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

GREEN PARTY OF PENNSYLVANIA, et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
CAROL AICHELE, SECRETARY OF THE COMMONWEALTH OF PA, et al.,	:	
Defendants	:	No. 14-3299

COMMONWEALTH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendants Carol Aichele and Jonathan Marks (together, the "Commonwealth Defendants") move the Court to enter judgment in their favor. The Commonwealth Defendants make this motion because, based upon the facts as set forth in the stipulation of facts (Doc. No. 24) and attached exhibits, there is no genuine issue as to any material fact and the Commonwealth Defendants are entitled to judgment as a matter of law.

This motion is supported by the attached memorandum of law, the stipulation of facts (Doc. No. 24), and the following attached exhibits:

Exhibit No.	**Description**
1	Deposition of Jonathan Marks
2	Deposition of Michelle Dresbold
3	Transcript of July 31, 2014 Hearing on Plaintiff's Motion for an emergency TRO and Preliminary Injunction

WHEREFORE, the Commonwealth Defendants pray for an order granting judgment in their favor and affording such further relief as is just and proper.

Respectfully submitted,

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Date: October 31, 2014

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MEMORANDUM OF LAW IN SUPPORT OF COMMONWEALTH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This is an action challenging numerous provisions of the Pennsylvania Election Code governing the conduct of minor political parties, political bodies, and their candidates for public office. The plaintiffs are the Constitution Party of Pennsylvania and its chair, Joe Murphy; the Green Party of Pennsylvania and its chair, Carl Romanelli; the Libertarian Party of Pennsylvania and its chair, Thomas Robert Stvens; James Clymer, a member of the Constitution Party of Pennsylvania, and Ken Krawchuk, a former candidate of the Libertarian Party of Pennsylvania. (collectively, "Plaintiffs".)

In their Amended Complaint, Plaintiffs assert a smorgasbord of claims, totaling 29 counts, under both federal and state law. Named as defendants in their official capacities only are Carol Aichele, Pennsylvania's Secretary of State, and Jonathan Marks, Pennsylvania's Commissioner for the Bureau of

Commissions, Elections and Legislation (together, the "Commonwealth Defendants").

Plaintiffs commenced this action on June 9, 2014. Doc. No. 1. After filing an Amended Complaint (Doc. No. 10), on July 29, 2014 Plaintiffs filed a Motion for Emergency Temporary Restraining Order or Emergency Preliminary Injunction regarding five of their claims, requesting relief by August 1, 2014 (Doc. No. 11). The Court quickly convened a hearing, at the conclusion of which it enjoined Defendants Carol Aichele and Jonathan M. Marks from enforcing the "In-State Witness Requirement" for nomination paper circulators. The Court denied the motion in all other respects. Exhibit 3: Transcript from 7/31/14 hearing; Doc. No. 16: 7/31/14 Order.

This was followed by a period of discovery, which Plaintiffs had requested. Plaintiffs' discovery consisted of a deposition of Commissioner Marks. Plaintiffs also produced a report from a document examiner, Michelle Dresbold, whom they put forth as a handwriting expert. Doc. No. 22. The Commonwealth Defendants' discovery consisted of deposing Ms. Dresbold.

There were no disputed facts before discovery. The limited discovery conducted did nothing to change that. The Commonwealth Defendants therefore move for summary judgment.

II. UNDISPUTED FACTS

The material undisputed facts are set forth in the Parties' Stipulated Facts (Doc. No. 24).

III. ARGUMENT

A. Applicable Standards

I. Motion for summary judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a)(setting forth the legal standard formerly found in Fed.R.Civ.P. 56(c)). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The motion must be granted unless the nonmoving party designates specific facts in discovery materials or affidavits showing a genuine material factual issue that can only be resolved by a trial or unless the law does not support the motion. Id. at 324; Fed.R.Civ.P. 56(e). The court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party. Scott v. Harris, 550 U.S. 372, 378 (2007).

However, a non-moving party may not "rest upon mere allegations, general denials or ... vague statements...." Trap Rock Industries, Inc. v. Local 825, Intern. Union of Operating Engineers, AFL-CIO, 982 F.2d 884, 890 (3d Cir. 1992) (*quoting* Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3rd Cir.), *cert. denied*, 502 U.S. 940 (1991)). Conclusory statements are not facts and cannot

create issues of fact. Lujan v. National Wildlife Federation, 497 U.S. 871, 888, 889 (1990). Furthermore, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt to the material facts." Matsushita Indus. Elec. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the non-moving party's evidence "is merely colorable, …or is not significantly probative, … summary judgment may be granted." Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992) (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)).

B. Plaintiffs' § 1983 claims

Although Plaintiffs are frequent litigants in this Court,[1] they use this single case to assert 29 claims. The first 23 counts are claims under 42 U.S.C. § 1983 in which they allege various provisions of the Election Code violate their First Amendment rights:

Count	Description
I.	The state residency requirement for circulator of nomination papers (facial)
II.	The state residency requirement for circulator of nomination papers (as applied)
III.	Nomination papers must be notarized (facial)
IV.	Nomination papers must be notarized (as applied)

[1] For example, in another case currently pending in this district some of the same individuals and entities are attacking another Election Law provision they allege affects minor political party and political body access to the general election ballot. Constitution Party v. Aichele, No. 12-2726 (J. Stengel).

