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

GREEN PARTY OF PENNSYLVANIA, ET AL.,

Plaintiffs,

v.

AICHELE, ET AL.,

Defendants.

CIVIL ACTION No. 14-cv-3299

Judge Dalzell

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

OCTOBER 31, 2014

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I. INTRODUCTION

Plaintiffs filed this action to vindicate the numerous and longstanding restrictions imposed by the Pennsylvania Election Code on core political speech in the form of the circulation, filing and acceptance of nomination papers necessary for minor political parties, political bodies and independent candidates to qualify for the Commonwealth's general election ballot. This Court has openly commented on the number of challenges brought in this action. The scope of plaintiffs' complaint to the result of the number of severe impairments to the political speech of plaintiffs and Pennsylvania voters' right to be able to vote for the candidates of their choice without undue and unnecessary restrictions interposing and blocking candidates from the voters' ballot box. Plaintiffs are not to blame for the number of violations contained in 25 P.S. § 2911.

The United States Supreme Court has clearly held that the overall combination and number of individual restrictions placed on election petitions may, taken together, make it so difficult for minor political parties to gain access to the general election ballot that they may act in an unconstitutional impairment of core political speech protected under the First and Fourteenth Amendments to the United States Constitution – even if the restrictions, on an individual basis are not, by themselves unconstitutional. Plaintiffs believe that all of the individual restrictions contained in 25 P.S. §2911 and challenged in this action are either individually unconstitutional or enforced in excess of defendants' statutory authority. This action is an attempt by plaintiffs to permit this Court to take a measured scalpel to antiquated restrictions that impose a severe restriction on First Amendment protections that no longer narrowly advance a compelling governmental interest, while leaving the bulk of 25 P.S. § 2911 largely in place.

However, if this Court declines plaintiffs' claims we believe that all of the challenged restrictions, working together, are unconstitutional under Supreme Court precedent. Accordingly, if our claims to the individual restrictions are rejected, plaintiffs will ask this court for leave to file a second amended complaint to challenge 25 P.S. § 2911 as unconstitutional working as a whole.

II. FACTS

A. In his deposition testimony, defendant Marks has conceded:

1) That the qualifications to register to vote (i.e., to be able to register to vote) are the same qualifications (with various time/duration amendments) listed in the State Constitution that 25 P.S. § 2602(t) makes reference to as the definition of a qualified elector. Exhibit C, Marks Tr. at pp. 14-16;

2) A "qualified elector" is defined by the State Constitution. Exhibit C, Marks Tr. at p. Marks Tr. at pp. 72-76;

3) Pennsylvania has conformed state election law to federal law. Exhibit C, Marks Tr. at p.16;

4) Over 1 million Pennsylvania residents of voting age are not registered to vote. Exhibit C, Marks Tr. at p. 19;

5) A voter cannot be removed from the voter registration rolls except through the procedures set forth in the National Voter Registration Act. Exhibit C, Marks Tr. at p. 19;

6) Voter registrations completed through the Pennsylvania Department of Transportation (hereinafter "PennDot" capture voter registration signatures via electronic pads. Exhibit C, Marks Tr. at pp. 20-22;

7) 1.4 million out of a total of 8.2 voter registrations in the SURE system are voter registrations whose signature was captured by electronic keypads rather than pen on paper

signatures captured on physical voter registration applications. Exhibit C, Marks Tr. at pp. 23-24;

8) 250,000 to 300,000 voter registration applications per year are submitted by PennDot. Exhibit C, Marks Tr. at pp. 24-25;

9) PennDot retains no physical record of a voter registration. Exhibit C, Marks Tr. at pp. 32-35;

10) A PennDot employee/computer operator records the voter registration information into the PennDot computer for the person seeking to register to vote. Exhibit C, Marks Tr. at pp. 22-23;

11) Third parties are permitted to complete voter registration application information for the prospective voter who signs the voter registration application. Exhibit C, Marks Tr. at pp. 22-23;

12) Voters are not required to automatically update their signatures as they grow older. Exhibit C, Marks Tr. at pp. 27-28;

13) A voter who moves within the county in which they are registered remains a registered voter. Exhibit C, Marks Tr. at pp. 29-31;

14) A voter registration record can be searched and retrieved in the SURE system through a name only and/or part of a name and/or address. Exhibit C, Marks Tr. at pp. 39-41;

15) There are no identical addresses, known to defendants, in any town, borough or township of the same name. Exhibit C, Marks Tr. at pp. 41-42;

16) Each voter record in the SURE system identifies the voter's election districts. Exhibit C, Marks Tr. at pp. 43-44;

17) Defendants do not check the validity of nomination paper signatures, even if there is no private challenge to a nomination paper. Exhibit C, Marks Tr. at pp. 53-54;

18) There is no known standard as to what constitutes a signature match. Exhibit C, Marks Tr. at pp. 54-55;

19) Information printed on a nomination paper is sufficient to contact the signer of the nomination paper. Exhibit C, Marks Tr. at pp. 55-56;

20) Information printed in a nomination paper, on its face, is sufficient to determine if the signer is a resident of the Commonwealth of Pennsylvania. Exhibit C, Marks Tr. at pp. 64-65;

21) One affidavit per circulator would be sufficient to satisfy the need to know the identity of the circulator. Exhibit C, Marks Tr. at pp. 67-70;

22) It would be difficult to carry and/or manage many different nomination papers. Exhibit C, Marks Tr. at pp. 80-82.

B. Michelle Dresbold, a recognized handwriting expert, rendered the following opinions in her expert report:

1) A handwriting expert is often able to render an opinion, within a reasonable degree of professional certainty, as to the petition circulator authoring multiple signature lines on a nomination paper **based solely on an analysis of the circulator's printing of names, addresses and dates by observing multiple signature lines**. The petition circulator (or circulators) will exhibit their personal characteristics of handwriting with elements that incorporate their unique elements of writing similarities which include but are not limited to: Pictorial appearance (the overall appearance of the writing), arrangement of writing, placement on signature line, writing size, relative heights of letters, height to width ratio of letter, letter

design, connecting strokes, initial and terminal strokes, line quality, pressure, slant, placement of t-bars and i-dots, numbers, ornaments and flourishes, simplification of letters, balance of writing, connection of letters and spelling. Writings are identified as being done by the same person when there is a similar combination of writing habits and there are no basic or structural differences between the writings. Because a circulator (or circulators) will, inevitable, not be able to hide their own person characteristics a qualified handwriting expert will, in most cases, be able to detect where the circulator authored the writing of the printing of names, addresses and dates on petition signature lines. Exhibit D, Dresbold Report at p. 4;

2) Matching a contemporary signature recorded on a nomination paper to the SURE system signatures is not always a reliable method to exclude a signature recorded on a nomination paper as not having been recorded by a registered voter. This is because a signature may evolve over time. Though some people's signatures change very little over time, others may change drastically. An older signature recorded in the SURE system may not match the voter's contemporary signature recorded on a nomination paper even though the same individual recorded both signatures. In certain circumstances, the health of a writer must be considered as illness, lameness from accidents, injuries, strokes, emotional trauma, depression, alcohol and drugs may affect the script. In addition, a signature recorded in a rush may be distorted from those recorded in a more leisurely manner. Exhibit D, Dresbold Report at p. 5;

3) Under most circumstances, if a signature is "matched" between a hand-written signature recorded on a nomination paper and a hand-written signature recorded on a voter registration card in PA's SURE system, that "match" is conclusive evidence that the signer of the voter registration card is the signer of the nomination paper. An axiom of document examination is that it is impossible for a stranger without access to a copy of a signature to imitate that

signature without knowledge of what that signature looks like. Exhibit D, Dresbold Report at p. 6; and,

4) It is very difficult, within any degree of certainty, to match many of the compressed electronic signatures that are in the SURE system to signatures recorded by pen and paper - the method of gathering the signature (i.e., by electronic key pad) and the technology used to upload electronic signatures are of such a poor quality that they do not provide a proper exemplar to compare to a signature recorded by a signer on paper using a pen on a nomination paper. Exhibit D, Dresbold Report at p. 6.

C. Plaintiff John J. Sweeney provides uncontested declarations as to the following:

1) Defendants' narrow interpretation of the term "qualified elector" as being only registered "qualified electors" increases the cost and time necessary to gather a sufficient number of nomination paper signatures to qualify candidates for the Commonwealth's general election ballot. Exhibit A, Sweeney Declar. at pp. 2-3;

2) Defendants' authority to strike any signature from nomination papers that failed to perfectly record all printed information increases the cost and time necessary to gather a sufficient number of nomination paper signatures to qualify candidates for the Commonwealth's general election ballot. Exhibit A, Sweeney Declar. at p. 4;

3) The requirement of 25 P.S. § 2911 (d) that separate nomination papers must be used to record signers resident in different counties increased the cost and time necessary to gather a sufficient number of nomination paper signatures to qualify candidates for the Commonwealth's general election ballot. Exhibit A, Sweeney Declar. at pp. 4, 8-9;

4) The requirement of 25 P.S. § 2911(d) that separate nomination papers must be used to record signers resident in different counties results in the loss of nomination paper signatures in 2014. Exhibit A, Sweeney Declar. at pp. 8-10;

5) The in-state witness requirement of 25 P.S. § 2911(d) impairs the ability of out-of-state circulators to be able to circulate nomination papers in Pennsylvania, impairing the ability of Pennsylvania candidates to secure nomination paper signatures. Exhibit A, Sweeney Declar. at p. 5;

6) Candidate recruitment is directly impaired by all of the restrictions challenged in this action contained in 25 P.S. § 2911. Exhibit A, Sweeney Declar. at p. 6;

7) The Green Party of Pennsylvania was not able to pay for the notarization of nomination papers in 2014 because of a lack of funds. Exhibit A, Sweeney Declar. at p. 7;

8) The costs associated with the requirement that every nomination page be separately notarized impose an absolute ceiling on the number of nomination paper signatures that I can afford to collect. Exhibit A, Sweeney Declar. at p. 7;

9) The Green Party of Pennsylvania cannot afford to establish an intra-party network of notary publics sufficient to be able to service the entire Commonwealth of Pennsylvania in order to notarize nomination papers for Green Party candidates. Exhibit A, Sweeney Declar.at p. 8;

10) I am willing to sign nomination papers for other minor political parties and political bodies, such as the Libertarian and Constitution parties of Pennsylvania. Exhibit A, Sweeney Declar. at p. 10;

11) Over a period of about 14 years, thousands of nomination paper signatures have been lost owing to the requirement that only registered qualified elector may validly sign nomination papers. Exhibit A, Sweeney Declar. at p. 11; and,

12) Two signatures from known registered voters who signed my nomination paper, and which would have qualified me for the November, 2014 general election ballot as a candidate for the 20th State Senatorial district, were incorrectly struck from my nomination papers based on the inability of Commonwealth Court to match an older registration signatures shown in the SURE system to the more recent nomination paper signatures recorded on my nomination papers. Exhibit A, Sweeney Declar. at p. 12; Exhibit E, Veteran Declar. at p. 1; Exhibit F, Crean Declar. at p. 1.

D. Plaintiff William Redpath provides uncontested declarations as to the following:

1) As a national board member of the Libertarian Party and resident within 50 miles of Pennsylvania, I am willing to travel to Pennsylvania to circulate nomination papers on behalf of Libertarian candidates in Pennsylvania. Exhibit H, Redpath Declar. at pp. 1-2;

2) The restriction that only Pennsylvania residents are permitted to execute the "Affidavit of Qualified Elector" prevents me from freely circulating nomination papers in Pennsylvania without first arranging to circulate nomination papers with a Pennsylvania resident. Exhibit H, Redpath Declar. at pp. 2-3;

3) I am willing to consent to the jurisdiction of Pennsylvania as a condition precedent to being able to circulate nomination papers for Libertarian candidates in Pennsylvania without the need to work with a Pennsylvania resident who can execute the "Affidavit of Qualified Elector." Exhibit H, Redpath Declar. at pp.3-4.

E. Commonwealth Court Judge Bonnie Leadbetter made the following comment and took judicial notice from the bench during the adjudication of objection to plaintiff Sweeney's 2014 nomination papers:

1) In response to Sweeney's attorney questioning issues "with some of the motor voter --- they're signed on electronic key pads and then transferred over. They get compressed. The signatures become almost unrecognizable" Judge Leadbetter stated: "I can take judicial notice that those signatures are virtually unrecognizable from the get go,---…signed with those pads….To the extent we move into mostly motor voter registrations, I don't know how we're going to do this." Exhibit G, Tr. *In re Sweeney*, at Tr. pp. 100-101.

III. ARGUMENT

A. Standard of Review

The United States Supreme Court established in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) that on a motion for summary judgment once the party seeking summary judgment has pointed out to the court the absence of a fact issue:

> …its opponent must do more than simply show that there is a metaphysical doubt as to the material facts.…In the language of the Rule, the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial'…where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'.

475 U.S. at 586-87. Accordingly, summary judgment must be granted unless the evidence construed in favor of the non-moving party is sufficient for a reasonable jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 243, 249-50 (1986). Granting summary judgment is appropriate against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3rd Cir. 1986) (holding that

under the Rule 56(c) of the Federal Rules of Civil Procedure summary judgment should be granted to a moving party when there are no genuine issues of material fact when the facts are construed in favor of the non-moving party).

