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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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**REPLY BRIEF OF APPELLANTS**

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Appellants Constitution Party of Pennsylvania (“CPPA”), Green Party of Pennsylvania (“GPPA”), Libertarian Party of Pennsylvania (“LPPA”), Joe Murphy, James Clymer, Carl Romanelli, Thomas Robert Stevens and Ken Krawchuk (collectively, the “Minor Parties”) respectfully submit this Reply to the brief filed by Appellees Carol Aichele, Jonathan M. Marks and Linda L. Kelly (collectively, “the Secretary”) on November 15, 2013 (“Sec. Br.”).<sup>1</sup>

### **INTRODUCTION**

The only issue to be decided in this appeal is whether the District Court erred in dismissing the Minor Parties’ Complaint for lack of standing, and on that issue there is no dispute. The Secretary concedes, as she must, that the District Court incorrectly treated her motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) as asserting a factual challenge, and not a facial challenge, to the Minor Parties’ standing. The Secretary also concedes that, as a result of this error, the District Court applied the wrong standard in granting the motion. The Secretary contends, however, that the District Court’s error “does not matter” to the proper disposition of this case. That is incorrect. By expressly rejecting the Minor Parties’ undisputed allegations and disregarding the evidence they submitted in

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1 The Minor Parties do not object to the substitution of current Attorney General Kathleen G. Kane for her predecessor, Carol Aichele, pursuant to Fed. R. App. P. 43(c). The Minor Parties will continue to refer to all Appellees by the term “Secretary,” however, because that abbreviation is not misleading or improper.

support of their Complaint, the District Court violated the cardinal rule governing motions to dismiss under Rule 12(b)(1). It therefore must be reversed.

## **ARGUMENT**

### **I. The Secretary Misstates Several Key Points of Law and Fact and Misrepresents the Narrow Question Raised By This Appeal.**

Throughout her brief, the Secretary misstates several key points of law and fact, in an apparent attempt to confuse or complicate the issues raised by this appeal. As a preliminary matter, therefore, these misstatements require correction.

*First*, the Secretary mischaracterizes the legal theory on which the Minor Parties rely in this case. Contrary to the Secretary’s assertion, the “essence” of the Minor Parties’ claims is not that their rights are violated by the “possibility” that costs will be imposed against them following a successful challenge to their nomination petitions. Sec. Br. at 8. Rather, as set forth at the outset of their Complaint, the Minor Parties’ legal theory is that Pennsylvania’s ballot access scheme is unconstitutional because it requires their candidates both to submit nomination petitions pursuant to 25 P.S. § 2911(b), and to shoulder the financial burden of validating them pursuant to 25 P.S. § 2937. JA 31-32. Count I and Count II expressly rely on that allegation, JA 47, 48 (Comp. ¶¶ 55, 63), and notwithstanding the Secretary’s repeated assertions, there is nothing “conjectural” or “hypothetical” about it. Sec. Br. at 34-36. Each time the Minor Parties submit

nomination petitions as required by Section 2911(b), the Minor Parties – and not the Secretary – have the statutory obligation to verify their validity when a challenge is filed pursuant to Section 2937. JA 38 (Comp. ¶¶ 21-21) (citing 25 P.S. § 2936). As the record amply demonstrates, Pennsylvania’s statutory scheme thus imposes substantial burdens on the Minor Parties, in addition to the threat that they may be ordered to pay their challengers’ costs pursuant to Section 2937. For example, while this case was pending before the District Court, both CPPA and LPPA were ordered to supply 20 workers on a daily basis, at their own expense, to validate their 2012 nomination petitions. *See In Re Nomination Paper of Virgil H. Goode*, No. 508 M.D. 2012 (Pa. Commw. 2012) (order entered August 10, 2012 in CPPA challenge); *In Re Nomination Paper of Margaret K. Robertson*, No. 507 M.D. 2012 (Pa. Commw. 2012) (order entered August 10, 2012 in LPPA challenge). Because the District Court did not rule on their emergency motion for preliminary injunctive relief, this financial burden forced CPPA to withdraw from the election, despite its belief in the validity of its nomination petitions. *See Third Clymer Dec.* ¶¶ 7-14 (Dckt. No. 23-1).