V. Nomination papers must be separated by county (facial)

VI. Nomination papers must be separated by county (as applied)

VII. Signers of nomination papers must include the year in the "date of signing" box (facial)

VIII. Signers of nomination papers must include the year in the "date of signing" box (as applied)

IX. Signers can only sign nomination papers for one candidate for each office for each office as there are vacancies to be filled (facial)

X. Signers can only sign nomination papers for one candidate for each office for each office as there are vacancies to be filled (as applied)

XI. The inclusion of the "Presidential Electors" section on nomination papers for political bodies during non-presidential election years (as applied)

XII. Note on 2014 nomination paper forms of possibility of Commonwealth Court challenge based upon circulator not being a resident of the electoral district (facial)

XIII. Note on 2014 nomination paper forms of possibility of Commonwealth Court challenge based upon circulator not being a resident of the electoral district (as applied)

XIV. Limiting signers to those who are registered to vote (facial)

XV. Limiting signers to those who are registered to vote (as applied)

XVI. Signers must include their printed name and address (facial)

XVII. Signers must include their printed name and address (as applied)

XVIII. Signers who did not include their printed name and address cannot have that information later added by a third person (facial)

XIX. Signers who did not include their printed name and address cannot have that information later added by a third person (as applied)

XX. The striking of signatures by Commonwealth Court when the address of the signer does not match the address in the SURE system (facial)

XXI. The striking of signatures by Commonwealth Court when the address of the signer does not match the address in the SURE system (as applied)

XXII. The striking of signatures by Commonwealth Court for people who were not registered to vote at the time they signed, but later registered in time to be eligible to vote in the election (facially)

XXIII. The striking of signatures by Commonwealth Court for people who were not registered to vote at the time they signed, but later registered in time to be eligible to vote in the election (as applied)

While these claims will be addressed in greater detail below, some principles generally applicable to these claims must be considered.

With the exception of Count XI, Plaintiffs assert both a facial and an as-applied constitutional challenge to various provisions of the Election Code. "Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) (*quoting* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). "When a challenge is brought against a state statute

that has been authoritatively construed by the relevant State's highest court, a federal court is bound by that construction in determining whether the statute violates the Constitution." Project Vote v. Kelly, 805 F.Supp.2d 152, 168 (W.D.Pa.,2011) (*citing* New York v. Ferber, 458 U.S. 747, 769, n. 24 (1982)). The interpretation placed on the statute by the officials charged with enforcement of the statute must also be granted some meaningful weight. Bellotti v. Baird, 428 U.S. 132, 143 (1976). To prevail on a facial challenge, the plaintiffs "must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." National Endowment for the Arts, at 580. Meanwhile, "An as-applied attack ... does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010). The bar is therefore lower for establishing such a claim.

While both types may be pled, Plaintiffs here can only pursue a facial challenge given the arguments they advance and relief they seek. Plaintiffs' arguments, if correct, preclude the idea that the provisions at issue have a "plainly legitimate sweep" or that "circumstances exist under which [they] would be valid." Chula Vista Citizens for Jobs and Fair Competition v. Norris, 755 F.3d 671, 683 n. 12 (9th 2014) (*quoting* United States v. Stevens, 559 U.S. 460, 472–73 (2010)). They seek relief in the form of declarations that various provisions of the Election Code are unconstitutional, injunctions precluding enforcement of those provisions "against all plaintiffs now and in the future,"

and further relief which would affect the ballot access for all minor political party and political body candidates. Am. Compl. pp. 175-182. Because Plaintiffs "claim[s] and the relief that would follow … reach beyond the particular circumstances of these plaintiffs," they must "satisfy [the] standards for a facial challenge to the extent of that reach." Id. (*quoting* Doe v. Reed, 561 U.S. 186, 194 (2010)).

"The Constitution grants States 'broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election process for state offices." Clingman v. Beaver, 544 U.S. 581, 586-87 (2005) (*quoting* Art. I, § 4, cl. 1; Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986)). Plaintiffs here challenge the Commonwealth of Pennsylvania's process by which candidates for minor political parties and political bodies gain access to the ballot. The Third Circuit instructs that the following standard should be used in ballot access cases:

> [The court's] scrutiny is a weighing process: We consider what burden is placed on the rights which plaintiffs seek to assert and then we balance that burden against the precise interests identified by the state and the extent to which these interests require that plaintiffs' rights be burdened. Only after weighing these factors can we decide whether the challenged statute is unconstitutional. Consequently, we will look at the nature of the rights involved here and the burdens imposed by Pennsylvania election law on minor political parties in order to determine if the burden is justified.

Rogers v. Corbett, 468 F.3d 188, 194 (3d Cir. 2006) (*citing* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

It is undisputed that the Commonwealth has a strong interest in preventing voter confusion, avoiding ballot clutter, and ensuring viable candidates by limiting ballot access. Constitution Party of Pennsylvania v. Aichele 2014 WL 3294855, at *2 (3d Cir. Jul. 9, 2014). Preventing fraud and providing orderly election administration are also undoubtedly legitimate interests of the Commonwealth and the public in general. *See* Valenti v. Mitchell, 962 F.2d 288, 301 (3d Cir. 1992) ("The state's interest in a timely and orderly election is strong.")[2]

"Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." Storer v. Brown, 415 U.S. 724, 733 (1974) (*citing* Jenness v. Fortson, 403 U.S. 431, 442 (1971)). "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." Id., at 732 (*quoting* Jensen, at 442).

The Supreme Court has long recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)

[2] The threat of fraud is not an abstract one - in Pennsylvania's 2004 general election the nomination paper objection process uncovered rampant fraud in the nomination papers submitted by a political body presidential candidate. In re Nader, 865 A.2d 8 (Pa.Cmwlth. 2004).

