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

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al. Plaintiffs, v. PEDRO A. CORTES, et al., Defendants.	CIVIL ACTION No. 09-cv-01691

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS THE AMENDED COMPLAINT FILED BY DEFENDANT JUSTICES, DEFENDANT JUDGES AND DEFENDANTS JOHNS AND KRIMMEL

The Constitution Party of Pennsylvania, the Green Party of Pennsylvania, the Libertarian Party of Pennsylvania and their respective chairpersons Wes Thompson, Hillary Kane and Mik Robertson ("Plaintiffs") oppose the Motion to Dismiss filed by Defendant Justices of the Supreme Court of Pennsylvania, Defendant Judges of the Commonwealth Court of Pennsylvania, Defendant Johns and Defendant Krimmel ("Moving Defendants"). As set forth below, Pa. Cons. Stat. § 2937 ("Section 2937") clearly violates Plaintiffs' constitutional rights as applied. Further, Plaintiffs' challenge to the statute presents a justiciable controversy, and Moving Defendants are the proper parties, in their official capacities, to defend Plaintiffs' claims for prospective declaratory relief under 42 U.S.C. § 1983. Therefore, Moving Defendants' motion should be denied.

Pursuant to Rule 7.1(f) of this Court's Rules of Civil Procedure, Plaintiffs request oral argument on the instant motion.

INTRODUCTION

Plaintiffs are minor political parties in Pennsylvania and their respective chairpersons, who seek to participate in Pennsylvania's electoral process free from the threat that Moving Defendants will tax costs against their candidates pursuant to Section 2937. Section 2937, as authoritatively construed by the Pennsylvania Supreme Court, authorizes Pennsylvania courts to order candidates to pay costs arising from private party challenges to their nomination petitions. Pa. Cons. Stat. § 2937. Accordingly, in the 2004 and 2006 election cycles, Moving Defendants twice ordered candidates to pay more than $80,000 each in costs arising from such challenges. Because Pennsylvania does not provide minor party candidates with a non-monetary alternative to gain ballot access, Section 2937 severely burdens Plaintiffs' exercise of their constitutional rights. Plaintiffs therefore initiated this action under 42 U.S.C. § 1983, and seek a judgment declaring Section 2937 unconstitutional as applied.

Moving Defendants are named in this action in their official capacities only. Nevertheless, they move to dismiss on the ground that Plaintiffs' challenge to Section 2937 does not present a justiciable controversy, and that they are not proper parties. However, Moving Defendants' argument in support of their motion fails to acknowledge that Pennsylvania's unique legislative scheme requires them to perform an administrative or enforcement function, which executive branch elections officials perform in every other state. Moving Defendants thus disregard controlling case law holding that claims for prospective declaratory relief against judicial officers acting in an administrative or enforcement capacity satisfy the Article III case or controversy requirement. Moving Defendants also fail to acknowledge that immunity under Section 1983 does not extend to judicial officers acting in an administrative or enforcement

capacity. Because Moving Defendants overlook these critical points of law, their motion fails to provide any basis for dismissal.

ARGUMENT

I. SECTION 2937 VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS AS APPLIED BY MOVING DEFENDANTS, BECAUSE IT CONDITIONS PLAINTIFFS' PARTICIPATION IN ELECTIONS UPON AN ABILITY TO PAY.

Moving Defendants do not dispute that Section 2937 violates Plaintiffs' constitutional rights as applied, nor could they. The line of Supreme Court decisions holding that states may not condition participation in elections upon an ability to pay is well-settled. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding poll taxes unconstitutional); *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). Pennsylvania does just that, however, by authorizing Moving Defendants to tax costs against minor party candidates under Section 2937, without providing such candidates with a non-monetary alternative to gain ballot access. Amended Complaint ("Am. Comp.") ¶¶ 25-27, 32-36. Section 2937 thus violates Plaintiffs' constitutional rights as applied by Moving Defendants.