To be sure, the Minor Parties also allege, in Count III, that the imposition of costs pursuant to Section 2937 violates their rights by threatening to impose substantial financial burdens on them for engaging in quintessentially protected



First Amendment conduct. JA 48-49 (Comp. ¶¶ 66-72). But while this threat provides the basis for the Minor Parties' claim that Section 2937 is unconstitutional on its face, it does not constitute the entire legal basis for all of their claims in this case, and the Secretary has no basis for insisting that it does. The Secretary simply invites this Court to commit the same error as the District Court, by disregarding undisputed evidence in the record demonstrating that Pennsylvania's ballot access scheme burdens the Minor Parties whether or not they are ordered to pay their challengers' costs pursuant to Section 2937.

*Second*, the Secretary misleadingly asserts that this case is “the latest of several attempts” to challenge the constitutionality of Section 2911(b) and Section 2937. Sec. Br. at 21. But none of the cases the Secretary cites involved the claims alleged herein, nor did any one of them address the legal theory on which the Minor Parties rely. Sec. Br. at 11-14 (citing cases). Simply put, no court has ever heard, much less ruled upon, the Minor Parties' claims that Pennsylvania's ballot access scheme is unconstitutional as applied, because it requires the Minor Parties to submit nomination petitions and shoulder the financial burden of validating them, nor that Section 2937 is unconstitutional on its face, because it authorizes the imposition of substantial financial burdens on parties who engage in quintessentially protected First Amendment conduct. JA 46-49 (Comp. ¶¶ 48-72).

Any suggestion that the Minor Parties' claims have already been adjudicated on the merits is therefore incorrect. In particular, the Secretary's repeated assertion that "the constitutionality of § 2911(b) is not open to debate" is incorrect. Sec. Br. at 23, 40 (citing *Rogers v. Corbett*, 468 F.3d 188 (3rd Cir. 2006)). Like the other cases the Secretary cites, *Rogers* arose from different facts and relied on a different legal theory, and it does not in any way foreclose the claims the Minor Parties assert herein.

*Third*, and finally, the Secretary misrepresents the issue raised by this appeal. According to the Secretary, the Minor Parties "want this Court to exempt them from § 2911(b) ... and § 2937." Sec. Br. at 22. That is incorrect. The District Court dismissed this case under Rule 12(b)(1), on the ground that the Minor Parties lack standing, and consequently it did not reach the merits of the Minor Parties' claims. JA 19. The narrow question presented by this appeal, therefore, is only whether the Minor Parties have standing to challenge the constitutionality of Pennsylvania's ballot access scheme. Whether the challenged provisions are in fact unconstitutional is a separate issue entirely. Because the District Court did not reach that issue, it is neither necessary nor proper for this Court to do so. For the reasons that follow, however, this Court can and should reverse the District Court's decision holding that the Minor Parties lack standing to pursue this action.

**II. Reversal Is Proper Because It Is Undisputed That the District Court Applied the Wrong Standard in Dismissing This Case Under Rule 12(b)(1), and the Secretary Fails to Provide Any Basis for This Court to Affirm That Error.**

The Secretary does not dispute that her motion to dismiss pursuant to Rule 12(b)(1) asserts a facial challenge, and not a factual challenge, to the Minor Parties' standing. The Secretary also concedes that the District Court incorrectly treated the Secretary's facial challenge as a factual challenge. The Secretary contends, however, that the District Court's error "does not matter," because the distinction between facial challenges and factual challenges is only a matter of "terminology," which has no legal significance to the proper disposition of this case. Sec. Br. at 24, 27. The Secretary is incorrect.

**A. The District Court Applied the Wrong Standard in Dismissing This Case Under Rule 12(b)(1).**

Contrary to the Secretary's contention, this Court has long recognized that the distinction between facial challenges and factual challenges to a plaintiff's standing is "crucial," because it determines the standard of review a court must apply in ruling on a motion to dismiss under Rule 12(b)(1). *See Mortensen v. First Federal Savings and Loan Assoc.*, 549 F.2d 884, 891 (3rd Cir. 1977). In ruling on a facial challenge, a court applies the standard governing motions to dismiss under Rule 12(b)(6), and "must consider the allegations of the complaint as true." *Id.* By

contrast, a court ruling on a factual challenge is permitted to “weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Id.* This differing standard of review is proper because a facial challenge “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)).