(*quoting* Storer, 415 U.S. at 730); League of Women Voters v. Blackwell, 340 F.Supp.2d 823, 829 (N.D.Ohio 2004) ("Few can doubt that deterrence, detection, and avoidance of election fraud are fundamentally important state and public concerns and interests.") The Constitution does not prohibit the States from enacting laws which incidentally burden candidates, for such a proscription would similarly preclude the regulation of elections and efforts to ensure their integrity." Krislov v. Rednour, 226 F.3d 851, 859 (7th Cir. 2000). "[T]he fact that an individual or a political party lacks sufficient resources to successfully run for public office does not constitute a violation of the rights of the candidate or the political party under the First Amendment. Rogers v. Cortes, 426 F.Supp.2d 232, 238 (M.D.Pa. 2006). "[W]hen 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." Burdick v. Takushi, 504 U.S. 428, 434-35 (1992) (*quoting* Anderson, 460 U.S., at 788).

The Commonwealth, through the Election Code, has established specific procedures for minor political party and political body candidates to obtain placement on the general election ballot. The Commonwealth Defendants are tasked with implementing and overseeing these procedures, which are set forth in the parties' Stipulation of Facts. While Plaintiffs do not challenge the general requirement that minor political party and political body candidates must gather a certain number of signatures, they attack nearly every regulation that governs that process. Combined, these regulations protect the

integrity of the nomination paper process. Plaintiffs cannot in good faith dispute that granting them the relief they seek will make it less likely that fraud in the signature gathering process would be detected.

By their very nature, rules governing this process, or any process, will involve some minimal inconvenience or indirect costs. However, the alleged burdens are reasonable and too insignificant to outweigh the protection to the integrity of the election process they provide.

1. The state residency requirement for circulator

Section 2911(d) requires each nomination paper to include an affirmation from a witness, typically the circulator of the nomination paper, that each of the entries on each nomination paper conatin accurate information and are signed by qualified electors. Section 2911(d) requires this person to be "qualified elector," which the Secretary interprets as being a resident of Pennsylvania eligible to vote. Plaintiff has approximately 10 million voting-age residents. Plaintiffs nonetheless allege that limiting the pool of circulators to these ten million people hampers their ability to gather signatures and serves no purpose.

In support Plaintiff cites Morrill v. Weaver, 224 F.Supp.2d. 882 (E.D.Pa. 2002). In that opinion, which struck down the requirement that circulators live within district of the candidate they are gathering signatures for, the Court acknowledged the legitimate purpose of requiring circulators to be Pennsylvania residents: the subpoena power of the Pennsylvania courts and elections officials would not extend to non-Pennsylvania residents. Id. at 903-

04. To allow nonresidents to circulate would allow them to avoid testifying about their signature-gathering activities in later challenges, which in turn would hamper the Commonwealth's interests to prevent fraud and conduct an orderly election process.

The Hearing on Plaintiffs' Motion for an Emergency Temporary Restraining Order resulted in the Court enjoining the Commonwealth Defendants from enforcing this provision. Exhibit 3: Transcript from 7/31/14 hearing, pp. 60-64. Given the minimal burden to Plaintiffs and significant interests of the Commonwealth in fairly resolving challenges to nomination papers, the Commonwealth Defendants maintain the Pennsylvania residency requirement is constitutional. The Commonwealth Defendants therefore request that the Court enter judgment in its favor on this issue, and lift the order enjoining the Commonwealth Defendants from enforcing this provision.

2. Nomination papers must be notarized

As the affidavit at the bottom of nomination papers instructs, it must be executed "in the presence of a person entitled to take acknowledgements (such as a notary public)." *See* Stipulated Facts Exhs. 1, 2. Plaintiffs initially contend that this is not required by the Election Code. This is incorrect.

Section 2911(d) requires each nomination paper to include an "affidavit" verifying various information contained therein. The word "affidavit" is significant. The Commonwealth's general rules for statutory construction define the term:

> § 1991. Definitions
>
> The following words and phrases, when used in any statute finally enacted on or after September 1, 1937, unless the context clearly indicates otherwise, shall have the meanings given to them in this section:
>
> > "Affidavit." A statement in writing of a fact or facts signed by the party making it, sworn to or affirmed before an officer authorized by the laws of this Commonwealth to take acknowledgments of deeds, or authorized to administer oaths, or before the particular officer or individual designated by law as the one before whom it is to or may be taken, and officially certified to in the case of an officer under his seal of office.

1 Pa.C.S. § 1991. There is nothing in the context of § 2911 suggesting "affidavit" should have a different meaning for purposes of that statute. There is no holding from a Pennsylvania court that affidavit means something different. The Commonwealth Defendants therefore require the affidavit to be executed "in the presence of a person entitled to take acknowledgements (such as a notary public)."

This is obviously a further safeguard against fraud in the signature gathering process, a legitimate interest. Plaintiffs simply argue that this is a serious burden because a notary typically charges a fee for each document notarized. The fact that there are necessarily minimal costs associated with meeting the requirements to secure a position on the ballot does not make those requirements unconstitutional. Plaintiffs could minimize these costs by having their regular circulators, candidates, and/or party leadership obtain their notary license, which costs $40.00. "In most jurisdictions, it is neither

impractical nor burdensome for party members to become notaries so that they may verify the petitions that they circulate." Perez-Guzman v. Gracia, 346 F.3d 229, 240 (1st Cir. 2003).