In *Bullock*, the Supreme Court struck down Texas' primary election filing fee system, which required candidates to pay filing fees as high as $9,800, but provided no non-monetary alternative. *See Bullock*, 405 U.S. at 134, 149. In declaring the filing fees unconstitutional, the Court noted that Texas had made the "legislative choice" of directing political parties to hold primary elections, and therefore, the Court rejected the state's assertion that candidates should "pay that share of the cost that they have occasioned" by availing themselves of the primary election machinery. *Id.* at 147-49. The Court specifically concluded that states may not require

candidates "to shoulder the costs of holding…elections." *Id.* at 149. Crucial to the Court's holding in *Bullock* was its finding that "the very size of the fees imposed" gave the Texas system "a patently exclusionary character." *Id.* at 143.

Two years after *Bullock*, the Supreme Court struck down California's primary election filing fee system. *See Lubin*, 415 U.S. 709. The California system imposed lower fees than the Texas system, ranging only as high as $982, but still provided no non-monetary alternative. *See id.* at 711. In striking down California's filing fees, the Court concluded that a state may not, "consistent with constitutional standards," require as a condition of ballot access the payment of filing fees that "impecunious but serious" candidates cannot afford. *Id.* at 717-18.

Like the state of Texas in *Bullock* and the state of California in *Lubin*, Pennsylvania made a legislative choice to require candidates to submit nomination petitions to access the general election ballot. 25 Pa. Cons. Stat. § 2911(b) ("Section 2911(b)"). Pennsylvania also made a legislative choice to allow private parties to challenge such petitions, and to authorize Moving Defendants to order candidates to pay costs arising from such challenges. 25 Pa. Cons. Stat. § 2937. Because Pennsylvania provides no non-monetary alternative for minor party candidates to gain ballot access, these facts alone render Section 2937 unconstitutional as applied by Moving Defendants, because it conditions minor party candidates' participation in Pennsylvania's elections upon an ability to pay costs of indeterminate but substantial amounts.[1] *See Bullock*, 405 U.S. at 149; *Lubin*, 415 U.S. at 717.

Section 2937 is even more clearly unconstitutional than the legislative schemes in *Bullock* and *Lubin*, because the costs that Moving Defendants tax against candidates under

[1] Whether costs are actually taxed against defending candidates in a particular case is inconsequential, because the threat of incurring such costs itself impermissibly burdens Plaintiffs' constitutional rights. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions").

Section 2937 greatly exceed the "patently exclusionary" filing fees struck down in *Bullock*. *Bullock*, 405 U.S. at 143; Am. Comp. ¶¶ 32-36. Furthermore, unlike the statutes in *Bullock* and *Lubin*, Section 2937 does not provide candidates with any notice as to the severe financial burden that they risk incurring if they defend nomination petitions submitted as required by Section 2911(b). Instead, Section 2937 provides that Moving Defendants may tax costs against defending candidates under Section 2937 "as [they] shall deem just." 25 Pa. Cons. Stat. § 2937. Therefore, Section 2937 also violates Plaintiffs' constitutional rights by failing to provide them with "fair notice" of the financial burden that Moving Defendants may impose upon them if they attempt to run for public office in Pennsylvania. *United States v. Harriss*, 347 U.S. 612, 617 (1954).

II. THE AMENDED COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY AND MOVING DEFENDANTS ARE PROPER PARTIES.

A. The Amended Complaint Presents a Justiciable Controversy That the Court May Resolve By Granting Plaintiffs Prospective Declaratory Relief.