This Court recently reaffirmed the propriety of the distinction between facial challenges and factual challenges under Rule 12(b)(1), as well as the differing standards of review that apply in each instance. *See Askew v. Church of the Lord Jesus Christ*, 684 F.3d 413 (3rd Cir. 2012). In *Askew*, an individual who claimed to be a member of a church asserted several claims against the church leaders, based on their alleged misappropriation of assets and breach of fiduciary duties. *See id.* at 415. The defendants moved to dismiss pursuant to Rule 12(b)(1). *See id.* at 417. Because they had not answered and no discovery had been taken, the District Court treated the defendants’ motion as asserting a facial challenge to the plaintiff’s standing, and took as true his allegation that he was a member of the church. *See id.* Thus, while the District Court granted dismissal of several counts unrelated to the plaintiff’s alleged status as a church member, it denied the defendants’ motion

with respect to those counts the plaintiff asserted on behalf of the church, and ordered the parties to engage in discovery on the plaintiff's claim to be a church member. *See id.* Only after the defendants filed a renewed motion to dismiss did the District Court consult the evidence adduced by the parties and conclude that the plaintiff lacked standing to assert his remaining claims, based on its determination that he was not in fact a member of the church. *See id.* This Court affirmed in all respects. *See id.* at 421.

When the analysis in *Askew* is applied here, the District Court's error in dismissing this case under Rule 12(b)(1) is readily apparent. Unlike *Askew*, this case does not present any question of fact that would require the District Court to weigh evidence to determine its power to hear the Minor Parties' claims. The Secretary does not contend, for example, that the Minor Parties are actually residents of New Jersey, such that they might never actually incur the burdens imposed by Pennsylvania's ballot access scheme. Further, even if the Secretary had raised such an issue, no defendant has filed an answer, and the District Court has not allowed the parties to engage in discovery for purposes of settling the factual dispute. Consequently, the District Court's determination that the Secretary asserts a factual challenge to the Minor Parties' standing is incorrect. *See Askew*, 684 F.3d at 417; *see also Mortenson*, 549 F.2d at 892 n.17 ("a factual jurisdictional

proceeding cannot occur until plaintiff's allegations have been controverted").

Because the Secretary asserts a facial challenge under Rule 12(b)(1), and not a factual challenge, the District Court was obliged to accept as true all allegations in the Minor Parties' Complaint and the sworn Declarations attached thereto. JA 31-97; *see Mortenson*, 549 F.2d at 891. The District Court failed to do so. Instead, it expressly rejected the Minor Parties' factual allegations as "conjectural or hypothetical," JA 16, without even addressing the supporting evidence set forth in their Declarations, which includes numerous specific examples of Minor Party candidates who were forced to withdraw from elections under financial duress, based in some instances on explicit threats from their political opponents. JA 51-97. The District Court summarily disposed of this evidence on the ground that it was "not persuaded," JA 17, but the District Court was not permitted to make such a determination. On the contrary, by rejecting the Minor Parties' allegations and disregarding their evidence, the District Court applied an improper standard under Rule 12(b)(1), and it should be reversed on that basis. *See Mortenson*, 549 F.2d at 891; *see also In Re: Schering-Plough Corp.*, 678 F.3d 235, 243 (3rd Cir. 2012) (citing *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3rd Cir. 2000)).

**B. The Secretary Fails to Provide Any Basis for This Court to Affirm the District Court's Error in Applying the Wrong Standard Under Rule 12(b)(1).**

The Secretary's contention that this Court should affirm dismissal of this case, even though the District Court applied the wrong standard under Rule 12(b)(1), has no merit. Sec. Br. at 24-27. The Secretary asserts three points in support of this view, none of which are availing.

First, the Secretary asserts that the District Court was not required to credit "bald assertions" or "legal conclusions" alleged in the Minor Parties' Complaint and Declarations. Sec. Br. at 25 (*citing Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). As the Secretary acknowledges, however, *Iqbal* does not address the pleading standard that applies under Rule 12(b)(1), but rather concerns the sufficiency of the facts alleged to support a claim that the Attorney General of the United States was personally liable for the unconstitutional conditions of a prisoner's confinement. The relevance of *Iqbal's* reasoning to the instant case, which seeks prospective declaratory relief from certain provisions of election law, is therefore questionable.