If Plaintiffs are not interested in licensing their own candidates or supporters, there are thousands of notaries throughout Pennsylvania, none of whom may charge more than $5.00 per acknowledgement. Exhibit 3: Transcript from 7/31/14 hearing, p. 38-39. Given this level of competition and the amount of papers they need notarized, Plaintiffs should be able to negotiate a reasonable fee arrangements with select notaries throughout the Commonwealth.[3] By law, notaries public may even waive the right to charge a fee.[4]

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[3] Plaintiffs allege that notaries in Pennsylvania in some cases charge "in excess of $20.00 per acknowledgement." By law notaries may not charge more than $5.00 per acknowledgement. While notaries may charge a separate clerical or administrative fee, a $15.00 fee would be unusual. *See* http://www.portal.state.pa.us/portal/server.pt/community/notaries/12609

[4] Section 21 of the Notary Public Law, 57 P.S. §167, states:

> § 167. Fees of notaries public
>
> (a) The fees of notaries public shall be fixed by the Secretary of the Commonwealth with the approval of the Attorney General.
>
> (b) A notary public shall not charge, attempt to charge or receive a notary public fee that is in excess of the fees fixed by the Secretary of the Commonwealth.
>
> (c) The fees of notaries public shall be displayed in a conspicuous location in the notary's place of business or be provided upon request to any person utilizing the services of the notary. The fees of the notary shall be separately stated. **A notary public may waive the right to charge a fee**, in which case the requirements of this subsection regarding the display or provision of fees

(continued on next page…)

Given the minimal burden to Plaintiffs and significant interests of the Commonwealth, the notarization requirement is constitutional. Judgment should therefore be entered in favor of the Commonwealth Defendants.

3. Nomination papers must be separated by county

Each nomination paper is to contain signatures from residents of a single county. Plaintiffs allege that since it is possible for a state-wide office circulator to encounter a potential signer from any of the 67 counties regardless of his location, he must therefore carry 67 sets of nomination papers. Plaintiffs allege this is a burden because the cumbersome process of selecting the right sheet delays the process of obtaining signatures. While it is certainly possible to encounter someone from any county, the reality is that a circulator gathering signatures in a particular county is most likely to encounter residents of that county or the surrounding counties. To be safe, the circulator could carry nomination papers for each county, or even papers with the county not yet filled in, but logic dictates that most of those papers will not need to be accessed. The burden is therefore minimal.

Lifting this requirement would create confusion for the Secretary, who is tasked with processing and managing the hundreds of nomination papers she

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shall not apply.

(d) The fee for any notary public employed by a bank, banking institution or trust company shall be the property of the notary and in no case belong to or be received by the corporation for whom the notary is employed.

57 P.S. §167 (emphasis added).

receives each year, most on a single day - August 1. It eliminates the most basic method for the Secretary, or a citizen, to facially determine if a candidate has enough signatures from residents of his district. Because a single nomination paper may be endorsing both a statewide candidate and a local candidate, or even multiple local candidates, having the nomination papers separated by county allows the Secretary or a citizen reviewing the nomination papers for purposes of the local candidate to easily tally the signatures for that candidate. If the nomination papers were not separated by county, the Secretary or citizen would have to review *all* of the nomination papers for the statewide candidate which also included the local candidate and search each for signers who were eligible to endorse the local candidate, based upon their address. That effort would be further complicated by the fact that there can be identical addresses in different counties (i.e., Springfield, Montgomery County; Springfield, Delaware County).[5]

Given the minimal burden to Plaintiffs and significant interests of the Commonwealth, the requirement that nomination papers be separated by county is constitutional. Judgment should therefore be entered in favor of the Commonwealth Defendants.

[5] Any confusion caused by the same address, different county situation could be addressed by requiring all signers to also include their county. This would necessarily extend the length of every encounter, something Plaintiffs are seeking to avoid.

4. Signers of nomination papers must include the year in the "date of signing" box.

The Election Code, and therefore the nomination paper forms, require each signer to include the "date of signing." Plaintiffs assert that, to the extent that "date of signing" mandates that the year be provided, the requirement is unconstitutional. They allege that it is burdensome because it lengthens the time of their encounter with each signer.

It is hard to believe that writing "14" adds that much time to an encounter. It would likely take more time to explain to each signer that they should fill in the date, but exclude the year. Meanwhile, this requirement ensures that signatures were gathered during the proper timeframe and are not being recycled from year to year.

Regardless, there is no case or controversy on this issue, meaning the Court lacks jurisdiction to address it. As Commissioner Marks testified before this Court (Marks Dep. at 29:25-30:18, 58:18-59:23), the DOS does not reject nomination papers because entries lack the year. The Plaintiffs do not allege that any signature has been rejected for that reason. In their Amended Complaint Plaintiffs note that the Pennsylvania Courts regularly deny challenges based upon the failure to include the year, so long as the year is evident from the printing on the form or other signature entries. ¶ 11(d)(iv). For example, nomination papers forms issued by DOS include a month and year in the bottom left hand corner. Stipulation of Facts, Exhs. 1, 2.

While these markings are for internal purposes, reflecting updates to the form, candidates will eventually be generating customized nomination papers directly through the DOS website. Stipulation of Facts ¶ 28; Marks Dep. at 47:21-49:8. These forms will include the year at the top. Id.

The claims pertaining to this requirement should therefore be dismissed for lack of jurisdiction.

5. Signers can only sign nomination papers for one candidate for each office as there are vacancies to be filled

Under the Election Code, a person can sign nomination papers of only one candidate for each office, unless there are two or more people being elected to that office. Stipulation of Facts ¶ 29.

