Parties sued three Pennsylvania state government officials, strictly in their official capacities. The named defendants in the district court were Carol Aichele, Secretary of the Commonwealth; Jonathan M. Marks, Commissioner of the Pennsylvania Bureau of Commissions, Elections, and Legislation; and the Attorney General of Pennsylvania (JA35-JA36 (complaint, ¶¶ 9-11)).<sup>2</sup>

Collectively, defendants below, now appellees, will be referred to here as “the officials.”<sup>3</sup> Without differentiating among them, the Minor Parties set forth three distinct claims against the three officials, jointly. In Count I of their complaint,<sup>4</sup> they requested a declaratory judgment holding Pa. Stat. Ann., tit. 25, § 2911(b) (Purdon 2007), and Pa. Stat. Ann., tit. 25, § 2937 (Purdon 2007)

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<sup>2</sup> The Secretary of the Commonwealth is an executive official who serves as the head of the Department of State. *See* Pa. Stat. Ann., tit. 71, §§ 61(a), 66 (Purdon 2012). The Bureau of Commissions, Elections and Legislation is a bureau within that department. The Attorney General is an independent elected official who performs a range of statutorily prescribed duties. *See* PA. CONST. art. 4, § 4.1; Pa. Stat. Ann., tit. 71, § 732-201 (Purdon 2012). When the complaint in this case was filed, the Attorney General was Linda L. Kelly. The current Attorney General is Kathleen G. Kane, who should be substituted pursuant to Fed.R.App.P. 43(c).

<sup>3</sup> Because the Attorney General is separately elected and, organizationally, has no connection to the Secretary of the Commonwealth, the Minor Parties’ shorthand reference, throughout their brief, to all three of their opponents as if they were one (as “the Secretary”) is not appropriate.

<sup>4</sup> Thirteen separate declarations were attached to and made a part of the complaint (*See* JA51-JA97). The declarations reiterate the allegations (and legal conclusions) in the complaint, in somewhat greater detail.

unconstitutional as applied, on First Amendment grounds (*See* JA46-JA47).<sup>5</sup> In Count II, too, they requested a declaratory judgment holding the same two statutory provisions unconstitutional as applied, this time on Equal Protection grounds (*See* JA47-JA48). And in Count III, they requested a declaratory judgment with regard to § 2937 only, on the ground that it is facially unconstitutional because it chills the Minor Parties' exercise of their rights under the First Amendment (*See* JA48-JA49).

The officials filed a motion to dismiss on various jurisdictional and substantive grounds (*See* JA27 (Doc. No. 8)). Before responding to that motion, the Minor Parties moved for a preliminary injunction or TRO, which the officials opposed (*See* JA27 (Doc. No. 12, 18)). Within days, six individuals moved to intervene as defendants, and that motion was granted over the Minor Parties'

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<sup>5</sup> In substance, the challenged provisions now codified in title 25 of Purdon's Pennsylvania Statutes, at §§ 2911(b) and 2937, were originally enacted as §§ 951 and 977 of the Election Code, respectively. The latter designations were not used in the district court and will not be used here. For simplicity's sake, the officials will refer to the provisions at issue (and related Election Code provisions) by their Purdon's section numbers alone.

As further explained *infra*, § 2911(b) concerns "Nominations by political bodies," and § 2937 pertains to "Objections to nomination petitions and papers."

opposition (*See* JA27-JA28 (Doc. No. 14, 19, 24)).<sup>6</sup> Meanwhile, the Minor Parties did file a response to the officials' motion to dismiss (*See* JA28 (Doc. No. 21)).

In anticipation of a hearing on the Minor Parties' motion for injunctive relief, they and the officials entered into and filed a Joint Stipulation of Facts (with five documentary exhibits attached) (*See* JA28 (Doc. No. 22)). The Minor Parties also offered an additional declaration in support of their contentions (*See* JA28 (Doc. No. 23)). Then, on September 11, 2012, the district court heard oral argument on both the officials' pending motion to dismiss and the Minor Parties' pending injunction request, and took the case under advisement (*See* JA 29 (Doc. No. 27, 32-33)).

By memorandum and order entered March 8, 2013 (JA3-JA20), the district court agreed with the officials on the threshold issue of standing and dismissed the Minor Parties' complaint on that basis (*See* JA12-JA19). The court concluded that the Minor Parties lacked standing because neither "injury" nor "causation" could be established, and that it was therefore unnecessary to consider "the issue of

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<sup>6</sup> The intervenors (who, at that time, were pursuing Commonwealth Court challenges to certain of the Minor Parties' nominating petitions) then filed their own motion to dismiss, which the Minor Parties' opposed, as well as a response in opposition to the Minor Parties' pending motion for injunctive relief (*See* JA28-JA29 (Doc. No. 25, 26, 28)). Any rulings by the trial court with respect to any of the intervenors' separate contentions are irrelevant at this juncture, because the Minor Parties do not directly question them and the intervenors opted not to become involved in this appeal.

redressability or whether the plaintiffs' claims are ripe" (JA19). In addition, having dismissed the action as a whole, the court denied the Minor Parties' motion for a preliminary injunction as moot (JA20).

After the district court's March 8, 2013 ruling, the Minor Parties filed a timely Notice of Appeal (JA1). Only the dismissal order is now at issue; the denial of the Minor Parties' motion for injunctive relief is not being challenged in this Court (*See, e.g.*, MP brf., at 2).



## STATEMENT OF FACTS

As already noted, this § 1983 case concerns two provisions of the Pennsylvania Election Code, codified in Purdon's as §§ 2911(b) and 2937, and the alleged constitutional ramifications of their application to non-major political parties and candidates. In essence, the Minor Parties contend that their rights have been violated because of the possibility that – in the event of a successful challenge to one of their nomination petitions – they may be ordered to pay the challenger's costs.

To understand both the events that gave rise to this litigation and the two sides' legal arguments, one must be aware of how elections are conducted in Pennsylvania, pursuant to §§ 2911(b) and 2937 (and certain other sections of the Election Code). The very existence of several recent state and federal court decisions, interpreting §§ 2911(b) and 2937, also needs to be taken into account.

### **Statutory Framework<sup>7</sup>**

Under Pennsylvania law, a political body qualifies as a “political party” when one of its candidates obtains a 2% level of support in the preceding general

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<sup>7</sup> The summary that follows is based on the statute itself and on the averments in ¶¶ 14-22 of the Minor Parties' complaint (*see* JA36-JA38), which the district court recapitulated in its memorandum (*see* JA4-JA6).

election. *See* § 2831(a). Political parties with registered membership under 15% of the state-wide registration for all political parties are defined as minor political parties. *See* § 2872.2. Currently, the Democratic Party and the Republican Party are the only political parties in the Commonwealth with sufficient membership to fall outside the “minor political party” definition.