Furthermore, although the Secretary asserts that the Minor Parties' Complaint was "peppered" with the sorts of allegations that may be disregarded under *Iqbal*, she conspicuously fails to identify a single one. Sec. Br. at 25. For example, the Secretary does not and cannot dispute the Minor Parties' allegation that Pennsylvania's ballot access scheme burdens them by forcing them to shoulder the financial burden of validating nomination petitions they are required by law to

submit. JA 31-32, JA 46-48 (Comp. ¶¶ 48-65); *see* 25 P.S. §§ 2911(b), 2936, 2937. Nor does the Secretary identify any specific allegation of injury in the Minor Parties' Complaint and Declarations, JA 44-46 (Comp. ¶¶ 40-47), which the Secretary believes the District Court was permitted to "identify but disregard." Sec. Br. at 25 (citing *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212 (3rd Cir. 2011)). The Minor Parties' allegations that they intend to submit nomination petitions in future elections are likewise undisputed. JA 34-35 (Comp. ¶¶ 5, 6, 8); JA 44-45 (Comp. ¶ 42). Consequently, even if the *Iqbal* analysis were stretched to apply in the context of this case, the Secretary's sweeping assertion that "all" of the Minor Parties' allegations of jurisdictional facts are "beside the point" cannot be squared with the record. Sec. Br. at 25.

The Secretary next asserts that the Minor Parties themselves "transformed" the Secretary's standing challenge "from 'facial' to 'factual,'" when they filed their emergency motion for preliminary injunctive relief. Sec. Br. at 26. This novel assertion is wrong as a matter of law. As this Court has repeatedly recognized, courts may not treat Rule 12(b)(1) motions as asserting a factual challenge unless and until the defendant files an answer and the parties are permitted to take discovery on disputed issues of fact. *See Askew*, 684 F.3d at 417; *Mortenson*, 549 F.2d at 892 n.17. At most, therefore, the District Court was permitted on this record



to deny the Minor Parties’ motion for preliminary injunctive relief – but not to dismiss their entire Complaint, including claims for prospective declaratory relief, pursuant to Rule 12(b)(1).

The Secretary’s last purported justification for the District Court’s error in applying the wrong standard under Rule 12(b)(1) is unclear, but the gist seems to be that the District Court did not “disadvantage” the Minor Parties by “ignoring” the allegations in their Complaint. Sec. Br. at 27. On the contrary, the prejudice arising from such an error is obvious: the District Court dismissed the Minor Parties’ claims without permitting them a hearing on the merits, on the ground that it was “not persuaded” by their allegations and evidence. JA 16. The Minor Parties addressed this issue *supra* at Part II.A, and it need not be revisited.

In sum, none of the Secretary’s assertions provide grounds for this Court to affirm the District Court’s erroneous decision. Reversal is therefore warranted.

### **III. The Minor Parties Are Entitled to Seek Declaratory Relief Because This Case Presents a Justiciable Controversy.**

In their opening brief, the Minor Parties cite a long line of precedent, rooted in the Supreme Court’s decisions striking down poll taxes and mandatory filing fees, which hold that states may not require candidates, voters or political parties to pay for the state’s own legislative choices in regulating elections. *See* Minor Parties’ Br. at 23 (citing cases). The Minor Parties rely on this precedent because it

establishes that their own claims present a “substantial controversy” that warrants declaratory relief, rather than “abstract, contingent or hypothetical questions.” *The St. Thomas-St. John Hotel & Tourism Ass’n. v. Virgin Islands*, 218 F.3d 232, 240 (3rd Cir. 2000). Just as states may not require major parties to hold and pay for primary elections, for example, see *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289 (8th Cir. 1995), states also may not require minor party and independent candidates to submit nomination petitions and pay the costs of validating them. See *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992); *McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373 (M.D. N.C. 1994); *Clean-Up ’84 v. Heinrich*, 590 F. Supp. 928 (M.D. Fl. 1984). Because Pennsylvania’s statutory scheme imposes a similar burden as the provisions held unconstitutional in *Fulani*, *McLaughlin* and *Clean-Up ’84*, the Minor Parties contend that their claims present a justiciable controversy.