B. The In-State Witness Requirement of 25 P.S. § 2911(d) is Unconstitutional as a Matter of Law and No Genuine Issue of Material Fact Exists Even When the Facts Are Construed in Favor of Defendants.

The In-State Witness Requirement of 25 P.S. § 2911(d) requires that the "Affidavit of Qualified Elector" (hereinafter sometimes the "Affidavit") on each of plaintiffs' nomination papers must be executed by a "qualified elector" of the Commonwealth of Pennsylvania. The "Affidavit of Qualified Elector" must be completed for each nomination paper before plaintiffs may file them with defendants. The Affidavit requires that the "qualified elector" must attest that he/she has personal knowledge as to the validity and circumstances of the signatures recorded on the nomination paper for which the Affidavit is executed. Accordingly, the challenged provision of 25 P.S. § 2911(d) prohibits out-of-state circulators from circulating nomination papers out of the sight lines of an in-state "qualified elector" of the Commonwealth of Pennsylvania – rendering any assistance of out-of-state circulators to be merely duplicative of in-state circulator efforts.

The challenged provision flatly prohibits an out-of-state circulator from validly circulating plaintiffs' nomination papers in any geographic location for which there is no in-state circulator able and willing to partner with the out-of state circulator. Furthermore, the challenged provision flatly limits out-of state circulator participation to the precise time and convenience of an in-state "qualified elector." In *Morrill v. Weaver*, 224 F.Supp.2d 882 (2002), the Commonwealth conceded to this Court that although the in-state witness who executes the

Affidavit "does not have to personally gather the signatures, . . . he must be present when they are made." *Morrill* 224 F.Supp.2d at 898.

In evaluating ballot access cases, courts must "be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 (1999). The Supreme Court has twice considered statutes that restrict who may circulate election petitions in support of ballot access, and has twice invalidated the restriction. In *Meyer v. Grant*, 486 U.S. 414 (1988), the Court struck down Colorado's prohibition on paid petition circulators. Holding that the restriction was "a limitation on political expression subject to exacting scrutiny" the Court reasoned that the state had failed to justify the burden on advocates' free speech rights. *Meyer*, 486 U.S. at 420. In *Buckley*, the Court invalidated a requirement that petition circulators be registered voters of the state, holding that the "requirement cuts down the number of message carriers in the ballot-access arena without impelling cause." *Buckley*, 525 U.S. at 197.

Although *Buckley* expressly reserved the question of whether residency requirements like the one at issue in this action would be unconstitutional, *Buckley*, 525 U.S. at 197, every court, but one, to consider the issue has expressly relied on *Buckley* and *Meyer* to hold such requirements unconstitutional in the context of both ballot initiative and candidacy petitions. Furthermore, <u>every</u> court has held such requirements where those seeking to circulate election petitions from out-of-state have expressly been willing to consent to the other state's jurisdiction for purposes of investigation and prosecution of allegations of election petition fraud. *See Citizens in Charge v. Gale*, 810 F.Supp.2d 916 (D. Neb. 2011) (invalidating state residency requirement for circulators of candidacy and ballot initiative petitions); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (invalidating state residency requirement for circulators of presidential

candidacy petitions); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (same); *Daien v. Ysursa*, 711 F.Supp.2d 1215 (D. Idaho 2010) (same); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (invalidating residency requirement for circulators of petition for congressional candidacy petitions); *Libertarian Party of Virginia v. Judd*, 718 F.3d 308 (4th Cir. 2013) (invalidating state residency requirement for circulators of candidacy petitions), *aff'g* 881 F.Supp.2d 719 (E.D. Va. 2012) *cert. denied*, 571 U.S. ____, 134 S. Ct. 681 (Dec. 2, 2013).

As in the cases cited above, the state residency requirement here imposes a severe burden on plaintiffs' First Amendment rights without being narrowly tailored to serve a compelling governmental interest.

a. 25 P.S. 2911(d) imposes a severe burden on political speech and must be reviewed under a strict scrutiny standard.

In evaluating the constitutionality of an election law, "the rigorousness of [the court's] inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When constitutional rights "are subjected to 'severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id*. (internal quotation marks and citation omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id*. (internal quotation marks and citation omitted).

Nearly every court to consider the constitutionality of a residency requirement for petition circulation has subjected the requirement to strict scrutiny. *See, e.g., Citizens in Charge v. Gale*, 810 F.Supp.2d at 925; *Nader v. Blackwell*, 545 F.3d at 475; *Nader v. Brewer*, 531 F.3d at 1036; *Daien*, 711 F.Supp.2d at 1231 ; *Krislov*, 226 F.3d at 862; *Libertarian Party of Virginia*

v. Judd, 718 F.3d at 317. As in these cases, the provision at issue in the present action undoubtedly places serious burdens on the First Amendment rights of the plaintiffs. Indeed, it burdens the free speech rights of nearly everyone who participates, or wishes to participate, in the Commonwealth's process for establishing who will appear on its general election ballot, from which voters will select who they will elevate to important public office(s). The scope and severity of these burdens require the Court to evaluate the challenged statutory provision under strict scrutiny.

i. The Burden on Candidates.

In *Meyer*, the Court explained that the circulation of a ballot initiative petition involves "the liberty to discuss publicly and truthfully all matters of public concern" at the core of the First Amendment. 486 U.S. at 414 (citation omitted). Such discussion is inherent in the petition process:

> Although a petition circulator may not have to persuade signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.

486 U.S. at 421. Similarly, circulating nomination papers to place a candidate on the Commonwealth's general election ballot requires circulators to explain and answer questions about a candidate's positions, and to persuade signatories that the candidate's ideas are serious enough to warrant his or her appearance on the state ballot. The circulation of nomination papers is, in fact, one of the few (if not the only) opportunity for plaintiffs' to have a legitimate reason to stop Pennsylvania residents and – in a "cold call" fashion – interact with voters and potential voters and to communicate to them the need to expand their choice of candidates and to encourage them to take an active role in the opposition to the monopoly of political power

currently evident in Pennsylvania and, in particular, support plaintiffs' campaign to be placed on the general election ballot.

For candidates, therefore, the circulation of nomination papers is a vital means for conveying their message to voters and those eligible to register to vote and cast ballots in the Commonwealth's general election. Courts have recognized that provisions virtually identical to the challenged law reduce the number of eligible circulators available to circulate plaintiffs' nomination papers undermining candidate speech in two ways:

> First, it limits the number of voices who will convey [the candidate's] message and the hours they can speak and, limits the size of the audience they can reach. Second, it makes it less likely that [the candidate] will garner the number of signatures necessary to place the matter on the ballot, thus limiting [his or her] ability to make the [candidacy] the focus of statewide discussion.

Id. at 422-23. While there are other means for candidates to spread their message, "[t]he First Amendment protects [candidates'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id*. at 424.

In addition to the foregoing, in Pennsylvania, the challenged provision imposes a severe geographic limitation on free speech. Plaintiffs' members are, by and large, organized in concentrated pockets in the more urban centers of the Commonwealth. With respect plaintiffs Libertarian Party of Pennsylvania the urban concentration of their in-state membership makes it more difficult for out-of-state circulators (both paid and volunteer) to circulate nomination papers in the more rural regions of the Commonwealth (because the challenged provision requires out-of-state circulators to circulate in tandem with an in-state circulator) in which voters and potential voters are more amenable to their more conservative message of less government constrained within proper constitutional limits.

Additionally, the challenged provision "burdens [candidates'] right to associate with a class of circulators." *Krislov,* 226 F.3d at 860:

> Although the [Pennsylvania] provision does not go so far as to specifically prohibit candidates from associating with individuals who are not residents of [Pennsylvania] . . ., it still substantially burdens this right of association by preventing the candidates from using signatures gathered by these circulators [without being witnessed by Pennsylvania residents] . . . . By doing so, the law inhibits the expressive utility of associating with these individuals because these potential circulators cannot [freely] invite voters [and potential voters] to sign candidates' petitions . . . .

Id. at 861 (bracketed text inserted into the quote as necessary to conform to Pennsylvania facts).

As in *Meyer* and *Buckley,* the Pennsylvania residency requirement to execute the "Affidavit of Qualified Elector" on each nomination paper drastically reduces the number of persons, both volunteer and paid, available to circulate petitions," *Buckley,* 525 at 193. In doing so, it severely burdens this important means of communication for candidates and limits candidate's ability to associate with many potential supporters.

ii. The Burden on Political Organizations.

Because political organizations such as plaintiffs Green Party of Pennsylvania and Libertarian Party of Pennsylvania play a large role in advocating for their candidates' place on the ballot, and providing financial support for nomination paper circulation drives, their free speech rights are likewise burdened by the in-state residency requirement to witness the Affidavit on each nomination paper. Pennsylvania's in-state residency requirement restricts their ability to advocate for their candidate through the free circulation of nomination papers, and burdens their ability to associate, on their own terms, with potential out-of-state circulators.

iii. The Burden on Circulators.

Because those seeking to circulate nomination papers in the Commonwealth of Pennsylvania, such as plaintiff Redpath, are the ones most directly engaging in the effort to

persuade voters and potential voters of the value of a particular candidate, it follows that the in-state residency requirement to execute the Affidavit on nomination papers also gravely diminishes the free speech and association rights of out-of-state residents who wish to circulate nomination papers in Pennsylvania. In fact, many of the cases that have considered the constitutionality of in-state residency requirements have been filed and won by the circulators themselves. *See Daien*, 711 F.Supp.2d 1215, *Nader v. Brewer*, 531 F.3d 1028.

The in-state residency restriction of the challenged statutory provision affects the free speech rights of out-of-state circulators in a number of ways. First, it deprives them of the opportunity to persuade voters and potential voters in Pennsylvania of the viability and/or utility of their candidate being placed on the Commonwealth's general election ballot. Although the restriction "does not specifically preclude these circulators from speaking for the candidates . . ., by making an invitation to sign the petition a thoroughly futile act, it does prevent some highly valuable speech from having any real effect. Robbed of the incentive of possibly obtaining a valid signature, candidates will be unlikely to utilize non-registered, non-resident circulators to convey their political message to the public." *Krislov*, 226 F.3d at 861 n.5. Furthermore, the difficulty and time consuming process of matching a willing out-of-state circulator with a willing in-state circulator to circulate nomination papers at a time and place convenient to each is a time-consuming organizational difficulty to plaintiffs with limited campaign infrastructure which presents an added impairment to the use of the willing out-of-state circulator by Pennsylvania candidates.

Second, the in-state residency requirement "limit[s] the nature of the support [a circulator] can offer" to his or her candidate of choice, because it "completely precludes [a circulator] from participating in the single most critical part of . . . a candidacy . . . that of

obtaining sufficient nominating signatures to appear on the [state] ballot." *Daien*, 711 F.Supp.2d at 1224. Third, an out-of-state circulator "has an interest in who qualifies for President in every state," and the candidate he supports is "burdened in [his or her] attempt to gain ballot access in [Pennsylvania] because they are not permitted to enlist the assistance of non-[Pennsylvania] residents to circulate [nomination papers]." *Id*. Plaintiff Redpath intends to assist in the 2016 circulation of nomination papers for the Libertarian candidates for President and Vice-President of the United States in Pennsylvania.

Finally, just as the in-state residency requirement to execute the Affidavit burdens a candidate's right to expressive association with potential out-of-state circulators, it burdens the circulators' right to associate with a candidate and with voters and potential eligible voters of Pennsylvania, at the time and place of the circulators choosing. *See, Lerman v. Board of Education*, 232 F.3d 135, 143 (2nd Cir. 2000) (noting a circulator's right "to engage in interactive political speech and expressive political association across electoral district boundaries"). In sum, the free speech rights of out-of-state election petition circulators are severely burdened by Pennsylvania's in-state residency requirement to execute the Affidavit on each of plaintiffs' nomination papers.

iv. The Burden on Voters and Potential Voters.

Not only are those disseminating information – the candidates and the circulators – burdened by Pennsylvania's in-state residency requirement to execute the Affidavit on each nomination paper, those who would receive the information – voters and potential voters who are eligible to register to vote and may decide to register if they are permitted to vote for a candidate of their choice and support in the general election – are burdened as well. "[T]he Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557 (1969).

"This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution." *Board of Educ., Island Trees Union Free School Dist, No. 26 v. Pico*, 457 U.S. 853, 867 (1982). By constraining the ability of willing out-of-state circulators to freely circulate nomination papers in Pennsylvania without first seeking and securing an in-state circulator to work with who can then execute the required Affidavit on each nomination paper, the in-state witness requirement to execute the Affidavit reduces the number of circulators available at any given time and thereby restricting "the speech available to [Pennsylvanians], who benefit from the free exchange of ideas and political dialogue that comes from petition circulation." *Daien*, 711 F.Supp.2d at 1231; *see also Krislov*, 226 F.3d at 859 n.3 ("[o]f course, the restriction also affects the rights of . . . those who might hear their message).