Non-minor political parties (that is, the Democrats and the Republicans) place their candidates on the general election ballot through the primary system, which is publicly funded. *See* § 2862. To get on the primary ballot, candidates must collect up to 2,000 signatures from party members (depending on the office sought). *See* § 2872.1. The winner of a party’s primary election for a certain office becomes the party’s general election candidate for that office. *See* § 2882.

There are no primaries for minor political parties (or for political bodies not recognized as parties). They place their candidates (and independent candidates place their names) on the general election ballot by circulating and submitting nomination petitions. *See* §§ 2872.2, 2911. To secure a place on the general election ballot via nomination petition, a candidate must collect signatures of registered voters (regardless of party), and the number of valid signatures must equal or exceed 2% of the vote total of the candidate who obtained the most votes for statewide office in the previous election. *See* § 2911(b). Suffice it to say, far more than 2,000 signatures are needed to meet this requirement.

The timeframe within which nominating petitions are to be circulated and submitted to the Secretary of the Commonwealth for review is defined by statute. *See* § 2913. No nomination petition “shall be permitted to be filed” if, upon examination by the Secretary, it fails to comply with the standards spelled out in § 2936. For example, a petition will be rejected if it “contains material errors or defects apparent on the face,” if it contains “material alterations made after signing without the consent of the signers,” or if “it does not contain a sufficient number of signatures as required by law.” *Id.*

Under the Election Code, a nomination petition that the Secretary *does* accept and file is “deemed to be valid,” unless a private party files timely objections and asks for the petition to be set aside. *See* § 2937. In that event, the Commonwealth Court of Pennsylvania must conduct appropriate proceedings, “without delay,” to hear the objections and determine whether they are valid or not. *Id.* Further, and of particular relevance to the Minor Parties’ claims in this matter, “[i]n case any such [nomination] petition is dismissed [*e.g.*, if objections to the petition have been sustained], the court shall make such order as to the payment of the costs of the proceedings, including witness fees, as it shall deem just.” *Id.*

### **Relevant Developments in the Courts Before this Case**

This case, filed on May 17, 2012, is by no means the first to question, or attempt to question, the meaning and application of §§ 2911(b) and 2937. In

particular, there are five appellate decisions, rendered between 2006 and 2011, that cannot be ignored. Besides being potentially applicable legal precedents, they are also part of the factual backdrop that existed when the Minor Parties decided to bring this suit. Indeed, the Minor Parties allude to some of the decisions, and their purported impact, in the “Factual Background” section of their complaint. What is more, the Minor Parties themselves were directly involved in three of the five prior cases.

*First:* On August 22, 2006, the Pennsylvania Supreme Court decided *In re Nomination Paper of Nader*, 905 A.2d 450 (Pa. 2006), *cert. denied*, 549 U.S. 1117 (2007), which the Minor Parties mention in ¶ 24 of their complaint (JA39). *Nader* affirmed Commonwealth Court orders that had set aside the nomination papers of presidential candidate Ralph Nader and his running mate, Peter Camejo, because their signature-gathering process had been an extraordinarily “deceitful and fraudulent exercise.” *Id.*, 905 A.2d at 455. Pursuant to § 2937, the candidates were ordered to pay \$81,102.19 toward the successful challengers’ hearing and transcription costs. *Id.* The Supreme Court emphatically rejected all of the candidates’ appellate arguments, including their allegation that the orders imposing costs were “manifestly unfair” and constituted an “unconstitutional penalty against the exercise of political speech.” *Nader*, 905 A.2d at 459.

*Second:* A few weeks after the *Nader* decision, this Court decided *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006), *cert denied*, 552 U.S. 826 (2007), rejecting as-applied First Amendment and Equal Protection challenges to the 2% signature requirement that a minor political party candidate must meet, under § 2911(b), to be placed on the general election ballot in Pennsylvania. The Minor Parties do not mention *Rogers* in their complaint or cite it in their brief, even though three of them – the Green Party of Pennsylvania, the Constitution Party of Pennsylvania, and Ken Krawchuk – were also plaintiffs in *Rogers* and the claims they now raise in Counts I and II of their complaint (*see* JA46-JA48) echo, in part, those raised in *Rogers*.<sup>8</sup>

*Third:* There followed another case which is titled “*Rogers*” but which actually addresses the propriety of a costs order against Carl J. Romanelli, who was, at the time, a candidate for office whose nomination petition had been successfully challenged and now is a party to the present case. *See In re Nomination Paper of Rogers*, 942 A.2d 915 (Pa. Cmwlth.), *aff’d*, 959 A.2d 903 (Pa. 2008) (*per curiam*). Guided by the *Nader* opinion, the Commonwealth Court ordered Mr. Romanelli and his counsel to pay \$80,407.56 in costs to four

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<sup>8</sup> Basically, the *Rogers* plaintiffs challenged the combined effect of §§ 2911(b) and 2831(a), *see id.*, 468 F.3d at 195, whereas here the Minor Parties challenge § 2911(b) in conjunction with the costs provision in § 2937.

prevailing challengers, pursuant to § 2937. *Rogers*, 942 A.2d at 930, 933. The Minor Parties allude to this order in ¶ 26 of their complaint (JA39-JA40) but do not acknowledge the court’s underlying rationale for it, *i.e.*, that “Candidate [Mr. Romanelli] was not cooperative, often times disingenuous to the process.” *Id.*, 942 A.2d at 928, 932. Nor do the Minor Parties acknowledge the Commonwealth Court’s additional finding, based on *Nader*, that “[t]he constitutional issues raised by Candidate in opposition to the award of costs are without merit.” *Rogers*, 942 A.2d at 930 n.17.

*Fourth:* In *Constitution Party of Pennsylvania v. Cortes*, 433 Fed. Appx. 89 (3d Cir. 2011) (“*Constitution Party I*”), some of the same litigants who are now before this Court (the Constitution Party, the Green Party, and the Libertarian Party), along with three other plaintiffs, sued the officials’ predecessors, in their official capacities (as well as some other defendants), raising constitutional challenges that overlap significantly with the claims raised here. Specifically, the Minor Parties alleged then, and do again now, that the provision in § 2937 authorizing the imposition of costs is unconstitutional as applied to them.<sup>9</sup> Finding that they lacked standing, this Court affirmed the dismissal of that case.

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<sup>9</sup> In *Constitution Party I*, the Minor Parties questioned not only § 2937 but also §§ 2872.2 and 3155. They alleged “that their candidates are forced either to submit a nominating petition [pursuant to § 2872.2] and risk the imposition of tens of thousands of dollars of costs and fees [pursuant to § 2937] should their petitions [continued....]