It is not clear how this restriction amounts to a burden. Logic dictates that a circulator is attempting to get a particular minor political party or political party candidate or a ticket of candidates on the ballot and ultimately elected and that a willing signer is supportive of that goal. It would therefore be illogical for the circulator and signer to simultaneously supporting competitors for those offices.

The only way this makes sense is if the circulator and signer have a goal of simply getting as many minor political party and political bodies on the ballot as possible. This is not a legitimate goal and directly contradicts with the Commonwealth's interest in avoiding ballot clutter, ensuring viable candidates by limiting ballot access, and conducting an orderly election. It

would also allow a small number of people to influence the make-up of the ballot.

Given the minimal burden to Plaintiffs and significant interests of the Commonwealth, this requirement is constitutional. Judgment should therefore be entered in favor of the Commonwealth Defendants.

6. The inclusion of the "Presidential Electors" section on nomination papers for political bodies during non-presidential election years

The 2014 nomination papers for political bodies contained a section for Presidential Electors. As a result, there is less space for slots for signature entries than there would be if this section was removed.

The DOS is currently revising the way it generates and distributes nomination papers and, as part of that endeavor, the DOS will use an alternate form for non-presidential election years that deletes the presidential elector box, allowing for more signature slots. Stipulation of Facts ¶ 32; Marks Dep. at 47:12-20.

To the extent there ever was a claim or controversy as to this issue, it no longer exists. The claim should therefore be dismissed as moot.

7. Note on 2014 nomination paper forms of possibility of Commonwealth Court challenge based upon circulator not being a resident of the electoral district

The 2014 nomination papers for minor political parties and political bodies contained the same note at the very end:

Note: *While the Secretary of the Commonwealth will not reject nomination papers on the basis that the circulator does not reside in the district specified in the nomination paper, the candidate(s) should be aware that the nomination papers may be challenged in Commonwealth Court on the basis that the circulator does not reside in the district.*

Plaintiffs allege this note deters candidates from using circulators from outside their electoral district, which depletes the pool of available circulators.

As Commissioner Marks testified at his deposition, the note was included in error and will not appear on nomination papers in the future. Stipulation of Facts ¶ 34; Marks Dep. at 79:4-80:11.

To the extent there ever was a claim or controversy as to this issue, it no longer exists. The claim should therefore be dismissed as moot.

8. Limiting signers to those who are registered to vote

As Plaintiffs note, the Secretary requires the signer to be registered at the time he or she signs the nomination papers. That is because section 2911 requires signers to be "qualified electors" and, as a Court of the Middle District has observed, qualified electors means registered voter for purposes of this provision:

> Under Pennsylvania law, a "qualified elector" must also be a "registered voter." The Pennsylvania Commonwealth Court held that under 25 P.S. § 2911(c) signers of Nomination Papers must be registered voters. In re Nomination Papers of Rogers, 908 A.2d 942, 946 (Pa.Commw.Ct.2006). The Pennsylvania Supreme Court, in dicta, indicated that qualified electors who sign Nomination Papers must be previously registered to vote. *See* In re Nomination Papers of Nader, 580 Pa. 22, 47-48, 858 A.2d 1167, 1182 (Pa.2004). DOS and [the Bureau of Commissions, Elections and Legislation] applied Pennsylvania law, and this Court has no standing to dispute the decisions of two Pennsylvania courts regarding the qualifications of signers to Nomination Petitions.

Baylor v. Cortes, No. 08-1060, 2008 WL 4224803, at **1-2 (M.D.Pa. Sep. 10, 2008). *See also* Rogers v. Corbett, 468 F.3d 188, 191 (3d Cir. 2006) ("A

signatory must be a qualified elector of Pennsylvania who has registered to vote either on or before the day he signs the nomination petition.").[6]

The signer can be a member of any political party or no party at all; he or she must simply be registered. All registered voters appear in the Statewide Uniform Registry of Electors ("SURE") system, a statewide database of voter registration maintained by the Department of State and administered by each county. Stipulation of Facts ¶ 42. The SURE system contains the name, address, voting district, and signature for all registered voters. Id. ¶¶ 43, 44.

According to the most recent census (2010), there are approximately 9.9 million voting-age (18 years old) people in Pennsylvania. Id. ¶ 55. According to the SURE system, there are approximately 8.2 million registered voters in Pennsylvania. Id. ¶ 54. Plaintiffs argue that their First Amendment rights are violated because they are unable to obtain signatures from those of the approximately 1.7 million unregistered voters over 18, who are otherwise eligible to vote.[7]

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[6] The term qualified elector has been interpreted as having different meanings for different participants in the election process. For example in Morrill v. Weaver, 224 F.Supp.2d 882, 900 (E.D.Pa. 2002), the district court defined qualified elector for purposes of who may *circulate* a nomination petition includes someone who is eligible to vote, but not registered.

[7] In addition to being at least 18 years old, voter eligibility requires the person to be (1) a citizen of the United States for at least one month before the next primary, special, municipal, or general election, and (2) a resident of Pennsylvania and the election district in which you want to register and vote for at least 30 days before the next primary, special, municipal, or general election. Individuals who are incarcerated at the time of the election or who were convicted of violating any provision of the Pennsylvania Election Code within the last four years of the election are ineligible to vote.

The enormous burden that would result were unregistered voters permitted to sign nomination papers is that none of them appear in the SURE system. As explained below, this will throw the objection process into disarray and make it far easier for a candidate to use fraudulent signatures entries to get on the ballot.

Nomination papers are submitted to the Secretary, who through her staff, reviews them for deficiencies. Although the Secretary has the power to review the genuineness of each signature submitted, given staffing levels and the volume of papers received, such a review is not feasible and does not occur. If the information on the signature line is complete, the signature is accepted and counts towards the total. Nomination papers accepted by the Secretary are presumed valid and the burden is on any challenger to prove its invalidity. The objection process therefore provides a critical check on the nomination papers.