In addition to depriving Pennsylvania residents of speech by out-of-state petition circulators educating them about (1) political candidates; (2) the monopoly and corruption of the current two-party system in the Commonwealth; (3) the larger benefit of ballot access to the introduction of debate on new items of public policy in the electoral process; and (5) encouraging those who are eligible to register to vote to do so to support and vote for a break from the two-party system in Pennsylvania – the in-state residency restriction burdens voters and potential voters' First Amendment rights by limiting their choice on the ballot. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preference." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). By reducing the overall quantum of speech available to the election or voting process, the in-state witness restriction on the execution of the Affidavit for each nomination paper severely burdens the First Amendment rights of Pennsylvania residents, voters and potential voters eligible to register to vote.

b. Defendants Cannot Save the In-State Witness Restriction from Strict Scrutiny Analysis.

Because the in-state witness restriction on executing the Affidavit imposes a severe burden on First Amendment rights strict scrutiny applies to this Court's review of the challenged statute. Once this Court determines political speech has been burdened and that strict scrutiny must be applied; it is presumed that the law, or regulation, or policy is unconstitutional. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The government then has the burden to prove that the challenged law is constitutional. *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 450-51 (2007). To withstand strict scrutiny, the government must prove that the law is necessary to achieve a compelling governmental interest. *Id*. If this is proved, the state must then demonstrate that the law is also narrowly tailored to achieve the asserted interest. *Id*.

In order to meet its burden of proof, the government "must do something more than merely posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citing *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (1985)). In other words, the government must factually prove the existence of the evil and that the asserted interest is necessary and narrowly tailored to remedy that evil. Under the requirement that any policy must be narrowly tailored to advance the asserted compelling governmental interest, defendants cannot forego a policy which is clearly less burdensome on free speech and association rights in favor of the policy challenged in this action.

i. The In-State Witness Requirement Fails to Advance a Compelling Governmental Interest.

In this case, defendants cannot meet their burden of proof, because there is simply no legitimate state interest to be protected by prohibiting out-of-state circulators from executing the Affidavit on each nomination paper. Therefore, plaintiffs have shown a reasonable probability

of success on the merits and is entitled to the requested injunction against defendants from enforcing the in-state witness restriction of 25 P.S. § 2911(d) against plaintiffs.

While it is well established that states have a compelling interest in protecting the validity of their electoral process, in Pennsylvania that interest is mainly protected by 25 P.S. § 2937 which provides that any objection filed with Commonwealth Court shall trigger a judicial review of all challenged signatures and nomination papers. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (explaining that states have a compelling governmental interest in protecting the validity of their electoral process). In Pennsylvania, once plaintiffs have filed their nomination papers with defendants, any Pennsylvania "qualified elector" may file a challenge to plaintiffs' nomination papers. In Pennsylvania, after plaintiffs have filed their nomination papers, the Republican and Democratic Parties copy and review each signature and nomination paper to make sure it complies with the myriad of rules governing the circulation and recording of signatures on nomination papers. Historically, plaintiffs' nomination papers for state-wide and presidential office have been routinely subjected to challenge by "objectors" sponsored by the Republican and/or Democratic Parties triggering an immediate and lengthy (and expensive) signature-by-signature judicial review in the Commonwealth Court of Pennsylvania of challenged signatures and entire nomination paper sheets if the challengers contend that the Affidavit is in some way defective warranting the entire nomination paper sheet to be stricken.

Therefore, the Commonwealth of Pennsylvania has established a rigorous procedure to determine the validity of each nomination paper and each signature on each nomination paper sufficient to render the Affidavit a nullity with respect to its utility to advance any compelling governmental interest in making sure that each nomination paper has been validly filed and is free from any fraud. More specifically, defendants play no statutory role in any substantive

review and confirmation of the validity of any nomination paper beyond making sure that each signature facially complies with the requirements of 25 P.S. § 2911. Accordingly, the Affidavit plays no role whatsoever in any substantive validation of plaintiffs' nomination papers, and so the Affidavit, itself, does not advance any compelling governmental interest – let alone the further restriction that it must be executed only by a Pennsylvania "qualified elector."

The United State District Court for the Eastern District of Virginia in *Libertarian Party of Virginia v. Judd,* expressed open skepticism that the signature of an affiant on an election petition affidavit of the kind imposed by Pennsylvania in the Affidavit achieves any compelling governmental interest noting that "[a]s we have recognized 'the critical signature on the petition is not that of the circulator, but that of the voter' who is necessarily subject to the state's subpoena power by virtue of residency" for purposes of policing election petition fraud. *Id.* at n.5 (*quoting Perry v. Judd*, 2012 WL 113865, at 10).

To the extent that there is any vestigial utility for the Affidavit to assure defendants at the time plaintiffs nomination papers are filed that they have been circulated in accordance with law, defendants cannot prove any set of facts that an out-of-state circulator is in any way less trust worthy or more likely to commit perjury than an in-state witness executing the Affidavit. Defendants cannot prove that Pennsylvania residents are more likely to lawfully execute the Affidavit than an out-of-state circulator.

Accordingly, defendants cannot prove that the distinction between an in-state and out-of-state circulator for purposes of the in-state residency requirement to execute the Affidavit is necessary to advance any compelling governmental interest.

ii. The In-State Witness Restriction is not Narrowly Tailored to Advance a Compelling Governmental Interest.

To the extent that the In-State Witness Restriction serves any compelling governmental interest, the restriction is not narrowly tailored to advance that interest. Defendants must show that the In-State Witness Restriction is no broader in scope or burdensome than necessary to achieve its purpose. *Brewer*, 531 F.3d at 1037; *Krislov*, 226 F.3d at 863. Defendants cannot show that allowing non-residents of the Commonwealth to circulate nomination papers free from the supervision of an in-state resident (who may then lawfully execute the Affidavit) would increase the instances of fraud. To establish the need to regulate non-resident circulators, defendants must prove that non-residents are more likely to commit fraud then residents. However, multiple federal courts have rejected the idea that non-resident circulators are inherently less honest. *See, e.g.*, *Meyer*, 486 U.S. at 426; *Brewer*, 531 F.3d at 1037; *Yes on Term Limits v. Savage*, 550 F.3d 1023, 1029 (10th Cir. 2008).

To the extent that defendants allege that the in-state residency requirement is necessary to make sure that circulators are within the state's subpoena power, the courts in *Brewer*, *Yes on Term Limits*, *Chandler*, *Citizens in Charge*, *Perry* and *Libertarian Party of Virginia* have all ruled that such an interest is not narrowly tailored, as states could require circulators to submit to their subpoena power before becoming a circulator. Plaintiff Redpath has stated his willingness to submit to the Commonwealth's jurisdiction to freely circulate nomination papers. Amend. Compl. ¶21; Exhibit H, Redpath Declar. at pp. 3-4. Further, defendants can present no evidence that Pennsylvania has been unable to prosecute any fraudulent circulators because they were not residents of the Commonwealth.

In short, defendants cannot show any set of facts that the in-state residency requirement to execute the Affidavit contained in 25 P.S. § 2911(d) is narrowly tailored to preserve the integrity of the electoral process in Pennsylvania. Accordingly, for all the reasons stated above,

the In-State Witness Requirement of 25 P.S. § 2911(d) violates the First and Fourteenth Amendments to the United States Constitution and plaintiffs are entitled to summary judgment as to Counts I & II of plaintiffs' Amended Complaint.

C. The Notarization Requirement for Each Nomination Paper Contained in 25 P.S. § 2911(d) is Unconstitutional as a Matter of Law and No Genuine Issue of Material Fact Exists Even When the Facts Are Construed in Favor of Defendants.

Defendants have imposed the policy, in excess of their authority under 25 P.S. § 2911(d) [which only requires that an affidavit be appended to each nomination paper], that the Affidavit must be executed "in the presence of a person empowered to take acknowledgements (such as a notary public." Amend. Compl. ¶ 11(B)(i). Defendants will not accept any nomination paper to be filed where the Affidavit for that nomination paper is not executed by a notary public. A notary public in Pennsylvania charges, at a minimum, $5.00 per acknowledgement – and in some cases up to, or in excess of, $20.00 per acknowledgement. *Id*. Defendants' requirement that all nomination papers must be acknowledged "in the presence of a person empowered to take acknowledgements (such as a notary public)" is unconstitutional because defendants do not provide a non-monetary alternative in the context of a statutory scheme whereby the Commonwealth has delegated the certification of nomination paper signatures to private lawsuits which trigger a signature-by-signature review of all challenged signatures and Affidavits by Commonwealth Court. Accordingly, defendants' requirement that nomination papers must be acknowledged "in the presence of a person empowered to take acknowledgements (such as a notary public)" is a meaningless ministerial requirement that imposes a severe economic burden on the exercise of First Amendment rights in violation of the First and Fourteenth Amendments.

After this Court's hearing on plaintiffs' motion for emergency injunctive relief, the United States District Court for the Northern District of Illinois considered the validity of

Illinois' requirement that each page of a nomination paper be individually notarized by the circulator in *Summers v. Smart*, 1:14-cv-05398 (N.D.Ill. August 21, 2014) stated:

> The notarization requirement appears to fall…in the Court's view closer to the higher scrutiny end of the spectrum. The notarization requirement clearly places at least some logistical burden on new parties – particularly with the baffling requirement that each *sheet* of 10 ten signatures be separately certified and notarized even when collected by the same circulator – which are disproportionately affected by it, and the State's argument that the per-page notarization requirement prevents fraud on the petitions lacks evidence and, more importantly, logic.

Id. Exhibit I at page 11. Defendant Marks, for his part, has conceded that if permitted, one affidavit per signature would satisfy the Commonwealth's interest (an interest in fraud protection that Judge John Tharp nevertheless stated lacked "evidence and, more importantly, logic). Exhibit C, Marks Tr. at pp. 67-70. Furthermore, defendants have adduced no evidence that the notarization requirement for each nomination paper acts to prevent fraud in any manner.

Defendants' notary public requirement for the Affidavit amounts to a signature certification fee of $.14285 per signature for political body candidates, such as plaintiffs Glover and Sweeney, and a signature certification fee of $.10 per signature for minor political party candidates, such as plaintiffs Krawchuk and Scheetz. Amend. Compl. ¶ 11(B)(ii).

Defendants expressly represented to this Court in *Morrill v. Weaver*, 224 F.Supp.2d 882 (2002), that the purpose of the Affidavit (which is what must be notarized) is to "validate petitioners' signatures." Accordingly, defendants' requirement that the Affidavit be executed "in the presence of a person empowered to take acknowledgements (such as a notary public)" is the equivalent of an excessive signature verification fee of the kind consistently held unconstitutional. However, defendants also expressly represented to the Third Circuit in *Constitution Party of Pennsylvania v. Aichele*, No. 13-1952 (3rd Cir. July 9, 2014), that they have no role to play in the verification of nomination paper signatures. Accordingly, defendants

cannot now represent in good faith to this Court that they have any interest, let alone a compelling governmental interest, in imposing the sworn affidavit requirement.

While a notarization requirement might survive strict scrutiny in an election law scheme in which executive branch officials, such as defendants, are vested with some substantive authority to verify or certify the validity of nomination paper signatures, it cannot survive strict scrutiny under Pennsylvania's election law scheme where defendants have no statutory authority or responsibility to verify or certify the validity of nomination paper signatures and where a comprehensive judicial review (in which plaintiffs bear the economic burden to defend their own nomination papers), is triggered by a private lawsuit challenging the validity of plaintiffs' nomination papers – which is the exclusive statutory method under the Pennsylvania Election Code to establish the validity of both nomination paper signatures and Affidavits – all in the additional contextual overlay where defendants also prohibit a non-monetary alternative (though available for use by defendants under Pennsylvania law) to the sworn affidavit requirement. At bottom, defendants' sworn affidavit requirement is a naked economic and ministerial barrier to plaintiffs' exercise of rights guaranteed under the First Amendment to the United States Constitution for the sole purpose of placing an additional economic and ministerial barrier for plaintiffs and their candidates to gain access to Pennsylvania's general election ballot.

The Supreme Court has long recognized that states "may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (striking down Virginia law requiring voters either to pay a poll tax or file a certificate of residence). The Court has thus held that states may not condition participation in elections upon an ability to pay fees or taxes. *See Bullock v. Carter*, 405 U.S. 134 (1972) (holding non-trivial filing fees for candidates unconstitutional); *Lubin v. Panish*, 415 U.S. 709 (1974) (holding filing

fees for candidates unconstitutional in the absence of non-monetary alternatives); *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional). Following *Bullock* and *Lubin*, federal courts have, without exception, struck down statutory schemes that impose financial burdens on candidates and political parties without providing them with a non-monetary alternative. *See, e.g.*, *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3rd Cir. 2003) (enjoining enforcement of Pennsylvania's mandatory filing fees); *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289 (8th Cir. 1995) (holding that Arkansas cannot require political parties to hold and pay for primary elections); *Dixon v. Maryland State Bd. Of Elections*, 878 F.2d 776 (4th Cir. 1989) (declaring mandatory filing fee of $150 for non-indigent write-in candidates unconstitutional); *McLaughlin v. North Carolina Bd. Of Elections*, 850 F.Supp. 373 (M.D. N.C. 1994) (declaring the combination of a notarization requirement in addition to a five-cent per signature verification fee unconstitutional); *Clean-Up '84 v. Heinrich*, 590 F.Supp. 928 (M.D. Fl. 1984) (declaring ten-cent per signature verification fee unconstitutional).