In opposing this line of reasoning, the Secretary starts from a false premise. The Minor Parties do not rely on the cases cited in their opening brief merely because they were decided “in favor of voters and candidates,” as the Secretary suggests. Sec. Br. at 32. Rather, each of those cases supports the legal theory the Minor Parties assert in this case: that Pennsylvania’s statutory scheme violates the Constitution by requiring candidates both to submit nomination petitions and

shoulder the expense of validating them. Consequently, the Secretary's citation to a number of cases asserting other constitutional theories, simply because voters and candidates apparently did not prevail, is not relevant. Sec. Br. at 33.

The Secretary does cite a single case that is relevant to the Minor Parties' claims, but that case only reinforces the conclusion that this case presents a justiciable controversy. *See Biener v. Calio*, 361 F.3d 206 (3rd Cir. 2004). *Biener* upheld a statute imposing a primary election filing fee, which provided an exception for indigent candidates. *See id.* Crucially, however, the case was decided on summary judgment – after this Court held that the plaintiff had standing to challenge to statute, based on the financial injury he incurred in complying with it. *See id.* at 210-11. Here, too, the Minor Parties' allegations of financial injury are sufficient to confer standing on them to seek declaratory relief.

The Secretary also insists that the Minor Parties do not have “adverse interests” with each of the named defendants, and specifically objects to inclusion of the Attorney General in this action, on the ground that “the Attorney General does not have a discrete role in administering the Pennsylvania Election Code.” Sec. Br. at 33. This contention directly contradicts the position the Attorney General asserted in another election law case. “The Commonwealth has an interest in defending the validity of the Election Code and other statutes which are subject

to a constitutional challenge in either state or federal courts,” the Attorney General asserted. Amicus Brief on Behalf of the Commonwealth of Pennsylvania 2, *In re: Nomination Papers of Marakay Rogers*, No. 426 M.D. 2006 (Pa. Commw. 2006). By definition, that “interest” is adverse to the interest of litigants, such as the Minor Parties, who bring such a challenge. Therefore, the parties in this case have adverse interests.

The adversity of interests between the Minor Parties and Secretary Aichele and her subordinate, Commissioner of Elections Marks, is even clearer. As the Secretary concedes, both of these officials administer the Election Code. Sec. Br. at 34. Further, Secretary Aichele is specifically charged with reviewing nomination petitions the Minor Parties must submit pursuant to Section 2911(b) for compliance with applicable statutory requirements. *See* 25 P.S. § 2936. Because the Minor Parties challenge the constitutionality of Section 2911(b), their interests are adverse to those of Secretary Aichele and Commissioner Marks.

Finally, the Secretary objects that the Minor Parties’ claims lacked “sufficient immediacy and reality” when they were filed in 2012. Sec. Br. at 34 (quoting *The St. Thomas-St. John Hotel & Tourism Ass’n.*, 218 F.3d at 240). Relying on a rote recitation of supposed “contingencies” and “uncertainties,” the Secretary insists that it is “impossible” to conclude that the Minor Parties

“confronted a real, immediate problem that warranted judicial intervention.” Sec. Br. at 34-35. The glaring fact remains, however, that CPPA and LPPA both actually sustained the injury they sought to avoid by filing this action for prospective relief, while this case was pending, because the District Court declined to rule on their emergency motion for preliminary relief. *See* Third Clymer Dec. ¶¶ 7-14 (Dckt. No. 23-1). Plainly, therefore, the Minor Parties confronted a problem of sufficient immediacy to warrant judicial intervention. *See, e.g., Libertarian Party of Los Angeles v. Bowen*, No. 11-55316 (9th Cir. Feb. 25, 2013) (plaintiff’s concrete plan to violate law and defendants’ specific warning of enforcement satisfied case or controversy requirement).

#### **IV. The Minor Parties Satisfy Basic Standing Requirements.**

Only one additional point is necessary to rebut the Secretary’s attack on the Minor Parties’ standing. As this Court has recognized, the injury-in-fact element of standing is satisfied where a plaintiff alleges “an ‘identifiable trifle’ of harm.” *Belitskus v. Pizzigrilli*, 343 F.3d 632 (3rd Cir. 2003). The allegations in the Complaint surely satisfy this test. JA 44-46 (Comp. ¶¶ 40-47). Pennsylvania’s statutory scheme has injured the Minor Parties in past elections, it injured them in the 2012 election that took place while this case was pending in the District Court, and it will certainly injure them again, because it obliges them to shoulder the

financial burden of validating nomination petitions they are required by law to submit. *See* 25 P.S. §§ 2911(b), 2937. The Minor Parties have therefore alleged sufficient facts to establish their standing to challenge the constitutionality of that statutory scheme. *See Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 138 (3rd Cir. 2009) (acknowledging that satisfaction of injury-in-fact element “is often determinative” of standing).