Plaintiffs' constitutional challenge to Section 2937 presents a justiciable controversy that the Court may resolve by entering a declaratory judgment holding Section 2937 unconstitutional as applied by Moving Defendants. Section 1983 explicitly contemplates the availability of such relief, and provides that:

> in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983. Thus, while Section 1983 limits the availability of *injunctive* relief against judicial officers, the express terms of the statute clearly recognize the Court's power to award the prospective *declaratory* relief that Plaintiffs seek. Moreover, federal courts have not hesitated to grant such relief where states condition electoral participation upon an ability to pay. *See*, *e.g*,

Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992) (declaring provision requiring minor party candidates to pay unduly burdensome signature verification fees unconstitutional); *Dixon v. Maryland State Bd. of Elections*, 878 F.2d 776 (4th Cir. 1989) (declaring mandatory filing fee of $150 for non-indigent write-in candidates unconstitutional); *McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373 (M.D. N.C. 1994) (declaring signature verification fee of five cents unconstitutional).

Moving Defendants claim that no Article III case or controversy exists between Plaintiffs and themselves, because they are merely "neutral adjudicators" in Section 2937 proceedings, Def. Mot. 3-7, but this claim fails to acknowledge Moving Defendants' true function in administering Pennsylvania's unique electoral scheme, and it also misapprehends the gravamen of Plaintiffs' challenge to Section 2937. Unlike every other state in the nation, Pennsylvania requires judicial officers to determine whether a candidate's nomination petitions "contain a sufficient number of genuine signatures of electors entitled to sign the same." Pa. Cons. Stat. § 2937. In every other state, executive branch elections officials perform this function, and are subject to suit in disputes arising therefrom.[2] *See, e.g.*, *Fulani*, 973 F.2d 1539; *Dixon*, 878 F.2d 776; *McLaughlin*, 850 F. Supp. 373. The instant matter is not rendered non-justiciable, simply because Pennsylvania's unique electoral scheme requires judicial officers to perform this executive function.

[2] For example, Maine's statutory scheme provides that the Secretary of State shall review, accept and file candidates' nomination petitions, and shall hear and rule on challenges thereto, and that "A challenger or a candidate may *appeal the decision of the Secretary of State* by commencing an action in the Superior Court." 21-A M.R.S. § 356 (2006) (emphasis added). A partial list of states in which executive branch elections officials perform the function that Moving Defendants perform in Pennsylvania also includes: Arizona, A.R.S. §§ 16-311, 16-351(C)(2) (2007); Arkansas, Ark. Stat. Ann. § 7-7-103(b)(2) (2007); Colorado, C.R.S. 1-4-501(3) (2006); Florida, Fla. Stat. § 102.168(4) (2007); Illinois, 10 ILCS 5/10-8 (B) (2007); Iowa, Iowa Code § 44.4 (2006); Michigan, MCLS §§ 168.552(8), 168.552(12) (2007); Mississippi, Miss. Code Ann. §§ 23-15-359(8), 23-15-963 (2008); New Hampshire, RSA 655:44 (2007); New Mexico, N.M. Stat. Ann. § 1-8-31 (2008); Ohio, ORC Ann. 3513.263 (2008); Oregon, ORS §§ 246.910(1), 249.008 (2007); and Washington, Rev. Code Wash. § 29A.20.191 (2009).

As Moving Defendants recognize, "one seeking to enjoin enforcement of a statute on constitutional grounds ordinarily sues the enforcement official authorized to bring suit under the statute," because "that individual's institutional obligations require him to defend the statute." Def. Mot. 9 (quoting *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 21-22 (1st Cir. 1982)). In this case, no state official is authorized to bring suit under Section 2937. Pa. Cons. Stat. § 2937. Moreover, Plaintiffs do not challenge Section 2937 in its entirety (nor do they seek to enjoin any part of it), but only insofar as it authorizes Moving Defendants to tax costs against defending candidates following a challenge to their nomination petitions. Am. Comp. ¶¶ 51-58.

Accordingly, under the unique facts of this case, Moving Defendants cannot properly be considered neutral adjudicators with respect to the challenged portion of Section 2937. Rather, Moving Defendants "are the state officers who are threatening to enforce and who are enforcing the law." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736 (1980) (holding judicial defendants amenable to suit in their enforcement capacity). Therefore, this case satisfies the Article III case or controversy requirement, because Plaintiffs face a "substantial threat of sanctions" under Section 2937, as applied by Moving Defendants. *Surrick v. Killian*, 449 F.3d 520, 528 (3rd Cir. 2006); *see Wooley v. Maynard*, 430 U.S. 705, 709-10 (1977) (threat of prosecution satisfies Article III case or controversy requirement); *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974) (same); *In re Justices*, 695 F.2d at 24 (same).