*Fifth:* Most recently, the Pennsylvania Supreme Court decided *In re Nomination Petition of Farnese*, 17 A.3d 357 (Pa. 2011), mentioned by the Minor Parties in ¶ 38 of their complaint (JA43). In *Farnese*, objections to a candidate's nomination petition were dismissed and the candidate was granted costs by the Commonwealth Court, but the Supreme Court reversed, rejecting both sides' interpretations of § 2937. *See Id.*, 17 A.3d at 371-372.<sup>10</sup> The Supreme Court concluded that, pursuant to the statute, costs are *not* awardable automatically, but only as the court "shall deem just," which "contemplates a more nuanced, calibrated decision[.]" *Id.*, 17 A.3d at 370-371. As the court explained, any presumption in favor of cost-shifting would be in tension with the plain language of § 2937 and contrary to the "American Rule," under which "shifting of costs is exceptional." *Id.* Whether to shift costs to the losing party in a particular case is a "discretionary assessment," which requires consideration of multiple factors: the conduct of the parties, the relative strength of their legal positions, the policies to

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not withstand scrutiny, or to run as write-in candidates and risk having the votes that were cast for them ignored [in violation of § 3155]." *Constitution Party I*, 433 Fed. Appx. at 91.

<sup>10</sup> The prevailing candidate favored a presumption in favor of awarding costs whenever someone prevails in a nomination petition challenge. The unsuccessful objectors had "propose[d] a simple, blackletter rule that parties must prove fraud, bad faith, intention or gross misconduct to recover costs in election matters." *Farnese*, 17 A.3d at 371.

be served by the statute, and the practical realities (such as expedited scheduling) inherent in election-contest proceedings. *Id.*, 17 A.3d at 372-373.

### **The Minor Parties' Allegations<sup>11</sup>**

In 2002, 2004, and 2006, the Constitution Party, the Green Party, and the Libertarian Party of Pennsylvania were all considered qualified minor parties because each had a candidate on the preceding general election ballot who polled sufficient votes, as required under the Election Code (JA38-JA39). For the 2006 election, however, and in the wake of the *Nader* decision, plaintiff Krawchuk and three other Minor Party nominees either withheld or withdrew their nomination petitions (JA39). According to the Minor Parties, they did this because of the “threat” of incurring costs pursuant to § 2937 (*Id.*).

Plaintiff Romanelli, Green Party candidate for the U.S. Senate in 2006, did submit and defend nomination petitions as required under § 2911(b). To his regret, the Commonwealth Court removed him from the ballot and ordered him to pay \$80,407.56 to those who successfully challenged his petitions (JA39-JA40). *See Rogers*, 942 A.2d at 930, 933. As noted above, in arriving at this decision, the court determined, among other things, that the award against Mr. Romanelli was

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<sup>11</sup> Unless otherwise specified, the summary of the Minor Parties' factual allegations is based on their complaint (*See* JA38-JA46).



justified because, most notably, he had been uncooperative and disingenuous. *Id.*, 942 A.2d at 928, 932.

In the next election cycle, in 2008, the Libertarian Party of Pennsylvania submitted nomination petitions with an ample number of signatures, as required under § 2911(b), and succeeded in regaining minor party status, so Libertarian candidates appeared on the general election ballot that year (JA40).<sup>12</sup> The Constitution Party and the Green Party were unable to do likewise (*Id.*). The Minor Parties assert that this was “because their supporters were unwilling to devote time and resources to a petition drive that might result in a substantial assessment of costs against their nominees” (*Id.*).

In 2010, major party candidates or their allies filed challenges to Green Party and Libertarian Party nomination petitions (JA41). In some instances, according to the Minor Parties, “the challengers made explicit threats to seek costs” if the petitioners did not immediately withdraw their petitions (JA41-JA42). After receiving what they perceived as a threat, the Libertarian Party and its nominees withdrew their 2010 nomination petitions, as did the Green Party nominee for U.S. Senate, all purportedly because they were concerned about the risk of being ordered to pay challengers’ costs pursuant to § 2937 (JA42). Allegedly for the

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<sup>12</sup> No one challenged the Libertarian Party’s 2008 petitions (JA40).

same reason, the Constitution Party's 2010 nominee for Governor declined even to submit his nomination petitions (JA 43).

When the Minor Parties filed this action in mid-2012, they were conducting petition drives for the upcoming 2012 election (*See, e.g.*, MP brf., at 14). By the applicable deadline, candidates from the Libertarian Party, the Constitution Party, and the Green Party of Pennsylvania each filed nomination papers with the Secretary of State, who reviewed and accepted the candidates' papers (Doc. No. 22, Stipulation, ¶¶ 2-3, 12-13, 18-19).<sup>13</sup>

No one timely objected to the Green Party candidates' nomination papers (Doc. No. 22, Stipulation, ¶ 20).

A petition to set aside the nomination papers of the 2012 Libertarian Party candidates was filed in Commonwealth Court and docketed as *In re Nomination Papers of Margaret K. Robertson, et al.*, No. 507 M.D. 2012 (Doc. No. 22, Stipulation, ¶ 7). Among other forms of relief, that petition asked for the party and its candidates to pay the costs of the proceedings (Doc. No. 22, Stipulation, ¶ 8). Ultimately, however, on October 10, 2012, the court dismissed the petition to set

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<sup>13</sup> Plaintiff Joseph Murphy was the Constitution Party nominee for Vice President of the United States (Doc. No. 22, Stipulation, ¶ 12). Initially, plaintiff Carl Romanelli was the Green Party nominee for Vice President of the United States but he withdrew and the party substitute-nominated Cheri Honkala in his place (Doc. No. 22, Stipulation, ¶¶ 18, 21-22).

aside the Libertarian Party's nomination papers and ordered the Secretary of the Commonwealth to certify the party's candidates.<sup>14</sup> Having defeated the challenge, the Libertarian Party and its candidates obviously were not required to pay the challengers' costs.

There was also a Commonwealth Court petition to set aside the 2012 nomination papers of the Constitution Party candidates. It was docketed as *In re Nomination Papers of Virgil H. Goode, et al.*, No. 508 M.D. 2012 (Doc. No. 22, Stipulation, ¶ 14). Among other forms of relief, that petition, too, asked for the party and its candidates to pay the costs of the proceedings (Doc. No. 22, Stipulation, ¶ 15).