Not a single federal court has upheld a statutory or regulatory scheme that imposes a per-signature verification of at least five cents per signature. Under defendants' notarization scheme, the minimum amount that plaintiff Glover must pay is $.14285 cents per signature and a minimum aggregate total of $2,380.00. Furthermore, under defendants' notarization scheme, the minimum amount that plaintiff Krawchuk must pay is $.10 cents per signature and a minimum aggregate total of $1,665.00. Amend. Compl. ¶¶11(B)(i) and (iii). The total minimum notarization fees imposed by defendants is far in excess of the Pennsylvania filing fees held

unconstitutional by the Third Circuit in *Belitskus* – filing fees which ranged only from $5 to $200 in total. *Belitskus*, 343 F.3d at 651.[1]

Under this line of cases, defendants' requirement that the Affidavit on each nomination papers be executed by a notary public authorized to charge a substantial fee for each acknowledgement is unconstitutional on its face, because it imposes an ability to pay significant fees as a condition precedent to plaintiffs' right to exercise their First Amendment right to file nomination papers with defendants to be placed on the Commonwealth's general election ballot.

a. Defendants' Requirement that the Affidavit Must be Executed in the Presence of a Notary Public is a Severe Burden on First Amendment Speech.

Not all state election regulations that tend to limit the field of candidates from which voters might choose are subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). However, the Court has established that state election fee regulations that: "operate to exclude some potentially serious candidates from the ballot without providing them with any alternative means of coming before the voters….a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." *Lubin v. Panish*, 415 U.S. 709, 718 (1974). In balancing a State's regulatory interest in maintaining free, orderly and honest elections against the First and Fourteenth Amendment rights of ballot access for candidates and the right of voters to be able to cast ballots for the candidates of their choice, the Supreme Court has developed a balancing test to determine the appropriate level of scrutiny to be applied in ballot access cases. First, a reviewing court must first consider the character and magnitude of the asserted injury to the right protected by the First and Fourteenth Amendments

[1] Although *Belitskus* involved an "as applied" challenge, the Court rejected the need for ongoing "case-by-case litigation" and concluded that Pennsylvania's mandatory filing fees "inevitably" would be unconstitutional as a applied to a certain percentage of candidates

that the plaintiff seeks to vindicate. Second, the court must identify and evaluate the precise interest put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Accordingly, pursuant to the Court's test announced in *Anderson*, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. "[W]hen those rights are subject to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance." *Id*. (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

The Third Circuit in *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3rd Cir. 2003), explained that economic barriers to ballot access impose a severe burden on First and Fourteenth Amendment rights sufficient to trigger strict scrutiny where the "difficulty in raising funds to pay the required fees, looked at in light of the total assets and liabilities of the candidate, is sufficient to satisfy the test." *Belitskus*, 343 F.3d at 644. Moreover, the Third Circuit explained that "if a ballot access scheme…imposes a mandatory filing fee but fails to provide an alternative means of ballot access, such as signature collection, that scheme constitutes a severe burden on the rights of their indigent candidates and their supporters." *Belitskus*, 343 F.3d at 644. The Third Circuit further explained that: "In the absence of a reasonable alternative means of ballot access, any mandatory fee, no matter how small, will inevitably remain 'exclusionary as to some aspirants.'" *Belitskus*, 343 F.3d at 645 (citing *Lublin*, 415 U.S. at 718). The Third Circuit concluded that the failure of

the Commonwealth to provide a reasonable alternative to an economic fee necessary to secure ballot access severely burdened plaintiffs' rights. Plaintiff Sweeney, in his declaration, stated that some Green Party members refuse to circulate nomination papers because they cannot pay the per-page notarization fee. Exhibit A, Sweeney Declar. at p. 7, ¶21. Plaintiff Sweeney's declaration is unrefuted because defendants chose to not depose any of the plaintiffs in this action.

b. Defendants' Requirement that the Affidavit Must be Executed in the Presence of a Notary Public is a Severe Burden on the First Amendment Rights of Plaintiffs Green Party of Pennsylvania and Libertarian Party of Pennsylvania.

Defendants' requirement that the Affidavit on each nomination paper must be executed "in the presence of a person empowered to take acknowledgements (such as a notary public)" is a severe restriction on the Green Party of Pennsylvania and the Libertarian Party of Pennsylvania because the total minimum cost of notarizing each nomination paper for any statewide election contest far exceeds the total amount of funds that each party has available in their respective bank accounts. Sweeney's declaration in this action establishes that the Green Party of Pennsylvania was not able to cover the cost of the notary public fees in 2014 that defendants require to be paid in order to execute the Affidavit so that the nomination papers can be filed with defendants. Exhibit A, Sweeney Declar. at p.7, ¶20.

Furthermore, even if the Green Party of Pennsylvania and/or the Libertarian Party of Pennsylvania could or can raise funds sufficient to cover the actual costs of notarizing the nomination papers of their candidates, any such expenditure would constitute such a large majority of each political party's meager campaign funds so as to clearly constitute a severe burden on each political party's ability to engage in actual campaign activity and their ability to

communicate their political message toward the Pennsylvania electorate in clear violation of their rights under the First and Fourteenth Amendments.

In addition, because the Commonwealth of Pennsylvania has chosen to require the Green Party of Pennsylvania and the Libertarian Party of Pennsylvania to collect valid signatures of "qualified electors" equal to 2% of the largest number of votes cast in the preceding election, multi-thousand dollar notarization fees are only imposed on minor political party and political body candidates. While Pennsylvania is within its constitutional rights to impose different nomination systems for major political parties (who must gather and notarize fewer signatures on nomination petitions to secure access to a state paid-for primary election) and minor political party and political bodies (who must gather tens of thousands of signatures more than major political parties on nomination papers to secure access to the Commonwealth's general election ballot) the severity of the additional follow-on impact of defendants' requirement that the Affidavit on each nomination paper must be notarized by a commercial notary uniquely imposes a severe financial burden on the uniquely meager financial resources of a minor political party and political body such as the Green Party of Pennsylvania and the Libertarian Party of Pennsylvania.

Accordingly, for all the foregoing reasons, defendants' requirement that the Affidavit on each nomination paper filed by candidates for the Green Party of Pennsylvania and the Libertarian Party of Pennsylvania must be executed "in the presence of a person empowered to take acknowledgements (such as a notary public)" is a severe restriction on rights guaranteed to the Green Party of Pennsylvania and the Libertarian Party of Pennsylvania under the First and Fourteenth Amendments to the United States Constitution.

c. Defendants' Requirement that the Affidavit Must be Executed in the Presence of a Notary Public Fails to Advance a Compelling Governmental Interest.

Defendants assert that the notarization requirement serves the compelling governmental interest in assisting defendants in the certification and/or verification of nomination paper signatures. Many states (perhaps even most) vest in state executive branch officials the task/responsibility of verifying and/or certifying the validity of signatures recorded on election petitions (whether for political office or to place a question on the ballot for the voters to decide). In those states, a notarization requirement may be the only indicia of validity that executive branch officials charged with verifying/certifying election petition may have, because unlike judicial branch officials, executive branch officials do not (generally) have the power (or the funds or time) to conduct an independent investigation into the validity of those signatures affirming or attesting that an election petition and signatures recorded therein were gathered in compliance with state election law.

However, Pennsylvania has chosen a different, more comprehensive, method of verifying and certifying the validity of nomination papers – a statutory scheme defendants have expressly represented to the Third Circuit, through their legal counsel, omits defendants from the certification/validation process. Pennsylvania has expressly delegated validation and certification of the validity of nomination papers to Pennsylvania's judicial branch upon the timely filing of a "Petition to Set Aside" filed by private litigants setting forth, with particularity, any alleged violation of the Pennsylvania Election Code as to the validity of signatures recorded and Affidavits executed and filed by a minor political party or political body candidate sufficient for the Commonwealth Court of Pennsylvania to set aside a nomination paper and strike the candidate from the general election ballot.

Upon the filing of a "Petition to Set Aside" the Commonwealth Court immediately orders a signature by signature review of every challenged signature recorded on plaintiffs' nomination papers and the validity of each challenged Affidavit. Upon a timely filed challenge to their nomination papers, plaintiffs are required to bear the substantial economic costs of legal fees associated with defending their nomination papers in Commonwealth Court. Such costs routinely exceed $10,000 per nomination paper for statewide office. Accordingly, defendants' requirement that the Affidavit must be commercially notarized is a duplicative fee which does nothing toward establishing the validity of the Affidavit or the signatures recorded on the nomination paper – because such a determination is made by an independent determination of the Commonwealth Court of Pennsylvania after the presentation of admissible evidence and oral argument – a judicial process in which the bare act of notarization is given no weight as to the ultimate validity of the nomination paper or the Affidavit.

As noted above, defendants have expressly admitted to the Third Circuit that they have no role on the judicial process which is the actual validation and certification process mandated by the Pennsylvania Election Code. In *Constitution Party of Pennsylvania v. Aichele,* (July 9, 2014, 3rd Cir), in arguing against the causation prong of standing in that case, defendants argued that: "private parties are the ones who bring lawsuits objecting to the nomination papers, the independent decisions of those objectors constitute a break in any actionable link to the Commonwealth's conduct….the interests of the parties (in *Constitution Party of Pennsylvania)* are not adverse because Commonwealth officials (the defendants in this instant action) only accept nomination papers for filing and have no role in any challenge posed to the papers." Accordingly, defendants in this action have, presumable in good faith, admitted to the Third Circuit that their only role is to accept nomination papers for filing, and expressly disclaimed any

official responsibility in their representations to the Third Circuit to have any role in certifying and/or validating signatures recorded on nomination papers or the validity of the Affidavits executed for each nomination paper for which a notarization requirement could advance a compelling governmental interest. The Commonwealth's interest in making sure that plaintiffs' nomination papers are valid is advanced exclusively through the delegation to Commonwealth Court to review nomination papers upon a timely filed challenge to plaintiffs' nomination papers filed and accepted as facially valid by defendants – a process for which defendants' notarization process plays no substantive role. Furthermore, defendants have offered no evidence that the notarization requirement actually prevents election petition fraud, and therefore, is insufficient to support a motion for summary judgment.

Accordingly, defendants' requirement that the Affidavit must be executed "in the presence of a person empowered to take acknowledgements (such as a notary public)" fails to advance any compelling governmental interest. Put more bluntly, defendants' notarization requirement is a meaningless and expensive ministerial requirement specifically designed to impair the ability of minor political parties and political bodies to gain access to the Commonwealth's general election ballot and to deplete their campaign funds to minimize their ability to mount any campaign in the event they do gain access to the Commonwealth's general election ballot.

d. Defendants' Requirement that the Affidavit Must be Executed in the Presence of a Notary Public Fails is not Narrowly Tailored to Advance a Compelling Governmental Interest.

To the extent that this Court determines that defendants' official responsibility to merely accept or reject nomination papers for filing requires that some criminal penalty must threaten to attach to the fraudulent execution of an Affidavit (in order for defendants to be assured, at the

time nomination papers are accepted for filing, as to some indicia of validity), defendants' requirement that the Affidavit must be executed in the presence of a commercial notary public is not narrowly tailored to advance any compelling governmental interest that might attach to defendants' limited statutory role in accepting or rejecting nomination papers. 25 P.S. § 2911(d) does not require that the Affidavit be executed by a notary public. The statute only provides that an affidavit be appended to each nomination paper. The statute does not mandate that the affidavit must be executed in the presence of a notary public.

In choosing to impose a notarization requirement on nomination paper Affidavits, defendants have chosen to forego provisions of 18 Pa. Cons. Stat. § 4904(a)(1) which provides that a person can execute an unsworn affidavit subject to a criminal penalty providing that: "A person commits a misdemeanor of the second degree if, with the intent to mislead a public servant in performing his official function, he (1) makes any written false statement which he does not believe to be true." An affidavit executed pursuant to the penalties of 18 Pa. Cons. Stat. § 4904(a)(1) both: (a) fully encompasses all functions of the Affidavit that defendants will attempt to assert as a governmental interest in accepting or rejecting nomination papers (namely that the person executing the Affidavit is attesting to defendants that the nomination papers were circulated in compliance with the requirements of the Pennsylvania Election Code); (b) does not impose any financial burden on plaintiffs; (c) does not expose plaintiffs to the ever constant threat that large numbers of nomination paper signatures will be stricken as a result of a faulty notarization executed by a third party unrelated to the plaintiffs' political party or campaign; and (d) provides sufficient criminal penalty for any false execution of the Affidavit such that defendants can be as assured as to the validity of the Affidavit as much as any Affidavit executed in the presence of a notary public.

Furthermore, defendant Marks concedes in his deposition testimony that a single notarized affidavit per circulator (rather than per nomination page) would satisfy defendants' alleged interest against fraud. A single affidavit per circulator is a more narrow method of effectuating defendants' unproved averment that the notarized affidavit prevents fraud.