B. Moving Defendants Are Proper Parties to This Action Under Section 1983.

Courts have long recognized that judicial officers may be proper parties in actions that seek prospective declaratory relief under Section 1983. *See In re Justices*, 695 F.2d at 25 (recognizing that judicial defendants are not immune from suit for declaratory relief); *Brandon E. ex rel Listenbee v. Reynolds ("Listenbee")*, 201 F.3d 194, 199 (3rd Cir. 2000) (same). The

Third Circuit has adopted the reasoning of *In re Justices*, and thus holds that judicial defendants are amenable to suit for acts taken in an enforcement or administrative capacity, as opposed to a purely adjudicative capacity. *See Georgevich v. Strauss*, 772 F.2d 1078, 1087-88 (3d Cir. 1985) (permitting suit against judicial defendants as administrators or enforcers of Pennsylvania's statutory parole scheme). Accordingly, to the extent that Moving Defendants act as administrators or enforcers of Pennsylvania's Election Code, they are proper parties to this suit.

In *Georgevitch*, the Third Circuit concluded that the judicial defendants were proper parties to a lawsuit challenging the manner in which parole decisions were made, because Pennsylvania's statutory scheme divided the authority to make parole decisions between sentencing judges and executive branch officials on the parole board. *Georgevich*, 772 F.2d at 1087-88. Inasmuch as executive branch officials were subject to suit under such a scheme, the Court reasoned, so too were the judicial defendants, "as enforcers of the statutes, in other words as administrators of the parole power." *See id.* The same is true in this case. Because executive branch elections officials are subject to suit for enforcing statutes that impose unconstitutional financial burdens upon candidates, *see, e.g.*, *Fulani*, 973 F.2d 1539; *Dixon*, 878 F.2d 776; *McLaughlin*, 850 F. Supp. 373, so too are Moving Defendants. *See Georgevich*, 772 F.2d at 1087.

Immunity does not extend to Moving Defendants in this case because judicial immunity only applies where a challenged act is "a function normally performed by a judge." *See Beattie v. Dept. of Corrections*, 2009 U.S. Dist. LEXIS 16715 *15 (M.D. Pa. 2009) (citing *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). Thus, Moving Defendants' reliance upon *Listenbee* is misplaced. Def. Mot 7-8. In *Listenbee*, judicial officers were not proper parties to an action challenging a statute providing for involuntary treatment of minors for addiction, because the

judicial officers merely presided over proceedings to determine whether such treatment was appropriate. *See Listenbee*, 201 F.3d at 195. Under the unique facts of this case, by contrast, Moving Defendants do not act merely as neutral adjudicators in Section 2937 challenge proceedings, but rather as administrators or enforcers of Pennsylvania's Election Code, *see supra* n.2, with power to impose unconstitutional financial burdens upon defending candidates. *See Georgevitch*, 772 F.2d at 1087.

The very cases on which Moving Defendants rely demonstrate that they act as administrators or enforcers, rather than as adjudicators, with respect to the taxation of costs under Section 2937. Def. Mot. 5 (citing *In re Nomination Paper of Nader*, 905 A.2d 450 (Pa. 2006); *In re Nomination Paper of Rogers*, 942 A.2d 915 (Pa. Commw. 2008), *aff'd* 959 A.2d 903 (Pa. 2008). In *Nader*, the trial court noted that the "line-by-line review of individual signatures was both exhaustive and exhausting," and required several judges to work "nonstop, 16 hours a day." *In re Nomination Paper of Nader*, 865 A.2d 8, 13 (Pa. Commw. 2004). The Pennsylvania Supreme Court subsequently noted the "monumental effort and resources" that the trial court dedicated to the task. *In re Nomination Paper of Nader*, 905 A.2d at 454. Thus, the courts' own characterization of the underlying proceedings indicates that Moving Defendants' "involvement in the litigation [is] more direct and [gives] them an institutional stake in the outcome" of the instant proceeding. *In re Justices*, 695 F.2d at 22 (citing *Consumers Union*, 446 U.S. 719 (holding judicial defendants to be proper parties where they promulgated challenged rules)).[3]