Unlike the challenge to the Libertarian Party candidates, the challenge to the Constitution Party candidates did not go very far. With the consent of the objectors, the party and its candidates stipulated to the "withdrawal with prejudice

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<sup>14</sup> The docket for *In re Nomination Papers of Margaret K. Robertson, et al.*, No. 507 M.D. 2012, available through the website of the Unified Judicial System, (see <http://ujportal.pacourts.us/DocketSheets/Appellate.aspx>), summarizes the entire history of that proceeding, including the substance of the Commonwealth Court's October 10, 2012 ruling, which is a matter of public record. In ruling upon a motion to dismiss, a court may consider public records, including those pertaining to judicial proceedings. See, e.g., *Southern Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999) (summarizing caselaw). In addition, "[t]he record of a related state case is a proper object of judicial notice." *Munoz v. City of Philadelphia*, 346 Fed. Appx. 766, 771 n.11 (3d Cir. 2009) (citing *Lumen Const. v. Brant Const.*, 780 F.2d 691, 697 (7th Cir. 1985)).

of the Nomination Papers,” on the ground that “the Nomination Papers did not contain the minimum valid signatures required to successfully sustain a petition to be placed on the ballot” (Doc. No. 22, Stipulation, ¶ 16; Doc. No. 22-4, Commonwealth Court stipulation). They further stipulated that “[t]he parties shall pay their own fees and costs” (Doc. No. 22-4, Commonwealth Court stipulation, at ¶ 4). One day later, on August 22, 2012, the Commonwealth Court entered an order, consistent with the stipulation, setting aside the nomination papers of the Constitution Party and its candidates; striking the names of the party’s candidates from the 2012 general election ballot; and directing each party to the proceeding to “bear his or her own fees and costs” (Doc. No. 22-5, Commonwealth Court order. *See also* Doc. No. 22, Stipulation, ¶ 17).<sup>15</sup>

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<sup>15</sup> Thus, the *Goode* proceeding in Commonwealth Court ended two weeks after it began, well before the district court heard argument on the motions to dismiss and for injunctive relief in this matter.

## STATEMENT OF RELATED CASES

This case has not previously been before this Court. However, as the Minor Parties point out (*see* MP brf., at 3) and as noted elsewhere in this brief, it is related to *Constitution Party of Pennsylvania v. Cortes*, No. 10-3205 (3d Cir. May 19, 2011). This case was brought by three of the same parties who brought that earlier case, *Constitution Party I*; they (and their current co-plaintiffs) have sued successors-in-office to three of the defendants in *Constitution Party I*, and the legal issues raised here are similar, although not identical, to those raised and decided in *Constitution Party I*.

Also, this case is factually related to the now-concluded election contest proceedings docketed in the Commonwealth Court of Pennsylvania as *In re Nomination Papers of Margaret K. Robertson, et al.*, No. 507 M.D. 2012, and *In re Nomination Papers of Virgil H. Goode, et al.*, No. 508 M.D. 2012.

## SUMMARY OF ARGUMENT

This is the latest of several attempts invalidate, or avoid application of, §§ 2911(b) and 2937. Despite the Minor Parties' professed concern about being ordered to pay burdensome costs in the future (pursuant to § 2937), they did not present an Article III case or controversy, so dismissal of their suit was warranted.

Standing – the main issue here – is an essential prerequisite to the exercise of federal subject matter jurisdiction, including in declaratory judgment actions (where the “full harm expected” often has not yet occurred). The Minor Parties, however, did not allege a “substantial controversy” – between themselves and the defendant officials – of sufficient immediacy and reality to warrant the grant of declaratory relief. Nor did the Minor Parties satisfy the general three-prong test for standing. *First*, to meet the key injury-in-fact requirement, all they could offer was a “chain of contingencies” amounting to “mere speculation,” which is insufficient. (Past exposure to allegedly illegal conduct does not confer standing on a litigant to seek prospective relief.) *Second*, they could not show causation or traceability. The § 2911(b) petition provisions are valid, and the officials accepted the Minor Parties' 2012 petitions. Private parties, not the officials, initiate any petition challenges, and Commonwealth Court, not the officials, adjudicates petition challenges and decides whether imposition of § 2937 costs is justified. *Third*, without injury or causation, “redressability” could not be established either.

## ARGUMENT

This is a species of preemptive action, brought by the Minor Parties in an effort to invalidate statutory provisions that they detest and worry about – even though those provisions – § 2911(b), coupled with § 2937 – were not applied to them as feared in the two years preceding the filing of this action, and may never be applied to them in the future (least of all by the officials they have sued).<sup>16</sup> The federal courts cannot entertain such a challenge.

The Minor Parties contend, rather sweepingly, that Pennsylvania’s whole “ballot access scheme” violates their rights because it “forc[es] them to assume the risk of incurring substantial financial burdens if they defend nomination petitions they are required by law to submit” (JA31). More specifically, they want this Court to exempt them from § 2911(b), which “require[es] the submission of nomination petitions,” and § 2937, which “authoriz[es] the imposition of costs

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<sup>16</sup> In 2008, the Commonwealth Court did order plaintiff Romanelli and his then-attorney to pay prevailing nomination petition challengers’ costs pursuant to § 2937 (as well as counsel fees pursuant to Pa. Stat. Ann., tit. 42, § 2503(7) (Purdon 2004)). *See Rogers*, 942 A.2d 915. Any attempt to contest that determination in this litigation would be time-barred (and probably barred for other reasons as well). In Pennsylvania, actions such as this, brought under 42 U.S.C. § 1983, are subject to a two-year statute of limitations. *E.g., Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 599 (3d Cir. 1998). Having filed this case on May 17, 2012 (*see* JA21), the Minor Parties could only pursue causes of action that accrued after May 17, 2010.

against candidates who defend such petitions” (JA32). But the constitutionality of § 2911(b) is not open to debate, in light of *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006), *cert. denied*, 552 U.S. 826 (2007). And even if, in the abstract, the constitutionality of § 2937 might be debatable,<sup>17</sup> this particular controversy is not justiciable, as the district court correctly concluded.

**THE MINOR PARTIES’ CLAIMS WERE PROPERLY DISMISSED FOR LACK OF JURISDICTION BECAUSE THERE WAS NO ARTICLE III CASE OR CONTROVERSY BETWEEN THEM AND THE OFFICIALS.**

*Standard of review:*

Federal courts have subject-matter jurisdiction to decide “Cases” and “Controversies.” *See* U.S. CONST. art III, § 2. This Court exercises plenary review over jurisdictional determinations, including those involving standing and related

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<sup>17</sup> Existing decisions suggest otherwise. In *Nader*, 905 A.2d at 459, the Pennsylvania Supreme Court rebuffed a constitutional challenge to the imposition of costs pursuant to § 2937, and the Commonwealth Court reached the same conclusion in *Rogers*, 942 A.2d at 930 n.17 (citing *Nader*). While state court decisions are not binding on this Court, they are still entitled to credence. *See Guarino v. Larsen*, 11 F.3d 1151, 1157 (3d Cir. 1993) (“Just as federal courts should presume that pending state court proceedings can correctly resolve federal questions, they should also presume that completed state court proceedings have correctly resolved those questions”). *See also Burt v. Titlow*, 571 U.S. \_\_\_\_ (2013), 2013 WL 5904117, at \*4 (U.S. Nov. 5, 2013) (state courts are “adequate forums” for vindication of federal rights, and are “presumptively competent” to adjudicate constitutional claims).



Article III doctrines. *See, e.g., In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012); *Common Cause of Pennsylvania v. Commonwealth of Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009); *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994).