Accordingly, defendants' requirement that the Affidavit on each nomination paper must be executed "in the presence of a person empowered to take acknowledgements (such as a notary public)" is not narrowly tailored to advance a compelling governmental interest. For all the foregoing reasons, defendants' notarization requirement violates rights guaranteed to plaintiffs' under the First and Fourteenth Amendments to the United States Constitution. Furthermore, as no material issue of genuine fact exists with respect to the notarization requirement for each nomination paper plaintiffs are entitled to summary judgment as to Counts III and IV of plaintiffs' Amended Complaint.

D. The Requirement that Plaintiffs Circulate Separate Nomination Papers for Qualified Electors Resident in Different Counties is Unconstitutional As Applied to Defendants' Enforcement of 25 P.S. § 2911(d) in Pennsylvania upon Introduction and Implementation of the SURE system and No Genuine Issue of Material Fact Exists Even When the Facts Are Construed in Favor of Defendants.

The Pennsylvania Election Code, 25 P.S. § 2911(d), requires that residents of different counties must record their signatures on separate sheets of plaintiffs' nomination papers. This requirement of 25 P.S. § 2911(d) imposes a severe restriction on plaintiffs protected political speech and petition activity that is not narrowly tailored to advance any governmental interest and is, therefore subject to strict constitutional scrutiny and is unconstitutional.

The requirement that different nomination paper sheets must be used to record signatures of residents in different counties is an ancient relic from the time when nomination paper signatures were sent to each individual county by Commonwealth Court (upon a timely filed

challenge to a nomination paper) to permit each individual county to check challenged signatures against the signatures recorded on physical voter registration cards maintained by each county. The segregation requirement of 25 P.S. § 2911(d) was necessary in the past to permit challenged nomination papers to be checked by all counties at the same time, without the need for individual sheets to be sent to multiple counties to be checked. In the bygone era where voter registration records were solely maintained in a physical format by each individual county, efficiency and the need to resolve election challenges to nomination papers in an expedited time frame, necessitated the segregation requirement of 25 P.S. § 2911(d).

However, the entire factual rational for the segregation requirement of 25 P.S. § 2911(d) has been nullified with the introduction of Statewide Uniform Registry of Elections ("SURE"), in which county election officials are required to upload, maintain and update voter registration records (including the signature on record for each registered "qualified elector") to the SURE system which permits a voter registration record from any county in the Commonwealth to be located from any computer linked to the SURE system based on a mere fragment of a name and/or address of a registered "qualified elector." By defendants' own admission SURE is "[a] centralized, uniform statewide registry, as opposed to a collection of disparate county level voter files" that "greatly enhances overall accuracy and integrity of the voter roll….protecting against potential voter fraud, and promoting consistency among counties in their data management practices."

Accordingly, challenged nomination papers are no longer sent by Commonwealth Court to individual counties to be checked against the physical voter registration applications maintained by each county. Instead, one or two central locations are selected by Commonwealth Court (usually Philadelphia, Harrisburg and/or Pittsburgh) and staffed by election workers

trained to quickly locate voter registration records to assist both plaintiffs and defendants to review challenged signatures from every county in the Commonwealth.

Accordingly, the segregation requirement of 25 P.S. § 2911(d) no longer advances any governmental interest sufficient to save it from strict scrutiny and is, therefore, unconstitutional.

i. The Requirement of 25 P.S. § 2911(d) that "Different Sheets Must be Used for Signers Resident in Different Counties" Imposes a Severe Impairment on Core Political Speech Protected by the First and Fourteenth Amendments to the United States Constitution.

The moment a "qualified elector" signs plaintiffs' nomination papers it is accorded the highest level of constitutional protection as core political speech under the First and Fourteenth Amendments. The Commonwealth and defendants may take no action to strike any nomination paper signature unless the restriction giving rise to the striking of the signature is narrowly tailored to advance a compelling governmental interest.

Removal or striking a signature from a nomination paper is the most severe restriction on First Amendment speech possible. There can be no more severe restriction on core political speech than the State exercising its power to nullify otherwise protected speech out-of-existence. Any act to strike a signature from a nomination paper is an act to remove the signer from an important political process imposing a severe restriction on the rights of not only plaintiffs in this action seeking to collect a sufficient number of valid signatures necessary to gain access to the Commonwealth's general election ballot, but also of any "qualified electors" whose signature is removed who sought to participate in Pennsylvania's political process. Accordingly, the removal of a signature by defendants, as agents of the Commonwealth, is a severe impairment of First Amendment rights for all plaintiffs to this action and the severest form of impairment of First

Amendment speech for the "qualified electors" whose signatures are struck from plaintiffs' nomination papers.

Furthermore, the requirement of 25 P.S. § 2911(d) that different nomination paper sheets must be used for signers resident in different counties imposes a severe restriction on all plaintiffs to this action because it forces plaintiffs to either: (1) manage an unruly number of nomination paper sheets to cover willing signers who may be resident in any one of Pennsylvania's 67 counties; or (2) willingly restrict the circulation of nomination papers to a few counties and forego all signatures from other counties to avoid the impossible and time-consuming management of dozens of different nomination paper sheets. Because plaintiffs are required to gather tens of thousands of signatures to gain access to the Commonwealth's general election ballot for statewide offices, plaintiffs, out of practical necessity, must concentrate most of their circulation efforts on major transportation hubs in urban cities. As a result, plaintiffs encounter willing signers from most of Pennsylvania's 67 counties.

However, as a direct and proximate result of the segregation requirement contained in 25 P.S. § 2911(d), plaintiffs must forego willing signers from most of Pennsylvania's counties and concentrate on willing signers from a few of the large counties that ring the largest cities in Pennsylvania. It is impossible for any circulator (professional or volunteer) to efficiently manage dozens of separate nomination paper sheets and be able to present them for the signer to sign in the few moments that a willing signer is willing to spend on the process of signing a nomination paper. Accordingly, any effort to manage dozens of nomination paper sheets will actually reduce the number of signatures that can be collected because such a tactic will slow down the circulation effort and may, in any event, lose signatures as a result of an otherwise willing signer not willing to wait for the circulator to locate the specific nomination paper sheet

dedicated to the county in which the signer is a resident. Accordingly, circulators concentrate on securing the signatures of willing signers from a few large counties and forego all signatures from smaller or out-lying counties. Foregoing these signatures is a severe restriction on First Amendment speech as a direct and proximate result of the segregation requirement of 25 P.S. § 2911(d). Testimony will establish that plaintiffs have lost nomination paper signatures because they did not have a sheet for the specific county in which the willing signer was a resident.

Furthermore, in concert with defendants' requirement that nomination papers be notarized by a commercial notary, seeking to secure signatures on separate sheets for small or out-lying counties increases the cost of notarization because additional sheets, with many blank spaces, must be notarized at the same cost as full sheets (obviously the cost of notarizing 25 signatures on a single nomination paper sheet is less expensive than notarizing 25 separate sheets each with a single signature from 25 smaller counties).

Accordingly, the segregation requirement of 25 P.S. § 2911(d) imposes a severe burden on the First and Fourteenth Amendment rights of plaintiffs and millions of willing signers in smaller counties or counties further removed from Pennsylvania's larger urban transportation hubs.

ii. The Requirement of 25 P.S. § 2911(d) that "Different Sheets Must be Used for Signers Resident in Different Counties" No Longer Advances Any Governmental Interest.

With the advent of the SURE system, the Commonwealth and defendants cannot articulate any governmental interest, let alone a compelling interest, in the segregation requirement of 25 P.S. § 2911(d). The Commonwealth and defendants have no interest in prohibiting a "qualified elector" from Lancaster County from signing plaintiffs' nomination papers on the streets of Philadelphia for the sole reason that signers resident in counties other

than Lancaster recorded their signatures on the same sheet as the willing signer from Lancaster. Furthermore, the Commonwealth and defendants have no interest in forcing the otherwise willing signer from Lancaster County to take the additional time to search for someone with a Lancaster County specific nomination paper sheet before that Lancaster County "qualified elector" may validly participate in Pennsylvania's political process.

As noted above, the original rational for the segregation requirement of 25 P.S. § 2911(d) has been vacated by the advent of computer technology and the introduction in Pennsylvania of the SURE system (as mandated by and in compliance with the National Voter Registration Act) which empowers election officials in any county to pull the voter registration record for any registered "qualified elector" in any one of Pennsylvania's 67 counties. The repository of election rolls is now the SURE system and not in each individual county within the Commonwealth.

Defendants now concede that their earlier rational in support of a continued state interest in the segregation of nomination papers by county does not exist. In his deposition testimony, defendant Marks was not able to name a single address in the Commonwealth of Pennsylvania that was identical with another address in a city, town, borough or township with the same name. Accordingly, defendants have utterly failed in their effort to stitch together a continueing state interest in the segregation of nomination papers by county. Exhibit C, Marks Tr. at pp.41-42.

For all the foregoing reasons, the segregation requirement of 25 P.S. § 2911(d) imposes a severe impairment on plaintiffs' First Amendment speech and no longer advances a compelling governmental interest sufficient to save it from strict scrutiny. Accordingly, the segregation requirement of 25 P.S. § 2911(d) is unconstitutional as applied to plaintiffs in Pennsylvania.

Plaintiffs, therefore, are entitled to summary judgment as to Count VI of plaintiffs' Amended Complaint

E. The Prohibition on Signing More Than One Nomination Paper Contained in 25 P.S. § 2911(c) is Unconstitutional as a Matter of Law and As Applied to Pennsylvania and No Genuine Issue of Material Fact Exists Even When the Facts Are Construed in Favor of Defendants.

The Pennsylvania Election Code, 25 P.S. § 2911(c), prohibits all "qualified electors" from signing more than one nomination paper for each political office in an election year. This prohibition is a severe restriction on plaintiffs' protected political speech and petition activity that is not narrowly tailored to advance any governmental interest and is, therefore subject to strict constitutional scrutiny and is unconstitutional.

The prohibition, in combination with §2911(c)'s additional provision that: "More than one candidate may be nominated by one nomination paper and candidates for more than one office may be nominated by one nomination paper" (hereinafter the "Stacking Provision") effectively prohibits plaintiffs from signing nomination papers of other minor political parties and/or political bodies because if any such nomination paper contains a candidate that their own party is also advancing as a candidate, their signature on the opposing party's nomination paper will cause their signature on their own party's nomination paper to be invalid as to all candidates who are commonly seeking to qualify for the Commonwealth's general election ballot. Therefore, John Sweeney cannot validly sign a Libertarian nomination paper that lists a candidate for a political office that the Green Party is not seeking to qualify a candidate for the Commonwealth's general election ballot if that nomination paper also contains Libertarian candidates for political office for which the Green Party is also seeking to qualify their own candidate.

The prohibition against signing more than one nomination paper per political office prevents Pennsylvania citizens from petitioning defendants to include more than just one additional candidate and/or choice for each political office in any general election. Pennsylvania, through 25 P.S. §2911(c) is enforcing a complete ban on every Pennsylvania qualified elector from any First Amendment petitioning that advocates that the Commonwealth's general election ballot include more than one additional candidate beyond the nominees of the recognized major political parties.

Such a ban on core political speech and petitioning of state government constitutes a content based restriction on speech which is presumptively invalid. Furthermore, to the extent that this Court declines to recognize that the challenged prohibition is a presumptively invalid content based restriction on speech, it is, nevertheless, a severe restriction on protected First Amendment speech because it is a blanket prohibition of speech against every citizen of Pennsylvania for which defendants have completely failed to articulate any (let alone a compelling) governmental interest.

While the Commonwealth of Pennsylvania has a recognized governmental interest against "ballot clutter" Pennsylvania has never had more than 7 candidates qualifying for the general election ballot for statewide election contests (candidates for the 2 major parties + 5 additional minor political party/political body and independent candidates qualified for the 1980 general election ballot), and research has not uncovered any local election with more than 7 candidates on the general election ballot for a single seat/office election (excepting, of course, multiple seat elections, such as city council elections which were almost always populated by multiple major party candidates). Furthermore, research has uncovered that when a state requires 5,000 signatures (or more) to gain access to a general election ballot, no state ballot has

ever extended beyond 8 general election candidates in the entire history of the United States. Pennsylvania, owing to the size and growth (in nominal terms) of its electorate (even in off election years) has never, within the last 35 years, permitted access to the general election ballot for less than 8,500 valid signatures collected on nomination papers (i.e., there has not been a statewide candidate in the last 35 years who was the largest "vote getter" in that election who won with fewer than 425,000 votes). Furthermore, there are currently only three minor political parties/political bodies active in the Commonwealth of Pennsylvania (the Green, Libertarian and Constitution parties), leading to a maximum general election ballot of 5 candidates.

In the only Supreme Court articulation of what actually constitutes "ballot clutter" Justice Harlan, in his concurring opinion in *Williams v. Rhodes*, 393 U.S. 23 (1968) explained that: "And with fundamental freedoms at stake…eight candidacies cannot be said, in light of experience, to carry a significant danger of voter confusion….the actions taken by the overwhelming majority of other States suggest, opening the ballot to this extent is perfectly consistent with the effective functioning of the electoral process." *Id*. at 393 U.S. 47.