The SURE system plays a imperative role in that process. Not only does it allow one to quickly determine if the signer lives in the relevant political district, and is therefore eligible to endorse the candidate, it allows a quick and easy way to detect a potential fraudulent signature. As Plaintiffs' "handwriting expert," Michelle Dresbold,[8] stated in her report, "[a]n axiom of document

[8] Plaintiffs seek to have Ms. Dresbold certified as an expert for purposes of this matter. There is no legitimate basis for this. It is clear from her report and deposition testimony that her purpose is to describe her experiences as a handwriting expert in the signature objection process in the Pennsylvania Courts. The Commonwealth Defendants do not doubt that she is qualified to be a handwriting expert for purposes of those proceedings. This case is very

(continued on next page…)

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." In other words, save for the rare stroke of good luck, a forged signature will always be very different than the person's actual signature.

The SURE system therefore allows the challengers and candidates, with or without the use of handwriting experts, to quickly agree on the validity and invalidity of many signatures. This limits the number of signature entries disputes the Courts are left to decide. Indeed, in the typical challenge case the Commonwealth Court will order the parties to first jointly review the nomination paper entries using the SURE system and then present to the Court the entries that remain in dispute. As Plaintiffs must acknowledge, this initial review almost always greatly reduces the number of disputed signatures that the courts must then decide upon.

Plaintiffs assert that they just want to be able to access the small percentage of the population that is not registered. Because they are not in the SURE system, the signature for all of those people is not readily available. Accordingly, someone seeking to engage in forgery will make heavy use of unregistered individuals. This can easily be determined, as anyone can order

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different. It is about the constitutionality of the regulations that govern the nomination process. To the extent that Plaintiffs seek to use this matter to appeal of the Pennsylvania Courts' rulings on objections to signatures within their nomination papers, this Court lacks jurisdiction to do so. This does not preclude Ms. Dresbold from being a fact witness here, testifying about her experiences as an expert witness in objection proceedings. This is why her deposition testimony is attached as an exhibit.

from the DOS a list of registered voters for a district and then provide phony entries for addresses not listed.

Plaintiffs argue that there are other tools available to detect forgery, so this is of minimal concern. In support Plaintiffs rely on a report from Ms. Dresbold which says a handwriting expert can detect forgery based upon certain identifiers in the printed name and address a forger cannot hide. Ms. Dresbold's report provides an extreme example where the candidate obviously filled out all of the entries on a nomination paper, making no attempt to alter the handwriting from line to line.

An unscrupulous candidate with a little more wherewithal, would engage in a more sophisticated level of deception. For example, he could engage the assistance of numerous people and have them each complete a line or two on each Nomination Paper, mixed among some genuine entries, using different slots each time. While a handwriting expert may discover some of these forgeries by carefully scrutinizing the print on several nomination papers, it would certainly be a time-consuming process and would still allow well-hidden forgeries to slip by. As Ms. Dresbold acknowledged, without the SURE database, it would be easier for a candidate to have forged signatures go undetected by an expert.

Moreover, engaging the services of a handwriting expert is expensive. Ms. Dresbold testified that the typical rate for handwriting expert is $250.00 to $350.00 an hour. These costs would likely deter objections to nomination papers, which one could surmise is the ultimate goal of this litigation.

Plaintiffs also suggest that the objectors could go to each of the signers and find out if they signed the papers and then get an affidavit or have them appear in Court. This is not a practical alternative, especially given the time restraints involved under the Election Code.

Finally Plaintiffs argue that some signatures in the SURE system are of no use because the signer registered to vote electronically and the compression process altered them. Regardless of how many signatures fall into this category, this does not make the other entries useless or justify making eligible up to 1.7 million people who are definitely not in the SURE system.

Plaintiffs are essentially seeking to remove the most practical tool to verifying the accuracy of signatures entries – the SURE system signature. The objection process would fall into disarray, as the number of signature challenges that would need to be decided by the Courts would necessarily increase, quite significantly if circulators seek out unregistered voters in an effort to frustrate challenges. Meanwhile the ability to get away with hiding fraudulent signatures would be greatly enhanced.

Circulators also have an alternative when they encounter unregistered voters who want to sign a nomination paper. They could carry Voter Registration Applications and have the person complete them at the same time. The person would therefore be registered and eligible to sign.

Limiting nomination paper signers to registered voters prevents and deters fraud and ensures a fair and orderly ballot access process. Because

these are very strong interests of the Commonwealth and the public in general, this limitation is constitutional.

9. Signers must include their printed name and address

Plaintiffs assert that the requirement that the Secretary reject a signature entry that does not contain the name and address is unconstitutional. Plaintiffs' argument with respect to this claim and the remainder of his § 1983 claims follows the same formula: if the Court is going to find the SURE system an important tool, justifying the requirement that only registered voters may sign nomination papers, and that in some cases a handwriting expert can make a signature "match" by looking at a signature on a nomination paper comparing to a signature in SURE, requiring anything more than a signature is unconstitutional. This logic is flawed for numerous reasons.

First, requiring a circulator to get the signer to provide a name and street address and town name cannot be considered a burden. By taking the brief moment it takes to provide it, the signer demonstrates that he or she is truly interested in supporting the candidate. Meanwhile this information is essential to any method of verifying the legitimacy of an entry, whether through SURE or another method. While SURE is a critical tool, it does not mean the additional methods of determining the genuineness of a signature are of no value. Indeed, these alternatives are necessary for the instances where it is discovered that the signature in SURE is compressed and unusable.