As to the elements of causation and redressability, the Minor Parties rest on their opening brief.

#### **V. The Minor Parties’ Claims Were Ripe When This Action Was Filed.**

The Secretary purports to challenge the justiciability of this action on ripeness grounds, but offers precious little to support her conclusion that the Minor Parties filed this case “at an inappropriate time.” Sec. Br. at 44. In fact, much of the black-letter law the Secretary quotes at length actually supports the opposite conclusion – that the Minor Parties’ claims were ripe for adjudication when they were filed. *E.g.*, Sec. Br. at 43 (“declaratory judgments are typically sought before a completed injury has occurred”) (quoting *Khodara Environmental, Inc. v. Blakey*, 376 F.3d 187, 196 (3rd Cir. 2004)). Further, the Secretary all but concedes that her discussion of ripeness adds little to her prior discussion of standing in the declaratory judgment context. Sec. Br. at 44. Accordingly, for the same reasons that

the Minor Parties have standing to seek a declaratory judgment, their claims are ripe for adjudication.

**VI. The Secretary Fails to Remedy the District Court’s Error in Dismissing the Minor Parties’ Claim That Section 2937 Is Unconstitutional on Its Face.**

In the proceedings below, the District Court erroneously concluded that, in ruling on standing, “the identical analysis” applies to all three of the Minor Parties’ claims, including their Count III claim that Section 2937 is unconstitutional on its face. JA 14. In fact, however, it is well-settled that the doctrine of standing and its prudential counterparts are relaxed with respect to First Amendment overbreadth claims. *See generally McAuley v. University of Virgin Islands*, 618 F.3d 232 (3rd Cir. 2010) (standing); *Peachlum v. City of York*, 333 F.3d 429 (3rd Cir. 2003) (ripeness); *Ruocchio v. United Transport Union*, 181 F.3d 376 (3rd Cir. 1999) (mootness). Count III expressly alleges that Section 2937 is facially overbroad, because it “authorizes the imposition of costs against candidates even if they do not engage in fraud, bad faith or other misconduct.” JA 49 (Comp. ¶ 70). The District Court was therefore required to apply a more relaxed standard in analyzing the Minor Parties’ standing to assert that claim. It failed to do so.

Despite the District Court’s clear error in ruling on Count III, the Secretary contends that its “approach was entirely reasonable,” because its opinion otherwise

“would have been unnecessarily long and repetitious.” Sec. Br. at 30. But the potential length of an opinion cannot excuse a court’s application of an improper standard. The Secretary also asserts, in a footnote, that the District Court’s error in ruling on Count III was “harmless,” because a facial challenge is “difficult” to mount successfully. Sec. Br. at 29-30 n.19. Once again, however, the possibility that a claim might not succeed cannot excuse a court’s error in disposing of it.

Furthermore, the District Court’s error was not harmless. The District Court dismissed Count III for the same reason that it dismissed Count I and Count II – it concluded that the Minor Parties failed to allege an injury to themselves that is sufficiently concrete and particular. JA 16-17. In the First Amendment overbreadth context, by contrast, parties asserting facial challenges have standing even “where their own rights of free expression are not violated.” *McAuley*, 618 F.3d at 238. As a matter of law, therefore, the District Court’s skepticism toward the Minor Parties’ allegations of injury should not have deprived them of standing to assert their Count III claim.

Accordingly, the District Court should be reversed for the additional reason that it improperly dismissed the Minor Parties’ Count III claim.



## **CONCLUSION**

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

Dated: December 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

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## **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 7,000 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;
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/s/ Oliver B. Hall

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Oliver B. Hall

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of December 2013, I served a copy of the foregoing Reply Brief of Appellant, on behalf of all Appellants, by the Court's CM/ECF system upon the following:

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