With respect to a "ballot clutter" defense by defendants, they must not only assert that the restriction is aimed at preventing their interest against "ballot clutter" in Pennsylvania they must also prove that the alleged interest against the evil of "ballot clutter" is, in fact, something more than a hypothetical impairment of an effective and functioning electoral process in Pennsylvania. Defendants have adduced no such evidence, and case law shows that they cannot produce such evidence in support of a governmental interest sufficient to counter the severe impairment of First Amendment rights in Pennsylvania caused by the challenged provision in 25 P.S. §2911(c).

Furthermore, to the extent that defendants attempt to compare the circulation of nomination papers as some form of substitute primary election, and somehow triggering "one

man one vote" concerns, under any such analysis 25 P.S. §2911 would violate the Equal Protection Clause as members of major political parties, who are permitted to cast a ballot for their party candidate in primary election and also sign a nomination paper, would have unequal voting rights (2 votes) as compared to all other registered qualified electors who are not members of one of the major political parties how are only permitted to sign a single nomination papers (i.e., 1 vote). If this Court employs an election analysis to uphold the prohibition of signing more than one nomination papers per political office, plaintiffs will respectfully request leave to further amend their complaint to add an Equal Protection claim against 25 P.S. § 2911.

Accordingly, the prohibition against signing more than one nomination paper contained in 25 P.S. § 2911(c) is a presumptively invalid content based restriction on protected speech and/or imposes a severe burden on the First and Fourteenth Amendment rights of plaintiffs for which defendants cannot, as a matter of law, and as applied to the facts in Pennsylvania, articulate and prove a compelling governmental interest which is narrowly tailored to effectuate the governmental interest. The facts, placed in the light most favorable to defendants, admit of no genuine issue in dispute and plaintiffs are entitled to summary judgment as to Counts XI and/or X of plaintiffs' Amended Complaint.

F. Defendants' Enforcement of 25 P.S. § 2911(a) Interpreting "Qualified Electors" Who May Validly Sign Plaintiffs' Nomination Papers as "Registered Qualified Electors" is in Violation of the Statutory Text of the Pennsylvania Election Code and is a Severe Impairment of First and Fourteenth Amendment Rights for Which Defendants Fail to Articulate and Prove that the Restriction of Narrowly Tailored to Advance a Compelling Governmental Interest and as a Matter of Law and As Applied to Pennsylvania is Unconstitutional and No Genuine Issues of Material Fact Exist Even When the Facts Are Construed in Favor of Defendants.

Defendants require "qualified electors" to be registered to vote on or before the day they record their signature on plaintiffs' nomination papers for their signature to be valid. Defendants

requirement is contrary to both a plain reading of the Pennsylvania Election Code and a severe violation of plaintiffs' (and every unregistered "qualified elector's") rights under the First and Fourteenth Amendments to the United States Constitution.

a. Plain Reading of the Pennsylvania Election Code is Contrary to Defendants' Requirement that "Qualified Electors" Must be Registered to Vote on the Day they Sign Plaintiffs' Nomination Papers.

The Supreme Court of Pennsylvania has clearly articulated that: "In interpreting a statute, a court's goal is to ascertain and effectuate the legislature's intent." *See, In re Nomination Petition of Gales*, 54 A.3d 855, 859 (Pa. 2012); 1 Pa.C.S. § 1921(b). Furthermore, the Supreme Court of Pennsylvania has explained that: "The statute's plain language is the best indication of that intent. When the statute's words are clear and free from all ambiguity, its letter is not to be disregarded under the pretext of pursuing its spirit." *Id.* More importantly, perhaps, is the precedential decision of the Third Circuit in *Coffelt v. Fawkes*, No. 14-3280 (Aug. 26, 2014) that holds that a court must uphold the plain reading of the statute and may not give deference to a restriction imposed by election officials where the statute does not expressly provide for challenged restriction. *Id.* at slip op. pp. 11-15.

Defendants instruct Libertarian Party plaintiffs that: "Signers of nomination papers must be qualified registered electors of the Commonwealth and district and of the respective county in which the nomination papers are circulated….The elector's signature and residence should match the information that appears on his/her voter registration card." *See*, Amend. Compl. Ex. #7, ¶5. Defendants instruct Green Party plaintiffs that: "Signers must be qualified, registered electors of the Commonwealth and of all electoral districts referred to in the nomination papers sheet they have signed." *See*, Amend. Compl. Ex. #9, ¶5.

Contrary to defendants' requirement that only registered "qualified electors" may validly sign plaintiffs' nomination papers, 25 P.S. § 2911(a) merely requires that: "In addition to the party nominations made at primaries, nomination of candidates for any public office may also be made by nomination papers signed by qualified electors of the State, or of the electoral district for which the nomination is made…." *Id.* A "qualified elector" is defined by the Pennsylvania Election Code, 25 P.S. § 2602(t), as: "The words 'qualified elector' shall mean any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election." In its provision on the qualification of electors, the Constitution of Pennsylvania, merely imposes requirements of age, citizenship and state residency and residency in an electoral district 60 days before an election.[2] *See*, Pa. Const. Art. VII, § 1. Therefore, unlike the facts addressed by the Third Circuit in *Coffelt v. Fawkes*, where the election code was largely silent as to whether or not a third party candidate could remain registered with one of the major political parties, in the instant action, the Pennsylvania Election Code at 25 P.S. § 2602(t) gives an express definition of "qualified elector" without a registration requirement. In fact, defendant Marks conceded in his deposition testimony that Article VII, § 1 of the Pennsylvania Constitution is largely cognate with the requirements to be permitted to become a registered voter – thereby providing clear evidence that the Pennsylvania Legislature never intended to limit nomination papers to registered "qualified electors" because the constitutional standard of a "qualified elector" is cognate with the

[2] The 60 day residency requirement within the state and election district for "qualified electors" is always satisfied since nomination papers must be filed on or before August 1st of the year in which the election is held which is more than 60 days prior to the election and every signer of the nomination paper satisfies the state constitutional requirement of residency for the election district corresponding with for the address they record on plaintiffs' nomination papers.

qualifications of someone who has not yet registered to vote but wishes to do so. Exhibit C, Marks Tr. at pp. 14-16.

Further, the Pennsylvania Election Code clearly distinguishes between a "qualified elector" and a "registered qualified elector" demonstrating that there are "qualified electors" who are not registered to vote. In fact, it is the statutory requirement that nomination petitions (as opposed to nomination papers) may only be signed by registered "qualified electors" that the definition of "qualified elector" became improperly conflated with the judicial assumption that any "qualified elector" must also be registered, conflation that occurred via case law deciding cases adjudicating nomination petition disputes. Major political parties (i.e. the Republican and Democratic parties) nominate their candidates for the Commonwealth's primary election through the filing of nomination petitions. By law, only members of each major party may sign nomination petition to place candidates on their party's primary election. [3] 25 P.S. § 2867 provides that nomination petitions shall be: "signed by duly registered and enrolled members of such party who are qualified electors of the State, or of the political district, as the case may be, within which the nomination is to be made or election is to be held." 25 P.S. § 2867 makes it clear that registration is separate and different than the requirements of the Pennsylvania Constitution to be a "qualified elector." The first clause of 25 P.S. § 2867 cited above ["signed by duly registered and enrolled members of such party"] is the registration requirement and the

[3] Plaintiffs would note that a political party enjoys independent First Amendment rights of speech and association which likely would prohibit the Commonwealth from allowing anyone other than a party member (which is determined solely by reference to the party affiliation made by a "qualified elector" at the time they register to vote) from participating in a party's primary election. The Republican and Democratic parties have the right to have their candidates chosen by their own members. Accordingly, the registered "qualified elector" requirement to sign a nomination petition (as opposed to nomination papers) has a unique and independent constitutional pedigree not implicated for unregistered "qualified electors" and who may validly sign plaintiffs' nomination papers without implicating any adverse constitutional entanglement.

second clause of 25 P.S. § 2867 cited above ["who are qualified electors of the State, or of the political district, as the case may be, within which the nomination is to be made or election is to be held."] tracks with the state constitutional requirement necessary to be a "qualified elector". Accordingly, the state legislature and the statute make it clear that the status of being a registered voter is separate and distinct from the state constitutional requirement necessary to be a "qualified elector" who may validly sign plaintiffs' nomination papers under 25 P.S. § 2911(a).

Furthermore, party affiliation is solely determined by reference to the decision made by the "qualified elector" at the time they register to vote. No such party affiliation requirement is at play in the circulation of nomination papers which may be signed by any "qualified elector" – registered, unregistered, Republicans, Democrats, Independents, Communists, Socialists, Greens, or Libertarians.

There are other instances where the Pennsylvania Election Code clearly distinguishes between a "qualified elector" and a "qualified elector" who has become "registered." For instance, 25 P.S. § 1222(10), the statutory provision authorizing and directing the construction and implementation of the Commonwealth's SURE system, provides that the Secretary of State shall: "Assign a unique SURE registration number **to each qualified elector who shall become registered** and record the registered elector in the general register of the appropriate commission." 25 P.S. § 1222(10) is but one of many statutory instances where the Pennsylvania Election Code clearly demonstrates that registered voters is but a smaller sub-set of all "qualified electors."

b. This Court in *Morrill v. Weaver* Defined a "Qualified Elector" Without a Registration Requirement.

Pennsylvania law dictates that its statutes must be interpreted in a manner that does not violate the Constitution. *See*, *Morrill* at 896; 1 Pa.C.S. § 1922(3). This Court in *Morrill v.*

Weaver, 224 F.Supp.2d 882 (E.D.Pa 2002), was compelled to define a "qualified elector" without a registration requirement. In *Morrill*, this Court was confronted with the constitutionality of the Pennsylvania's Election Code requirement in 25 P.S. § 2911(d) that nomination paper "affiants" for a particular candidate be "qualified electors" of the district in which the candidates is running. Plaintiffs in *Morrill* alleged that if "qualified electors" must be registered voters living in particular electoral districts, then 25 P.S. § 2911(d) violates their rights to free expression and association under the First and Fourteenth Amendments to the United States Constitution under the Supreme Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999).

In *Buckley*, the United States Supreme Court struck down as unconstitutional state election laws which restrict the circulation of election petitions to registered voters of a state. In its decision, the *Buckley* Court noted with approval the district court's finding that "the requirement of registration limits the number of persons available to "***circulate and sign petitions and, accordingly restricts core political speech***." In *Morrill*, then district judge Van Antwerpen, in order to save 25 P.S. § 2911(d) from being stricken as unconstitutional under *Buckley* gave the provision a constitutional construction by ruling that while the Supreme Court had previously ruled that "qualified electors" signing a petition must be registered voters, he believed that "the Pennsylvania Supreme Court would attempt to 25 P.S. § 2911(d) a constitutional construction, and hold that the term 'qualified electors' applies to all residents of a particular district." *Morrill* at 885. If fact, in *Morrill*, defendants' legal counsel expressly argued, presumably in good faith, in order to save 25 P.S. § 2911(d) from being stricken as unconstitutional under *Buckley*, that that the Pennsylvania Election Code distinguishes between a "qualified elector" and a "registered elector" – the Commonwealth specifically argued in

Morrill that: "the term 'qualified elector' is ill-defined under 25 P.S. § 2911, and that is might include all residents of a particular election district, registered or not." *Morrill* at 894-96. Further, the Commonwealth argued in *Morrill* that while the definition of a "qualified elector" is defined by reference to the definition contained in the Pennsylvania Constitution, the definition of a "registered elector" is: "a qualified elector who is registered to vote." *Morrill* at 896.

This Court issued its opinion in *Morrill* defining a "qualified elector" without a registration requirement in 2002. In response, the Commonwealth of Pennsylvania has not amended any portion of 25 P.S. 2911(a) to expressly require that only registered "qualified electors" may validly sign plaintiffs' nomination papers.

Accordingly, a plain reading of the Pennsylvania Election Code and the definition already given by this Court in *Morrill* compels a ruling of this Court that the term "qualified elector" includes all Pennsylvania residents qualified and permitted to register to vote and is not limited to only those who have, in fact, registered to vote.

c. Defendants' Interpretation and Enforcement of the Term "Qualified Elector" as Only Those Who Have Registered to Vote on, or Before, the Day They Sign Plaintiffs' Nomination Papers Impairs Plaintiffs' Rights Under the First Amendment.

As a direct and proximate result of defendants' interpretation and enforcement of the term "qualified elector" in 25 P.S. § 2911(a) as including only those who have registered to vote on or before the date they sign plaintiffs' nomination papers, millions of Pennsylvania residents who are otherwise qualified to register to vote, and willing to sign plaintiffs' nomination papers, are prohibited from doing so in violation of their and plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Defendants' interpretation and enforcement of the term "qualified elector" in 25 P.S. § 2911(a) imposes a severe restriction on

plaintiffs' First Amendment right that is not narrowly tailored to advance a compelling governmental interest.

i. Defendants' Interpretation and Enforcement of "Qualified Elector" Imposes a Severe Burden on Plaintiffs' Speech.

The United States Supreme Court makes it clear that the severity of the burden placed on First Amendment speech can be determined based on the number of people excluded by the governmental restriction. In *Buckley,* the Supreme Court focused its analysis on the severity of the burden imposes by governmental restrictions on core-political speech on the number of people excluded by the restriction. *Buckley*, 525 U.S. at 194-95.