[3] The legislative history of Section 2937 underscores this conclusion, because Moving Defendants' construction of Section 2937 to authorize the taxation of costs against defending candidates violates the clear legislative intent behind the statute. *See, e.g.*, S. 3rd Cons. Cal. 58 (Pa. 1985) (statement of Sen. Williams) (Section 2937 should not be drafted so as to "have a chilling effect on the average person who may want in this democracy to run for office"); S. Supp. Cal. No. 1, 1483 (Pa. 1998) (statement of Sen. Kukovich) ("Do you remember how embarrassed we all were when [a bill] passed at the last minute last year…[would have] made it virtually impossible for a third party candidate to gather enough names on a petition to place her or his name on the ballot?"). Thus, Moving Defendants' construction of Section 2937 is akin to the promulgation of a new rule. *Cf. Consumers Union*, 446 U.S. 719; *Centifani v. Nix, et al.*, 865 F.2d 1422 (3rd Cir. 1989).

As the Supreme Court has recognized, immunity does not shield judicial defendants in the rare cases in which "they are the state officers who are threatening to enforce and who are enforcing the law." *Consumers Union*, 446 U.S. at 736. This is one such case. Although Section 2937 requires Moving Defendants to adjudicate challenges to candidates' nomination petitions, the statute (as authoritatively construed by the Pennsylvania Supreme Court) also authorizes Moving Defendants to order defending candidates to pay substantial costs following such proceedings. In the latter instance, Moving Defendants' function is not "purely that of a neutral adjudicator." *Chiantelli v. Judicial Council of California*, 392 F.3d 358, 365 (9th Cir. 2004) (recognizing enforcement capacity of court order prohibiting "vexatious litigant" from filing new litigation). Accordingly, Moving Defendants are proper parties to this action.

III. THE COURT NEED NOT AND SHOULD NOT RULE UPON THE INSTANT MOTION UNTIL THE COURT DETERMINES WHETHER COMPLETE RELIEF IS AVAILABLE AGAINST NON-MOVING DEFENDANTS.

As set forth more fully in Plaintiffs' Cross-Motion to Stay or to Dismiss Without Prejudice, which is incorporated herein by reference, the Court need not and should not rule upon the instant motion until the Court determines whether complete relief is available against the non-moving defendants in this action, who have yet to answer or move in response to the Amended Complaint. Moving Defendants are named in the instant matter in their official capacities only, and occupy a "nominal-party position" as defendants with respect to Plaintiffs' claim for prospective declaratory relief from Section 2937. *In re Justices*, 695 F.2d at 21. If the Court determines that complete relief is available against one or more non-moving defendants, however, then resolution of the factual and legal issues raised by the instant motion will be unnecessary, because there will be "no relief-related basis" for including Moving Defendants in this lawsuit. *Id.* at 22. Accordingly, in the alternative to denying the instant motion, the Court

should hold it in abeyance until the Court determines whether Moving Defendants are necessary parties.

CONCLUSION

For the foregoing reasons, the Court should deny Moving Defendants' Motion to Dismiss the Amended Complaint.

Dated: July 20, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2009, I served a copy of the attached Response In Opposition to the Motion to Dismiss the Amended Complaint Filed By Defendant Justices, Defendant Judges and Defendants Johns and Krimmel on behalf of all Plaintiffs, by the Court's ECF system, or by first class mail, postage pre-paid, upon the following:

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