\* \* \* \* \*

The district court resolved this matter on standing grounds, and standing is the primary issue to be addressed now. Because it was the Minor Parties who sought to invoke the court’s jurisdiction, it was their burden to establish their standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Common Cause*, 558 F.3d at 257. They did not do so, as the officials will explain. Before turning to substantive issues, however, a procedural point warrants attention.

**A. On this Record, it does not Matter Whether the Officials’ Challenge to the Minor Parties’ Standing is Termed “Facial” or “Factual.”**

Challenges to subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) may be “facial” or “factual.” *See Schering Plough*, 678 F.3d at 243; *Common Cause*, 558 F.3d at 257. In general, a facial attack is based on the sufficiency of the pleadings alone, and the plaintiff’s factual allegations are presumed to be true, while a factual attack entails consideration of information beyond the pleadings. *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977).

The Minor Parties criticize the district court at some length for treating this as a factual, rather than facial, attack on its subject matter jurisdiction and, consequently, for not accepting their allegations at face value (*See* MP brf., at 25-27). There are three problems with this argument.

First, had the officials' motion to dismiss been brought solely under Fed.R.Civ.P. 12(b)(6), *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), unquestionably would have governed. *Iqbal* and other cases teach that, in adjudicating a motion to dismiss, a district court must accept the plaintiff's factual averments but is not required to credit bald assertions and legal conclusions in the complaint. Logically, the same principle must apply when a court considers a facial attack on jurisdiction, brought under Fed.R.Civ.P. 12(b)(1). *See Mortensen*, 549 F.2d at 891.

The Minor Parties' complaint (including attachments) was peppered with argumentative statements, legal conclusions and expressions of opinion, all of which were beside the point. Accepting assertions of fact is one thing, and the district court did that (*compare* JA4-JA6, JA8-JA10 (memorandum) *and* JA36-JA46 (complaint)), but the district court was not obliged to agree with the Minor Parties' *interpretation* of the facts, or their legal conclusions. *See, e.g., Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011), *cert. denied*, 132 S.Ct. 1861 (2012) (courts must identify but disregard "allegations that, because they are

no more than conclusions, are not entitled to the assumption of truth”) (internal quotation marks and citations omitted).

Second, the elements of standing “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case,” so each “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561. *See also Pennsylvania Prison Society v. Cortes*, 508 F.3d 156, 161 (3d Cir. 2007). The focus is on the averments in the complaint, but “the proof required to establish standing increases as the suit proceeds.” *Davis v. FEC*, 554 U.S. 724, 734 (2008).

By filing their motion for injunctive relief, the Minor Parties themselves caused this case to advance beyond the pleading stage (albeit not to the point where the officials were required to answer the complaint). That, in turn, resulted – appropriately – in additional information being presented to the district court, and the district court was entitled to take that additional information (largely stipulated) into account in its standing analysis. If that transformed the officials’ lack-of-standing challenge to the court’s jurisdiction from “facial” to “factual,” the change was invited by the Minor Parties.<sup>18</sup>

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<sup>18</sup> Even while faulting the district court for not confining its analysis to the contents of their complaint (*see* MP brf., at 25-25), the Minor Parties point to and [continued....]

Third, the actual facts of this case were not contested in any real sense anyway, at any point during the district court proceedings. The preliminary injunction “hearing” was an oral argument, not a trial-type adversarial proceeding (*See generally* Doc. No. 32 (transcript)). The district court did not have to find facts by sifting through competing accounts in order to decide what “really” happened, and it did not do so. Nor did the court disadvantage the Minor Parties, inappropriately, by ignoring the facts they focused on in their complaint. (For the court to consider additional facts as well is another matter, but still was appropriate.) In the end, and notwithstanding the facial-versus-factual terminology in the district court’s memorandum (JA11-JA12), the court simply applied the law to indisputable facts and concluded that, on those facts, the Minor Parties lacked standing.

**B. Well-established Standing Requirements Apply to this Declaratory Judgment Action.**

The Article III case-or-controversy prerequisite for the exercise of federal court jurisdiction is enforced through several justiciability doctrines, including standing, ripeness, mootness, and others. *See, e.g., Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 137 (3d Cir. 2009) (citing *DaimlerChrysler Corp. v.*

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rely on subsequent developments to support their standing arguments on appeal (*see* MP brf., at 19-20).

*Cuno*, 547 U.S. 332, 352 (2006)). “[P]erhaps the most important of these” is standing. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

Standing jurisprudence is vast, but the core principles are “familiar,” *DaimlerChrysler*, 547 U.S. at 342, and the Minor Parties cannot and do not question them as a general proposition (*See* MP brf., at 19). “The ‘irreducible constitutional minimum’ of Article III standing consists of three elements.” *Toll Bros.*, 555 F.3d at 137 (quoting *Lujan*, 504 U.S. at 560):

- *Injury-in-fact*: The plaintiff must have suffered a concrete, particularized injury, which must be actual or imminent, not conjectural or hypothetical;
- *Traceability (or causation)*: The plaintiff’s claimed injury must result from and be fairly traceable to the challenged action of the defendant (not the result of independent action by some third party who is not before the court); and
- *Redressability*: It must be likely that the plaintiff’s claimed injury will actually be redressed by a favorable court decision.

*See generally, e.g., Clapper v. Amnesty International USA*, 133 S.Ct. 1138, 1147 (2013); *Davis*, 554 U.S. at 733; *Common Cause*, 558 F.3d at 258; *Pennsylvania Prison Society*, 508 F.3d at 160-161.

“[A] plaintiff must demonstrate standing for each claim he seeks to press.” *Davis*, 554 U.S. at 734 (quoting *DaimlerChrysler*, 547 U.S. at 352). Furthermore, “a plaintiff must demonstrate standing separately for each form of relief sought.” *DaimlerChrysler*, 547 U.S. at 352 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

Here, the Minor Parties pleaded three substantively overlapping claims (that is, claims that §§ 2911(b) and 2937 violate the First Amendment, the Fourteenth Amendment, or both), and they requested a declaratory judgment on each of their claims (*See* JA46-JA49). In other words, they raised three § 1983 claims, based on the same facts and related legal theories, and they sought the same form of relief on all three claims. This being so, the district court noted that “in considering the issue of standing, the identical analysis applies to all three counts in the complaint” (JA14).<sup>19</sup> For the court to take this approach was entirely reasonable; had the court

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<sup>19</sup> Citing only *Peachlum v. City of York*, 333 F.3d 429 (3d Cir. 2003), a ripeness case, the Minor Parties suggest that the district court’s “identical analysis” assertion amounts to “clear error” and warrants a remand, to enable the court to rule on the merits of their separate facial challenge to § 2937, in Count III of their complaint (MP brf., at 32-33). This point is not persuasive. Without discussing standing as such, *Peachlum* does say that a facial First Amendment challenge “is subject to a relaxed ripeness standard,” because of judicial concern that unconstitutional statutes may “tend to chill protected expression among those who forbear speaking because of the law’s very existence.” *Id.*, 333 F.3d at 434-435. This does not mean, of course, that every facial First Amendment challenge is *ipso facto* justiciable. This one was not, for the reasons discussed in the text. But even if the district court might have considered the Minor Parties’ standing to pursue