In 2002, the Commonwealth admitted to this Court that millions of Pennsylvania residents otherwise qualified to register to vote remain un-registered. *Morrill* at 899. Testimony will establish that, as of 2014, millions of Pennsylvania residents who are otherwise qualified to register to vote remain un-registered (far more than the 400,000 persons who Colorado admitted were "qualified but unregistered" that the *Buckley* Court found to be a sufficiently large number to constitute a severe burden on speech). Accordingly, millions of Pennsylvania residents are excluded from offering their voice and associating with plaintiffs' effort to gain access to the Commonwealth's general election ballot. Accordingly, under *Buckley* and *Morrill*, the severity of defendants' interpretation and enforcement of the term "qualified elector" in 25 P.S. § 2911(a) as excluding all un-registered Pennsylvania residents is clearly established. In *Morrill*, this Court held, consistent with Supreme Court precedent, that Pennsylvania's registration requirement for circulators of election petitions was unconstitutional because of the number of unregistered residents who were excluded from being able to circulate nomination papers. In this case, the number of exclusions is even greater than the exclusion addressed in *Morrill*,

because large numbers of certain registered voters are also not able to successfully sign a nomination paper and survive a challenge to their signature in Pennsylvania because: (1) older signatures in the SURE system than do not match a current signature recorded on a nomination paper is struck as invalid by Commonwealth Court; and (2) 1.4 million registered voters who registered via PennDot and whose electronic signature cannot be matched to a signature recorded by pen on a nomination papers. Exhibit D, Dresbold Report at pp. 5-6; Exhibit G, Tr. *In re Sweeney*, at Tr. pp. 100-101.

Furthermore, the severity on plaintiffs' circulation of nomination papers cannot be overstated. Forcing plaintiffs to ascertain whether a willing signer of their nomination papers is registered to vote: (1) lengthens the amount of time plaintiffs must dedicate to each potential signer of the their nomination papers; (2) forces plaintiffs to reject thousands of Pennsylvania residents otherwise willing to sign their nomination papers; (3) forces plaintiffs to self-strike those signers who sign their nomination papers who are not registered (and thereby increasing the cost of notarizing their nomination papers); (4) forces plaintiffs to dedicate substantial time and resources to attempt to verify the registration status of signatures before filing their nomination papers with defendants; (5) lengthens to time it takes to gather the required number of nomination paper signatures to gain access to the Commonwealth's general election ballot; and (6) increases the total cost to all plaintiffs of any nomination paper circulation drive.

Accordingly, the severity of defendants' interpretation and enforcement of the term "qualified elector" in 25 P.S. § 2911(a) to exclude all un-registered Pennsylvania residents is not merely severe, it is a cancerous impairment of plaintiffs' core-political speech protected under the First and Fourteenth Amendments to the United States Constitution.

ii. Defendants' Interpretation and Enforcement of "Qualified Elector" to Exclude All Un-Registered

Pennsylvania Residents from Signing Plaintiffs' Nomination Papers Does Not Advance A Compelling Governmental Interest.

Defendants argue, as they must, that the term "qualified elector" must exclude un-registered Pennsylvania residents because it would be impossible for defendants to verify and/or certify that signatures recorded on nomination papers were authentic. Defendants' argument in support of this alleged governmental interest is wrong for two important reasons. First, as noted above, defendants play no role in the validation and certification of nomination paper signatures beyond an initial review at the time nomination papers are filed for facial invalidity. Defendants do not make any effort to review whether or not nomination paper signatures match signatures recorded on voter registration cards. Private litigants who object to plaintiffs' nomination papers have the burden under Pennsylvania law to prove that a signature is not valid in the Commonwealth Court of Pennsylvania. Second, while the kind of evidence that private objectors will have to enter into evidence in order to establish that a signature is not valid will change if "qualified electors" are to now include un-registered Pennsylvania residents, such litigants will, nevertheless, have at their instant disposal all the information they require on the face of plaintiffs' nomination papers to gather any evidence they need to properly challenge signatures that they discover to not be authentic.

Defendants' entire rational for limiting nomination paper signatures to registered "qualified electors" is that the SURE system is the only way to verify the validity of nomination paper signatures and the SURE system, by definition, only contains the signatures of registered "qualified electors." Putting aside, for the moment, the fact that other evidence admissible in court is a more directly reliable (such as affidavits or declarations showing that a signature recorded on a nomination paper is not the signature of the Pennsylvania resident located at the

purported address) method for objectors to meet ***their burden of proof***, evidence made part of this motion shows that reliance on the attempting to match signatures in the SURE system with more contemporary recordation of a signature is often not a reliable method to exclude a signature from being valid. Plaintiffs' handwriting expert Michelle Dresbold explains in her expert report that:

> Matching a contemporary signature recorded on a nomination paper to the SURE system signatures is not always a reliable method to exclude a signature recorded on a nomination paper as not having been recorded by a registered voter. This is because a signature may evolve over time. Though some people's signatures change very little over time, others may change drastically. An older signature recorded in the SURE system may not match the voter's contemporary signature recorded on a nomination paper even though the same individual recorded both signatures. In certain circumstances, the health of a writer must be considered as illness, lameness from accidents, injuries, strokes, emotional distress, depression, alcohol and drugs may affect the script. In addition, a signature recorded in a rush may be distorted from those recorded in a more leisurely manner.

Exhibit D, Dresbold Report at p. 5. While the SURE system is certainly a tool, that can be continued to be used under any system as a supplement to other evidence introduced in support or opposition to the validity of a nomination paper signature, it is not such a perfect tool as to be used exclusively as conclusive evidence of validity or invalidity, and as an ongoing excuse to exclude millions of Pennsylvanians from being able to exercise their First Amendment rights of petition and core political speech.

Currently, because defendants' exclude un-registered Pennsylvania residents from the universe of "qualified electors" who may validly sign plaintiffs' nomination papers, private litigants and Commonwealth Court rely on the SURE system to determine if a challenged nomination paper signature is valid. However, if un-registered Pennsylvania residents are included in the definition of "qualified electors" then, presumably, objectors to plaintiffs' nomination papers will be able to determine validity based upon whether the name and address

recorded on plaintiffs' nomination paper match a person who actually resides at the address given on the nomination paper, and enter admissible evidence, such as sworn affidavits or the testimony of investigators, to Commonwealth Court if there is a discrepancy between the information recorded on plaintiffs' nomination papers and evidence the objectors collect as part of their good faith investigation as to the validity of plaintiffs' nomination papers. Such private litigants may, in fact, prefer the current system, but their preference is not a governmental interest (let alone a compelling governmental interest) sufficient to defend against a severe restriction on plaintiffs' speech where the Commonwealth of Pennsylvania has expressly seen fit to delegate the certification and validation of nomination paper signatures to private litigation. Defendants and the Commonwealth cannot divorce themselves from the cost and responsibility of signature verification and then impose those costs on private litigants (including plaintiffs' in this action who are required, by court order, to intimately participate in the certification process, and who must then bear the substantial cost of attorney fees to defend their nomination papers against partisan attack) and then argue to this Court that they have a compelling governmental interest in a particular method that those private litigants must use to certify and/or verify the validity of challenged signatures.

Furthermore, in *Buckley* the Supreme Court recognized the heightened indicia of reliability that the recordation of a current name and address on an election petition provides noting that: "the address at which he or she resides, including the street name and number, the city or town and county….has an immediacy, and corresponding reliability, that a voter's registration may lack…. Attestation is made at the time a petition section is submitted; a voter's registration may lack that currency." *Buckley*, 525 U.S. at 196.

Furthermore, defendants' reliance on matching voter registration signatures on file in the SURE system with nomination paper signatures – is no longer reliable evidence of validity or invalidity even for registered "qualified electors". Under the current system, if Commonwealth Court cannot affirmatively match a signature in the SURE system with a challenged nomination paper signature, that signature is uniformly stricken by the Court. Since passage of the National Voter Registration Act, millions of Pennsylvania voter registration records in the SURE system use compressed electronic signatures (of the kind generated when you sign an electronic key pad) which do not and ***never*** correspond to a recognizable signature recorded by pen on paper.

. As Dresbold further explains (with the agreement and judicial notice of Commonwealth Court judge Bonnie Leadbetter) the 1.4 million signatures currently in the SURE system that are PennDot registrations that captured the voter's signature via electronic key pad, cannot be used to compare a contemporary nomination paper signature recorded with pen on paper. Dresbold explains that:

> It is very difficult, within any degree of certainty, to match many of the compressed electronic signatures that are in the SURE system to signatures recorded by pen and paper – the method of gathering the signature (i.e., by electronic key pad) and the technology used to upload electronic signatures are of such poor quality that they do not provide a proper exemplar to compare to a signature recorded by a signer on paper using a pen on a nomination paper.

Exhibit D, Dresbold Report at p. 6. Commonwealth Court Judge Leadbetter took judicial notice of this fact stating: "I can take judicial notice that those signatures are virtually unrecognizable from the get go,---…signed with those pads….To the extent we move into mostly motor voter registrations, I don't know how we're going to do this." Exhibit G, Tr. *In re Sweeney*, at Tr. pp. 100-101.

Accordingly, millions of Pennsylvania residents who are registered on or before the day they sign plaintiffs' nomination papers are stricken 100% of the time when their signatures are

challenged by private objectors to plaintiffs' nomination papers. Accordingly, defendants' reliance on the SURE system as to the sole reliable method of verifying nomination paper signatures (even for those signers who are registered to vote) no longer works, is misplaced and actually further diminishes the pool of persons who may validly sign plaintiffs' nomination papers to those Pennsylvania residents who are registered to vote on or before the date they sign plaintiffs' nomination papers ***and*** who registered to vote exclusively through a paper voter registration application. Defendants' restriction of nomination papers to registered "qualified electors" in order to maintain reliance on the use of the SURE system by private litigants who challenge plaintiffs' nomination papers imply does not comport with First Amendment requirements and is not tethered toward advancing a compelling governmental interest.

Lastly, there is simply no cognizable argument that the same term contained in the same section of the Pennsylvania Election Code can have two different meanings. Such an argument would defy all basic principles of statutory construction. This is especially true where the term "qualified elector" was given a construction by this Court in *Morrill* to not exclude un-registered Pennsylvania residents in order to comply with constitutional prohibitions against limiting access to participation in the political process protected under the First and Fourteenth Amendments, and where a contrary construction in this action would impose the same constitutional evil sought to be avoided by this Court in *Morrill* and the Supreme Court in *Buckley*. Therefore, for all of the foregoing reasons defendants' interpretation and enforcement of the term "qualified elector" as excluding all un-registered Pennsylvania residents fails to advance a compelling governmental interest and is unconstitutional.

Accordingly, defendants' enforcement of 25 P.S. § 2911(a) prohibiting unregistered qualified electors from validly signing plaintiffs' nomination papers is contrary to the express

definition of "qualified elector" given by the Pennsylvania Election Code prohibiting defendants from adding a registration requirement under the Third Circuit's recent precedential opinion in *Coffelt v. Fawkes*. Defendants' enforcement of 25 P.S. §2911(a) also violates the "unconstitutional conditions doctrine" and is a severe restriction on First Amendment speech for which defendants fails to articulate a compelling governmental which is narrowly tailored to effectuate that interest. Therefore, defendants' enforcement of 25 P.S. §2911(a) is in violation of the Pennsylvania Election Code, and/or the "unconstitutional conditions" doctrine and the First and Fourteenth Amendments to the United States Constitution. The facts and evidence, placed in a light most favorable to defendants, admit of no genuine issue in dispute and plaintiffs are entitled to summary judgment as to Counts XIV, XV and/or XXIX of plaintiffs' Amended Complaint.

G. In the Alternative to Section "F" above, and To the Extent that a "Qualified Elector" is a "Registered Qualified Elector" and the SURE System is Conclusive Evidence as to the Validity or Invalidity of Any Signature Recorded on Plaintiffs' Nomination Papers, <u>THEN</u> Defendants Lack Any Compelling Governmental Interest in Striking Signatures from Nomination Papers that Can be Matched to a Signature of a "Registered Qualified Elector" Recorded in the SURE System Owing to a Failure to Perfectly Complete Any Single Part of the Printed Information Required Under 25 P.S. § 2911(c) and Defendants Enforcement of § 2911(c) is, as a Matter of Law and As Applied to Pennsylvania Unconstitutional Under the First and Fourteenth Amendments to the United States Constitution and for Which <u>Plaintiffs' are Entitled to Summary Judgment</u>.

Simply stated, if enough information is printed on plaintiffs' nomination papers to direct Commonwealth Court to discover a match between the signature recorded on the nomination paper and the signature of a "registered qualified elector" recorded in the SURE system, defendants lack any compelling governmental interest to strike such signatures from plaintiffs' nomination papers. Once validity via a signature match is established, the Commonwealth's and

defendants' legitimate governmental interest in guarding against election petition fraud (despite the fact that the Commonwealth does not consider it a sufficiently weighty interest to conduct the policing of alleged fraudulent signatures themselves) is conclusively sated. Defects such as a failure to print the name (so long as the recording of the name is legible), use of an initial for the first name, use of "ditto marks" to indicate that information printed in the line above is identical to the information intended to recorded by that signer, identical address information recorded by a spouse or some other third party (so long as the signature is recorded by the signer), or that the voter registered after signing plaintiffs' nomination papers – all fail to demonstrate any indicia of fraud when enough accurate information is recorded by the signer to permit those seeking to challenge nomination papers and Commonwealth Court to easily pull the SURE system record of the "registered qualified elector" to establish a match between the signature recorded on the nomination paper and the signature of a "registered qualified elector" as recorded in the SURE system.