For example, if a citizen wants to verify if all the signers live within the electoral district simply by looking at the nomination papers, or by comparing the signatures to his copy of the list of registered voters, he would be unable to do so if address information is incomplete. Similarly, an objector who wants to investigate signatures by visiting signers would be unable to do so by simply getting a copy of the nomination papers. In both cases, the person would need to get to a SURE terminal and search for the missing information.

The lack of information would hamper the process of searching the SURE system. If the name is provided, but address is not, the file for each person with that name would have to be opened until someone with a close signature is found. A search of a common name could generate numerous entries, especially if the county is unknown.[9]

Finally, a handwriting expert would have less print available from which to detect fraud by comparing the entries on the papers themselves.

Requiring a signer to print their name, street address, and town is a minimal burden and helps maintain an orderly, fraud-free election process. It is therefore constitutional.

Given the minimal burden to Plaintiffs and significant interests of the Commonwealth, this requirement is constitutional. Judgment should therefore be entered in favor of the Commonwealth Defendants.

[9] Plaintiffs seek to exclude the signer's county of residence through Counts V and VI

10. Signers who did not include their printed name and address cannot have that information later added by a third person

Plaintiffs argue that if the name and address are required, the circulator or some third party should be able to add it after the fact and that failure to allow this violates their First Amendment rights. As explained above, this is a minimal burden, which demonstrates some level of commitment to the candidate. Moreover, allowing the circulator to provide all of the information would eliminate the handwriting expert's ability to detect fraud simply by looking at the nomination papers. As Ms. Dresbold testified, this is one of the primary ways handwriting experts detect fraud in nomination papers.

Given the minimal burden to Plaintiffs and significant interests of the Commonwealth, this requirement is constitutional. Judgment should therefore be entered in favor of the Commonwealth Defendants.

11. The striking of signatures by Commonwealth Court when the address of the signer does not match the address in the SURE system

Plaintiffs argue that their Constitutional rights are being violated when the Commonwealth Court rejects signers who appear in the SURE system under addresses that do not match their current address. There is no allegation that the Secretary rejects nomination petitions on these grounds or that there is any authority specifically authorizing her to do so.

This issue seems to be one between Plaintiff and the Courts of Pennsylvania. Once the Secretary accepts nomination papers, a private party

may challenge those nomination papers by filing a petition in Commonwealth Court. The Commonwealth Defendants have no personal involvement in those proceedings. In hearing those petitions the Supreme Court of Pennsylvania teaches that the following standards apply:

> [T]he Election Code must "be liberally construed to protect a candidate's right to run for office and the voters' right to elect the candidate of their choice." [In re] Flaherty, 770 A.2d [327] at 331 [(Pa. 2001)]; see also Weiskerger Appeal, 290 A.2d at 109. Furthermore, nomination petitions are presumed to be valid and an objector has the burden of proving that a nomination petition is invalid. *See* 25 P.S. § 2937.

In re Nomination Petition of Driscoll, 577 Pa. 501, 508, 847 A.2d 44, 49 (2004) (*citing* In re Nomination Petition of Flaherty, 564 Pa. 671, 770 A.2d 327, 331 (2001); 25 P.S. § 2937).

Plaintiffs do not dispute this standard applies and do not argue it is unconstitutional. Instead, they apparently disagree with the Commonwealth Court's application of this standard in proceedings before it.

Plaintiffs' remedy for this claim, and any other claims based upon how the Commonwealth Court applies this standard, is to appeal those decisions to the Pennsylvania Supreme Court. This Court cannot order the Commonwealth Court to weigh the evidence differently or to reach alternate decisions.

Moreover, claims based upon the Commonwealth Court's rulings on objections cannot proceed against the Commonwealth Defendants because they do not have personal involvement in those proceedings. In order to bring a claim pursuant to § 1983, the official sued must have some type of personal involvement in the matters complained of. *See* Rouse v. Plantier, 182 F.3d 192

(3d Cir. 1999); Rizzo v. Goode, 423 U.S. 362 (1976). Although Defendants Aichele and Marks are the Commonwealth officials with primary responsibility over the administration of the Election Code, determinations regarding objections to nomination papers are matters delegated by statute (§ 2937) exclusively to the judiciary. The principles governing the separation of powers, the independence of the judiciary, and due process would surely be violated if the Commonwealth Defendants could simply ignore or override the Pennsylvania Supreme Court's interpretation of the meaning of § 2937 or the factual determinations made by the Commonwealth Court.

Judgment should therefore be entered in favor of the Commonwealth Defendants.

12. The striking of signatures by Commonwealth Court for people who were not registered to vote at the time they signed, but later registered in time to be eligible to vote in the election

Plaintiffs argue that precluding unregistered voters who register to vote after signing the nomination paper violates their constitutional rights. The same problem exists as for those who do not register at all – they are not in the SURE system and therefore cannot be verified by checking the information contained therein at the objection stage. As noted, the Secretary does not check whether the signers are in the SURE system. If the signer registered well before the objection stage he should be entered in the SURE system, the entry would presumably not be stricken. To best prepare for a situation where the circulators encounters an unregistered voter who expresses interest in both

signing nomination papers and registering for the upcoming election, the solution is simple – the circulator should carry voter registration applications and collect both the signature and completed voter registration application for submission to the county board. If the date is close to August 1, he would be wise to make a copy in case it does not make it into the SURE system by the time of the objection stage.