[continued....]

done otherwise, its decision on standing would have been unnecessarily long and repetitious.<sup>20</sup>

As the district court also understood (*see* JA14), in a case like this, where the plaintiff seeks declaratory relief, the Article III case-or-controversy requirement is not eliminated. “Although declaratory judgments are frequently sought in advance of the full harm expected, they must still present a justiciable controversy rather than abstract, hypothetical or contingent questions.” *The St. Thomas-St. John*

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Count III separately from their standing to pursue Counts I and II of their complaint (a point not conceded), the court’s so-called failure to do so was ultimately harmless. “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully[.]” *United States v. Salerno*, 481 U.S. 739, 745 (1987). As articulated in *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009), and prior decisions:

[T]his court will not invalidate a statute on its face simply because it *may* be applied unconstitutionally, but only if it *cannot* be applied consistently with the Constitution. ... [A] facial challenge will succeed only if [the statute in question] is unconstitutional in every conceivable application, or ... it seeks to prohibit such a broad range of protected conduct that it is constitutionally overbroad.

*Id.*, 586 F.3d at 269 (internal quotation marks and citations omitted; emphases in original). The statute the Minor Parties want to challenge on its face, § 2937, has already withstood two as-applied constitutional challenges. *See Nader*, 905 A.2d at 459; *Rogers*, 942 A.2d at 930 n.17. For that reason, any facial challenge would fail.

<sup>20</sup> Such an across-the-board approach is not always appropriate. For example, in *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), the plaintiff did not have standing to pursue injunctive relief, although he did still have standing to seek money damages.

*Hotel & Tourism Ass’n, Inc. v. Govt. of the United States Virgin Islands*, 218 F.3d 232, 240 (3d Cir. 2000) (internal quotation marks eliminated).

And for there to be a case or controversy in a declaratory judgment action, the plaintiff must still have standing, even if a concrete “injury” has not yet been inflicted. To satisfy the standing requirement in this context, the plaintiff must show, first of all, that “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.*

As a practical matter, this does not supplant the usual three-step analytical framework for addressing standing questions. Rather, in matters where the plaintiff is requesting declaratory relief, there is an extra layer to the analysis. Assuming there is an immediate, substantial controversy between parties with adverse interests (for declaratory judgment purposes), the inquiry is not over. The injury requirement, the traceability or causation requirement, and the redressability requirement for standing must still be satisfied too. *See Khodara Environmental, Inc. v. Blakey*, 376 F.3d 187, 193-196 (3d Cir. 2004) (addressing dimensions of controversy first; then considering injury in light of those conclusions; then turning to causation and redressability).

With these principles in mind, the particulars of this case must be scrutinized.



**C. The Minor Parties did not Meet the Threshold Test for Pursuing a Declaratory Judgment Action.**

The Minor Parties argue that they were entitled, in general, to seek declaratory relief (*See* MP brf., at 22-24). They misunderstand, however, what is needed in order to press a declaratory judgment claim.

As just mentioned, a litigant cannot seek (or obtain) obtain a declaratory judgment without showing that there exists a “substantial controversy” between parties having adverse legal interests, and that controversy must be of sufficient immediacy and reality to warrant the grant of declaratory relief. The Minor Parties do not meet these criteria.

In an effort to explain why there is a substantial controversy here, the Minor parties fill almost an entire page of their brief with citations to past election-related decisions in favor of voters and candidates, dating back to 1966 (MP brf., at 23). But that is, frankly, a very simplistic argument, based on cases that are readily distinguishable from this one.<sup>21</sup> Just as voters and candidates have prevailed on

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<sup>21</sup> For example, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), struck down a poll tax imposed on every resident, as a precondition to voting. *Lubin v. Panish*, 415 U.S. 709 (1974), invalidated fixed filing fees charged to all candidates, even those who were indigent, without exception. Obviously this case has nothing to do with immutable financial barriers to voting or running for office in the first place. Nor does this case resemble those, cited by the Minor Parties, where up-front signature verification fees imposed on potential candidates were found improper. *See Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992);

[continued....]

some constitutional theories over the years, they have lost on others. In contrast to the Minor Parties' citations, *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006), *cert. denied*, 552 U.S. 826 (2007), is a prime example, because it – like this case – dealt with § 2911(b), and held it constitutional. *See also, e.g., Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding constitutionality of Georgia nomination petition procedures for non-party political bodies); *Biener v. Calio*, 361 F.3d 206 (3d Cir.), *cert. denied*, 543 U.S. 817 (2004) (upholding constitutionality of primary election filing fee for non-indigent candidates). The Minor Parties undoubtedly believe their legal quest is a pressing one, but it is not legally “significant” simply because they say it is.

The Minor Parties' attempt to characterize their interests and those of the three officials they have sued as “adverse” is also a stretch. The Attorney General does not have a discrete role in administering the Pennsylvania Election Code, especially §§ 2911(b) and 2937, and should not even have been named as a defendant in the present litigation. *Cf. Rode v. Dellarciprete*, 845 F.2d 1195, 1207-1209 & n.9 (3d Cir. 1988) (§ 1983 claim against Attorney General properly dismissed, as he was not a necessary party; moreover, absent action or threatened

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*McLaughlin v. North Carolina Bd. of Elections*, 850 F. Supp. 373 (M.D.N.C. 1994); *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928 (M.D. Fla. 1984). The other cited cases differ from this one as well.

action by the Attorney General under challenged statute, there was no case or controversy against him).

The Secretary of the Commonwealth (defendant Aichele) and her subordinate (defendant Marks) do administer the Election Code, for all Pennsylvanians, but that alone does not mean the interests of those two officials and those of the Minor Parties are “adverse.” The most the two officials actually did in this instance was review *and accept* the Minor Parties’ 2012 nomination petitions. They, as Commonwealth officials, do work for the Department of State, but vis-à-vis the Minor Parties’ petitions, Department officials had no further duties or responsibilities after the petitions were accepted. Crucially, and by law, the Department has no role in the challenge process, and no stake in the outcome of any petition challenge.

Finally, to move forward with their declaratory judgment claims, the Minor Parties had to present a controversy of “sufficient immediacy and reality,” not merely “abstract, hypothetical or contingent questions.” *St. Thomas-St. John Hotel & Tourism Ass’n*, 218 F.3d at 240. They did not do that either. When they filed this lawsuit, they were still conducting their petition drives. What lay ahead was a host of contingencies. The Minor Parties might or might not collect a sufficient number of signatures to get on the ballot; even if they did, their petitions might or might not pass muster on initial review; even if they did, private parties might or

might not challenge the petitions; even if challenges were lodged, they might or might not be successful; and even if one or more challenges did succeed, Commonwealth Court might or might not order the Minor Parties to pay the prevailing challengers' costs.<sup>22</sup> Given all those uncertainties, it is impossible to say that the Minor Parties confronted a real, immediate problem that warranted judicial intervention.