With respect to the prohibition of 25 P.S. § 2911(c) against someone other than the signer of the nomination paper from recording any of the required printed information on a nomination paper, it is telling that defendant Marks admitted that the Commonwealth permits voter registration applications to be filled out by 3rd parties so long as the signature is recorded by the individual seeking to become a "registered qualified elector". If the Commonwealth lacks any governmental interest it preventing 3rd parties from recording printed information on voter registration applications, then, defendants cannot advance, nor prove, that they have any compelling governmental interest in prohibiting 3rd parties from recording the printed information required on nomination papers in instances that a signature match has been established between the nomination paper and the signature of a "registered qualified elector" as

shown in the SURE system. If there was ever a time when the government might have an interest in preventing 3rd parties from recording information on an election document, one would think that it would be on the voter registration application – the very document that permits someone to actually cast a vote in an election; and the very document supplying the signature exemplar against which nomination paper signatures are to be compared to determine validity against fraud.

Striking otherwise valid First Amendment speech, free from any indicia of fraud is an absolute bar to core political speech made by the signer of the nomination paper, such that the severity of the restriction is absolute and conclusive. Striking otherwise valid Frist Amendment speech based on rules amounting to form-over-substance, free from any indicia of fraud, imposes the severe requirement on plaintiffs' petition activity that plaintiffs must gather far more signatures than would otherwise be necessary, increases the amount of time and funds needed to secure a sufficient number of signatures to qualify for the general election ballot, triggers unnecessary and costly challenges to nomination paper signatures for which plaintiffs must pay to defend resulting in a severe restriction on plaintiffs' speech by increasing the cost and time needed to circulate nomination papers and reducing the amount of time and funds available for plaintiffs to be able to dedicate toward direct election communication with voters. Plaintiffs lose a significant percentage of nomination paper signature every election cycle that have been matched to the signature of a "registered qualified elector" for the sole reason that: (1) signer of the nomination paper failed to record printed information in the precise manner dictated by 25 P.S. § 2911(c); (2) or someone other than the signer recorded printed information on their signature line in violation of 25 P.S. § 2911(c); or (3) the signer registered to vote after they

signed plaintiffs' nomination papers but within the time permitted by Pennsylvania law and within time to show up in the SURE system for any challenge to their signature by an objector.

Defendants have failed to adduce and cannot produce any evidence that the impairment to plaintiffs' First Amendment speech is not severe, nor can they articulate and prove that any of the challenged restrictions of 25 P.S. § 2911(c) are narrowly tailored to advance a compelling governmental interest. Therefore, plaintiffs, as a matter of law and as applied to Pennsylvania are entitled to summary judgment as to Counts XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII.

H. The National Voter Registration Act, the Supremacy Clause of the United States Constitution and the 2002 Amendments to the Pennsylvania Election Code Establishing a Unitary Election System for Federal and State Election Prohibit the Striking of Signatures from Nomination Papers for Both Federal and State Candidates Where the Only "Defect" is that the Signer has Moved to Another Location Within the County and District in Which They are Registered.

1. Federal Law Dictated the 2002 Amendments to the Pennsylvania Election Code.

Pennsylvania law provides that "qualified electors" may sign nomination papers. 25 P.S. §2911(a). To the extent that a "qualified elector" in 25 P.S. § 2911(a) refers to registered voters, federal law provides that the registration status of registered voters for purposes of elections for federal office may not be altered by virtue of the bare fact that they move from one residence to another within a county. Furthermore, the 2002 amendments to the Pennsylvania Election Code adopt the provisions of the National Voter Registration Act for state election contests, as well as federal contests, creating a unitary election system for both federal and state elections. Accordingly, the Supremacy Clause of the United States Constitution prohibits defendants' from strike signatures on plaintiffs' nomination papers solely because the signer records a residence different from the one recorded on his/her voter registration record because federal and state law

provide that such signers remain registered voters, which under defendants' own interpretation of 25 P.S. § 2911(a) means they remain "qualified electors" entitled to validly sign plaintiffs' nomination papers.

Congress enacted the National Voter Registration Act of 1993 ("NVRA") for the express purpose, in relevant part, to: (1) establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; and (2) to make it possible for Federal, State, and local governments to implement the NVRA in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; and (3) to protect the integrity of the electoral process. 42 U.S.C. § 1973gg (b)(1)-(3). In order to effectuate the NVRA's goal to "enhance the participation of eligible citizens as voters in elections for Federal office and to protect the integrity of the electoral process" the NVRA prohibits state officials from striking from federal voter registration rolls any voter who moves from one address to another address within an electoral district. 42 U.S.C. § 1973gg-6 (d)(1).

Section 1973gg-6 (d)(1) provides, in relevant part, that:

> (1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant – (A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or (B)(i) has failed to respond to a notice described in paragraph (2); and (ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice. (2)….

Id. Further, Section 1973gg-6 (e) provides that:

> (1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

> (2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant – (i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or (ii) (I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location, or (II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.
>
> (B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.
>
> (3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

Id.

By way of example, pursuant to the NVRA, federal law mandates that registered Philadelphia voters who move within Philadelphia may not be automatically removed from the voter registration rolls by providing an option to such registrants on the day of an election to provide updated address information to election officials. Federal law now preserves and guarantees the federal right, that cannot be impaired by the Commonwealth, that a registered voter who moves from one place to another within the county in which he/she is registered is entitled to cast a ballot at the 2014 General Election (though such a voter needs to provide – ***on Election Day*** – updated address information to assist the county registrar to maintain accurate voter registration lists).

Under the NVRA, each county within the Commonwealth is, in essence, treated as a single district for purposes of allowing certain electors to vote in federal elections. Moving from one address to another within a county is no longer a sufficient basis to automatically alter the registration status of an otherwise qualified elector.

Section 951 of the Pennsylvania Election Code, 25 P.S. § 2911(c), provides that a "qualified elector" entitled to sign plaintiffs' nomination papers is a "qualified elector of the State or district, as the case may be…" Neither the Election Code, nor the Pennsylvania Supreme Court has defined the term "qualified elector" under Section 2911. However, there is no statutory or decisional law which would suggest that a registered voter is not a "qualified elector" for purposes of Section 2911(c). *In re Nomination Petition of Flaherty*, 564 Pa. 671, 770 A.2d 333 (2001).

No valid argument can be made that as qualified electors entitled under federal (and state) law to lawfully cast an actual ballot for federal candidates, they are not also qualified under the Supremacy Clause to merely sign a nomination paper to get those candidates on the ballot. The old days when moving from one address to another within a county automatically disqualified an elector from lawful casting ballots in a federal election are over. Stale, parochial concepts of who may sign nomination papers cannot survive the enactment of supreme federal law to the contrary. The National Voter Registration Act provides the sole method of removing a "qualified elector" from the voter registration rolls. Defendants lack authority to diminish the registration status of a registered qualified elector by ignoring supreme federal law.

2. Subsequent Amendments to the Election Code Vacate the Pennsylvania Supreme Court's Statutory Analysis and Decision in *Flaherty* Imposing the Identical Address Requirement.

Amendments to the Election Code in 2002 deleted the statutory text upon which the Pennsylvania Supreme Court exclusively based its analysis justifying the Identical Address Requirement. Accordingly, the Supreme Court's statutory based analysis in ***Flaherty*** has been vacated by subsequent amendments to the Election Code.

Prior to the 2002 amendments to the Election Code, the ***Flaherty*** Court explained in imposing the Identical Address Requirement that:

> Furthermore, when electors move either within the same county or to another county within the Commonwealth, they must notify the registration commission of their new address by filing a removal notice generally no later than 30 days preceding an election. 25 P.S. §§961.901 – 961.902….Thus, absent extraordinary circumstances, electors who declare a residence at an address different than the address listed on their voter registration card are not qualified electors at the time they sign a nomination petition unless they have completed the removal notice required by the Voter Registration Act….Where electors fail to properly notify authorities of a change in address, those electors' voter registrations are terminated and thus, they are clearly disqualified from signing a nomination petition as a registered and enrolled elector.

Flaherty at 333-34. In 2002, after ***Flaherty*** was decided, and in response to a federal injunction issued by Judge Buckwalter in 1995 enjoining those provisions of the Election Code which were inconsistent with the NVRA as it applied to federal elections, the General Assembly amended the Election Code to provide that:

> A registered elector who removes residence from one place to another within the same county and who has not yet filed a removal notice with the commission shall be permitted to vote once at the elector's former polling place following removal if, at the time of signing the voter's certificate, the elector files with the judge of election a signed removal notice properly filled out. Removal notices under this paragraph shall be returned to the commission with the voting check list, and the commission shall proceed to transfer the registration of the elector under section 1502 (relating to transfer of registration) and shall promptly update information contained in its registration records. A registered elector may vote in the election district of the elector's former residence not more than one time following the elector's removal.

25 Pa. C.S. § 1501(b)(2).

Citing the 2002 amendments to the Election Code, this Court decided in *In re Nomination Petition of Brown*, 846 A.2d 783 (Pa. Cmwlth. 2004), to refuse to allow objectors to amend their objections to include a challenge to signers' residences, stating that such amendments would be "pointless." *Id.* at 787. This Court reasons that if the amendments were allowed, the addresses challenged as different from those on the registration cards would have no legal effect on the signers' status as qualified electors within the political district. This Court correctly explained that different addresses do not prevent signers from voting at their former polling places in the next election (or at the first election that the signers choose to cast a ballot) and, therefore, do not alter the "qualified elector" status of the signers. *Id.*

In *In re Nomination Papers of Robertson*, a majority of a three judge panel (Hon. Pellegrini and Hon. Colins) ruled in 2012, in an unpublished opinion, that the 2002 amendments to the Pennsylvania Election Code prohibit striking signatures from nomination papers solely because the signer had changed address within a county (and district) in which they are registered qualified electors. This Court explained:

> "The voter registration laws applicable to this election are substantially different from the voter registration laws provisions on which *Flaherty* was based. Unlike the state election at issue in Flaherty, elections for federal office are subject to the requirements of the National Voter Registration Act, 42 U.S.C. § 1973gg-6. The NVRA expressly prohibits states from disqualifying voters merely because they moved within the county without updating their address with the board of elections, and requires that such voters be permitted to vote at their prior polling place without changing their registration address in advance of the election. 42 U.S.C. § 1973gg-6(e). The NVRA also expressly prohibits states from terminating voters' registrations and removing voters from the rolls for federal elections simply because the voter has moved within the county without changing his or her address. 42 U.S.C. § 1973gg-6(d). Voters can be removed from the rolls based on a change of address within the same county only if the voter is first given notice and both fails to respond to the notice and fails to vote in at least two federal general elections. 42 U.S.C. § 1973gg-6(d)….While the NVRA applies only to federal elections, the result is the same with respect to state candidates. In 2002, after *Flaherty* was decided, the General Assembly repealed the statute on which *Flaherty* was based and enacted a new Voter Registration Act (the 2002

> Act), 25 Pa. C.S. §§ 1101-3302. Under the 2002 Act, a voter who has moved within the same county is entitled to vote in one election at his old polling place, regardless of when he moved. 25 Pa. C.S. § 1501(b)(2). In addition, the 2002 Act provides that a voter's registration cannot be canceled simply because the voter moved without changing his registration address, and a voter cannot be removed from the rolls based on a move within the same county unless the specific requirements of the NVRA are met. 25 Pa. C. S. § 1901(a), (d). Thus, Pennsylvania's current voter registration laws are substantially different from the automatic termination and termination of eligibility on which *Flaherty* was based. The current laws, like the NVRA, treat changes of address within the same county as not impairing the voter's eligibility. Moreover, to the extent that there are differences between the 2002 Act and the NVRA, our Supreme Court made clear in 2006 that Pennsylvania's Election Code provides a unitary election system from federal and state offices and that procedures for voting in state elections are to conform to federal requirements in order to prevent separate federal and state voting systems. (citing *Kuznik v. Westmoreland County Board of Commissioners*, 588 Pa. 95, 118-23, 902 A.2d 476, 495-504 (Pa. 2006).
>
> *Id.*

Accordingly, the 2002 amendments to the Election Code vacate the Pennsylvania Supreme Court's statutory based analysis establishing the Identical Address Requirement in *Flaherty* with respect to Respondents' federal and state candidates. Plaintiffs therefore are entitled to summary judgment as a matter of law on Counts XXIV and XXV of plaintiffs' Amended Complaint.

IV. CONCLUSION

For all the foregoing reasons, plaintiffs' motion for partial summary judgment should be granted and the requested declaratory and injunctive relief should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on October 31, 2014, he personally caused to be served upon the following a true and correct copy of the foregoing brief via the Court's ECF filing system to:

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