C. Plaintiffs' NVRA claims

In Counts XXIV and XXV Plaintiffs assert the Commonwealth Defendants are in violation of the National Voting Right Act (NVRA), 52 U.S.C.A. § 20501 et seq. (formerly cited as 42 USCA § 1973gg), because that statute bars removal of registered voter if the voter moved within the same county. 52 U.S.C.A. § 20507. Plaintiffs do not argue that the DOS is not complying with this requirement. Such individuals remain registered and therefore in the SURE system. There is no conflict with the NVRA.

The manner in which the states rely on voter registration system information for purposes of nomination papers for minor political party and political body candidates is not something addressed by the NVRA. Any claims based upon a violation of this statute are therefore baseless.

D. This Court lacks jurisdiction over Plaintiffs' claims based upon the Commonwealth Defendants' misapplication of state statutes

In Counts XXVI through XXIX, Plaintiffs assert the Commonwealth Defendants are misconstruing particular provision of the Commonwealth's Election Code. There exists no subject matter jurisdiction for these claims.

The court must examine each claim in a case to see if it may exercise subject matter jurisdiction over that claim. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984), Even if subject matter jurisdiction has been established on the basis of a federal question for Plaintiffs' claims against Commonwealth or other defendants, the court may not enter an order against Commonwealth defendants on the basis of state law. Id. 465 U.S. at 119-120 (constitutional bar to jurisdiction applies to pendent claims as well). See Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

Pennhurst bars this court from enforcing or relying on state law as against the Commonwealth Defendants. Pennhurst State School was a class action brought by mentally retarded citizens challenging the conditions of confinement in a state institution for the mentally retarded. The Supreme Court held that federal courts may not order state agencies or officials to conform their conduct to state law with respect to conditions of confinement at the institution even though only prospective injunctive relief was sought since the state was the real, substantial party in interest. Id., 465 U.S. at 104-05. The Court explained that it is "clear that suit may not be predicated on violations of state statutes that command purely discretionary duties." Id., 465 U.S. at 109-10. Noting that the prospective financial burden was substantial and the claim was that the official violated state law, the Court held that when a plaintiff alleges that the State has violated state law, regardless of the relief sought, the federal court may not exercise jurisdiction over that claim. Id. 465

U.S at 119. *See* Spidle v. Pennsylvania Office of Budget, 660 F. Supp. 941, 943 (M.D. Pa. 1987).

Furthermore, as explained below, Plaintiffs' arguments that the Commonwealth Defendants are not following state law are meritless.

1. The Commonwealth Defendants are authorized under the Election Code to strike fraudulent signatures

Plaintiffs argue that 2911(c) does not allow the Commonwealth Defendants to strike signature entries because the address on the nomination paper does not match the address in the SURE system. The statute requires the Commonwealth Defendants to reject nomination papers if (a) it contains material errors or defects apparent on the face thereof, or on the face of the appended or accompanying affidavits; or (b) it contains material alterations made after signing without the consent of the signers; or (c) it does not contain a sufficient number of signatures as required by law. Section 2936(a) also allows, but does not require, the Secretary to review the signatures and reject any she deems not genuine. Stipulation of Facts ¶ 13. The Commonwealth defendants have the power to strike an unregistered voter, but do not generally conduct such a review.

The weight the Commonwealth Court gives to evidence presented at objection proceedings, such as SURE entries, is a matter the Commonwealth Defendants have no control over. To the extent that the Commonwealth Defendants are ordered to strike a signature entry by the Commonwealth Court

finds invalid, the striking of that signature is pursuant to the order of that Court, not the Election Code.

2. The election code authorizes the Commonwealth Defendants to require the affidavit of the circulator be executed "in the presence of a person empowered to take acknowledgements (such as a notary public)"

Plaintiffs argue that the Election Code does not authorize the Commonwealth Defendants to require the affidavit of the circulator be executed "in the presence of a person empowered to take acknowledgements (such as a notary public)." As explained in § III(B)(2), this is simply incorrect.

3. The Commonwealth Defendants' interpretation of "qualified elector" to exclude unregistered voters is proper

Plaintiffs argue that "registered elector" for purposes of those eligible to sign nomination papers includes unregistered voters. As explained in § III(B)(8), this is simply incorrect.

4. The Commonwealth Defendants can and must strike signatures that the Commonwealth Court has ordered stricken.

Plaintiffs argue that the Election Code does not authorize the Commonwealth Defendants to strike citizens who register to vote in time for the general election, but are not registered at the time they sign the nomination papers. The Commonwealth Defendants do not reject signatures that are from unregistered voters pursuant to the authority granted to it by the Election Code. As Plaintiffs acknowledge, the Commonwealth Defendants strike signatures entries that are complete when the Commonwealth Court has

ordered them to stricken as a result of objection proceedings. Am. Compl. ¶ 447. The Commonwealth Defendants lack the authority to disregard such an order.

IV. CONCLUSION

For the foregoing reasons, the Commonwealth Defendants' Motion for Summary Judgment should be granted.

Respectfully submitted,

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

GREEN PARTY OF PENNSYLVANIA, et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
CAROL AICHELE, SECRETARY OF THE COMMONWEALTH OF PA, et al.,	:	
Defendants	:	No. 14-3299

CERTIFICATE OF SERVICE

I, Kevin R. Bradford, hereby certify that the Commonwealth Defendants' Motion for Summary Judgment has been filed electronically on October 31, 2014 and is available for viewing and downloading from the Court's Electronic Case Filing System ("ECF"). The following parties are listed as ECF Filing Users and are therefore automatically served by electronic means:

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