**D. Nor Did the Minor Parties Satisfy Basic Standing Requirements.**

Before and after the declaratory judgment contentions in the Minor Parties' brief, they argue broadly that they "satisfy each element of standing" (*See* MP brf., at 19-22) and, separately, they attack the district court's analysis of the injury and causation elements (*See* MP brf., at 27-32). Their discussion of injury-in-fact is weak; their treatment of causation is even weaker; and the flaw in their causation argument carries over to undermine their redressability argument as well.

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<sup>22</sup> The Minor Parties have stressed that in *In re Farnese*, 17 A.3d 357 (Pa. 2011), the Pennsylvania Supreme Court held that costs may be assessed pursuant to § 2937 even in the absence of fraud, bad faith, or gross misconduct (MP brf., at 13-14, 20, 30. *See also* JA43 (complaint, ¶ 38)). That is not incorrect, but it is incomplete. *Farnese* also holds that costs may *not* be assessed pursuant to § 2937 automatically; the court must undertake a more nuanced analysis of all the circumstances in a given case. *See Farnese*, 17 A.3d at 370-373.

# **1. Lack of injury-in-fact.**

What qualifies as injury-in-fact has been articulated in countless cases, in countless ways. The Minor Parties are correct that, for standing purposes, the plaintiff's claimed legal injury must be "actual or imminent" but "need not be actualized," as long as the threatened injury is "real, immediate, and direct" (MP brf., at 19 (citations omitted)). But the conclusion urged by the Minor Parties – that they meet the applicable test – is not correct.

It bears repeating that an injury-in-fact is not just any affront but "an invasion of a legally protected interest" that is "concrete and particularized," not "conjectural or hypothetical." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 41 (3d Cir. 2011); *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir. 2003). Abstract allegations of "possible future injury" are not enough, unless the threatened injury is "certainly impending." *Reilly*, 664 F.3d at 42 (internal quotation marks and citations omitted). *See also Clapper*, 133 S.Ct. at 1147; *Storino*, 322 F.3d at 297. A "chain of contingencies" that amounts to "mere speculation" will not suffice. *Clapper*, 133 S.Ct. at 1148.

In deciding whether a litigant has standing, the focus is ordinarily on the situation as it existed upon the filing of the plaintiff's complaint. *See Lujan*, 504 U.S. at 569 n.4. When the Minor Parties filed their complaint (and attached declarations), the thrust of their claims appeared to pertain to the prospect of their

being assessed costs in the future pursuant to § 2937 (*See* JA44-JA46 (complaint, ¶¶ 41-47). *See also* MP brf., at 30). For much the same reason that they did not present a real, immediate controversy for declaratory judgment purposes, however, they also did not plead a certainly-impending injury, due to the operation of § 2937. As was true in *Storino*, the Minor Parties' claimed injury cannot be described "without beginning the explanation with the word 'if.'" *Storino*, 322 F.3d at 297-298. Notwithstanding their contrary assertion, their purported "costs" injury is "in reality, conjectural." *Id.*, 322 F.3d at 298.<sup>23</sup>

While troubling for the Minor Parties to contemplate, their fear of having to pay costs some day, if they come out on the short end of a petition challenge, may never be realized. It does not rise to the level of injury-in-fact.

Perhaps recognizing the tenuousness of claiming that possibly having to pay a prevailing challenger's costs pursuant to § 2937 amounts to an actionable injury, the Minor Parties attempt to broaden the scope of their constitutional challenge.

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<sup>23</sup> The fact that the Minor Parties "incurred similar [financial] injury in prior elections" (*see* MP Brf., at 20) does not alter the calculus. Past exposure to illegal conduct does not give rise to a case or controversy, or justify seeking prospective relief, when the possibility of a recurrence of that conduct, affecting the same plaintiff(s), is abstract, speculative, or contingent. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102-107 (1983). *See also Reilly*, 664 F.3d at 42-43 (following *Lyons*).

To this end, 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’” (MP brf., at 28 (quoting complaint)). They go on to argue that they “actually incurred this injury in the 2012 election cycle” when both the Constitution Party and the Libertarian party “were ordered to provide 20 workers each day to validate their nomination petitions” (MP brf., at 28-29. *See also id.*, at 19). This does not save them.

The problem of having to provide workers to review challenged petitions did not yet exist when the Minor Parties filed their complaint. (The petitions themselves were still being circulated; they had not yet been submitted for review, let alone challenged.) More important, unlike a genuine (and arguably questionable) verification or validation fee, *see, e.g., Fulani*, 973 F.2d at 1544, any monetary burden associated with providing workers to review petitions was not statutorily-based, mandatory, fixed, inevitable, or discriminatorily-imposed. Although incident to the 2012 petition challenges, both sides to the challenges had to incur this cost, by Commonwealth Court order (*See* Doc. No.32, at 33-34

(transcript). *See also Robertson* on-line dockets, *supra* n. 14, at 10, 8/10/12 entry).

This did not invade a legally protected interest possessed by the Minor Parties.<sup>24</sup>

*Belitskus v. Pizzingrilli*, 343 F.3d 641, 632 (3d Cir. 2003), cited by the Minor Parties (MP brf., at 29), does not say otherwise. The types of financial burdens listed there, that did amount to injuries for standing purposes, were up-front and unavoidable, even if not yet suffered. The potential financial burdens the Minor Parties hang their hats on are ones they may or may not ever have to shoulder. They did not and cannot establish injury-in-fact.

## **2. Lack of causation or traceability.**

When considering the elements of constitutional standing, injury-in-fact “is often determinative,” *Toll Bros.*, 555 F.3d at 138, but a plaintiff has to show more than that. Standing also hinges, next, on causation or traceability. “If the injury-in-fact prong focuses on *whether* the plaintiff suffered harm, then the traceability

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<sup>24</sup> Apparently, requiring both sides to shoulder the cost of providing workers to review petitions is standard operating procedure. *See Rogers*, 942 A.2d at 924 (“the parties were required to each have nine reviewers at all times during the review process”). The theoretical possibility of having to reimburse prevailing challengers for the costs *they* incurred in supplying the needed reviewers, as evidently occurred in the past, in *Rogers*, 942 A.2d at 926, is no more an injury-in-fact than any other component of a hypothetical costs order, pursuant to § 2937, that may never be issued. Even if there were something illegal about such an order (and there is not), the fact remains that past exposure to illegal conduct does not give rise to a present case or controversy. *See Lyons*, 461 U.S. at 107; *Reilly*, 664 F.3d at 42-43.



prong focuses on *who* inflicted that harm. The plaintiff must establish that the defendant's challenged actions, and not the actions of some third party, caused the plaintiff's injury." *Id.*, 555 F.3d at 142 (emphasis by the court). The causal connection may be indirect, "so long as there is a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant." *Id.* (internal quotation marks and citation omitted).

The Minor Parties' causation theory boils down to this: their (anticipated) financial 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" (MP brf., at 21. *See also id.*, at 30-31). Because the Secretary of the Commonwealth accepts and reviews nomination petitions, they add, "the Secretary's enforcement of Section 2911(b) is the cause of [their] injury" (*Id.*). In other words, they seem to be saying, the petition requirement is the root of the problem; if they did not have to submit nomination petitions, they would not suffer any injury.

The Minor Parties' approach suffers from at least two flaws. First, it is too late to question the validity of the statutory petition requirement. That fight has already been fought, and this Court found the requirement constitutional. *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006), *cert. denied*, 552 U.S. 826 (2007). Second, for the Secretary of the Commonwealth to receive and review nomination

petitions submitted by Minor Parties is more beneficial to them than injurious.

Financial injury only looms if someone challenges the Minor Parties' petitions, and neither the Secretary nor any other official does *that*.<sup>25</sup> If there are challenges, they are initiated and pursued by private third parties, as the Election Code permits, and adjudicated by the Commonwealth Court, as the Election Code requires.

### **3. Lack of redressability.**

It is difficult to imagine how, absent injury and causation, the redressability requirement for Article III standing might still be met. Thus, after finding against the Minor Parties on injury and causation, the district court found it unnecessary to consider redressability (*See* JA 19). Not much can be said about it.

“[The redressability] requirement is closely related to traceability, and the two prongs often overlap.” *Toll Bros.*, 555 F.3d at 142 (internal quotation marks and citation omitted). “The difference is that while traceability looks backward (did the defendants cause the harm?), redressability looks forward (will a favorable decision alleviate the harm?).” *Id.* Even the Minor Parties seem to agree that a determination on redressability is likely to track whatever conclusion has been reached on traceability or causation (*See* MP brf., at 21-22).

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<sup>25</sup> Recall, too, that the Attorney General has nothing to do with the review process or with any subsequent petition challenges.

Unable to meet the test for causation, the Minor Parties also cannot demonstrate redressability. Their attempted argument in response this point has some surface appeal, but it is conclusory and illogical. They maintain that a declaratory judgment holding § 2911(b) unconstitutional as applied, in conjunction with § 2937, would redress their supposed injury, in that it would – theoretically – eliminate the prospect of their having to respond to petition challenges and pay associated costs if unsuccessful (*See* MP brf., at 21-22). This Court, however, has already upheld § 2911(b), and Pennsylvania courts have already found § 2937 constitutional. Not only do those provisions remain on the books; they also have not been and cannot be “enforced” against the Minor Parties *by the defendant officials*, as already noted. For that reason, an order against the officials, requiring them to refrain from doing something they are not in fact doing, or responsible for doing, would be pointless.

**E. In addition, the Minor Parties’ Claims Were Not Ripe When Filed.**

Aside from standing, other justiciability doctrines give life to the Article III case-or-controversy requirement. These include ripeness, which also cast a shadow over the Minor Parties’ case. Although the district court declined to address ripeness (*see* JA 19), the issue does warrant mention. Because the Minor

Parties' claims were unripe, the correctness of the district court's dismissal order is reinforced.

Ripeness and standing "require related but distinct inquiries[.]"

*Pennsylvania Family Institute, Inc. v. Black*, 489 F.3d 156, 165 (3d Cir. 2007).

"Whereas ripeness is concerned with *when* an action may be brought, standing focuses on *who* may bring a ripe action." *Pic-a-State Pa., Inc. v. Reno*, 76 F.3d 1294, 1298 n.1 (3d Cir. 1996) (emphasis by the court).

"The ripeness doctrine serves to determine whether a party has brought an action prematurely[.]" *Khodara Environmental*, 376 F.3d at 196 (internal quotation marks and citations omitted). Various considerations underpin the doctrine, "including whether the parties are in a 'sufficiently adversarial posture to be able to present their positions vigorously,' whether the facts of the case are 'sufficiently developed to provide the court with enough information on which to decide the matter conclusively,' and whether a party is 'genuinely aggrieved so as to avoid expenditure of judicial resources on matters which have caused harm to no one.'" *Id.* (quoting *Peachlum*, 333 F.3d at 433-434).

Analyzing ripeness in the context of a declaratory judgment action, such as this, can be especially challenging because "declaratory judgments are typically sought before a completed injury has occurred." *Id.* (quoting *Pic-a-State*, 76 F.3d at 1298). Even so, a court's "discretionary power to determine the rights of parties

before injury has actually happened cannot be exercised unless there is a legitimate dispute between the parties.” *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643, 647 (3d Cir. 1990). And whether a dispute is “ripe” for judicial action hinges on various factors, such as the adversity of the parties’ interests, the conclusiveness of a judicial judgment, and the practical help, or utility, of that judgment. *Pic-a-State*, 76 F.3d at 1298; *Step-Saver*, 912 F.2d at 647. Not surprisingly, perhaps, these are not unlike the factors to be considered in analyzing standing, in the declaratory judgment context and in other matters.

Here, when the Minor Parties filed their complaint, they had not even finished gathering signatures on nomination petitions. Their interests and those of the officials were not adverse (and that continued to be true). No conclusive judgment could be rendered against the officials, because they were not, and still are not, the ones who would challenge nomination petitions, should any be filed (raising the specter, for the Minor Parties, of having to expend funds to defend the challenges). Nor would the officials be the ones to rule on the validity of any such challenges. Accordingly, there was no “legitimate dispute” between the parties.

In sum: Besides being brought by plaintiffs who lacked standing, this suit was brought at an inappropriate time. Dismissal on standing grounds was correct, and because the controversy was not ripe, dismissal on ripeness grounds, too, would have been justified.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court, dismissing the Minor Parties' claims.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I, Claudia M. Tesoro, Senior Deputy Attorney General, hereby certify as follows:

1. I am a member of the bar of this Court.
2. The text of the electronic version of this brief is identical to the text of the paper copies.
3. The following virus detection program – SYBARI ANTIGEN Version 8.00.1470 – was run on the file and no virus was detected.
4. Excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii), this brief contains 10,153 words, and thus complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.
5. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in Times New Roman, 14-point.

*/s/ Claudia M. Tesoro*

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## CERTIFICATE OF SERVICE

I, Claudia M. Tesoro, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief for Appellees, via CM/ECF electronic service, on the following:

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I further certify that seven copies of this brief were duly sent to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

*/s/ Claudia M. Tesoro*

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