UNITED STATES COURT OF APPEALS

for the

THIRD CIRCUIT

Case No. 10-3205

THE CONSTITUTION PARTY OF PENNSYLVANIA, THE GREEN PARTY OF PENNSYLVANIA, THE LIBERTARIAN PARTY OF PENNSYLVANIA, HILLARY A. KANE, MICHAEL J. ROBERTSON and WES THOMPSON,

Appellants,

- v. -

PEDRO A. CORTES, CHET HARHUT, THOMAS CORBETT, CHARLES W. JOHNS, MICHAEL F. KRIMMEL, the JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA and the JUDGES OF THE COMMONWEALTH COURT OF PENNSYLVANIA,

Appellees.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AT NO 5:09-CV-01691-LS

REPLY BRIEF OF APPELLANTS TO BRIEF OF APPELLEES CHARLES W. JOHNS, MICHAEL F. KRIMMEL, THE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA AND THE JUSTICES OF THE COMMONWEALTH COURT OF PENNSYVLANIA

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ARGUMENT

I. THE DISTRICT COURT'S FAILURE TO RULE ON THE MERITS OF THE CLAIMS IN COUNT I AND COUNT III DOES NOT CONSTITUTE A "WAIVER" BY THE MINOR PARTIES.

The Judicial Appellees' contention that the District Court's failure to rule on the merits of Count I and Count III of the Amended Complaint constitutes a "waiver" by the Minor Parties has no merit. Waiver only occurs where a party fails to raise an issue in its opening brief, or mentions it in passing. *See Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3rd Cir. 1994). That most certainly did not happen in this case.

The Minor Parties appeal from the dismissal of their Count I and Count III claims not, as the Judicial Appellees assert, because the District Court did not "adequately address" or "provide sufficient analysis" of those claims, Brief of Jud. Appellees at 7, but because the District Court completely failed to address them at all, or to provide any analysis whatsoever. A-10 – A-25. The only issue before this Court with respect to the Minor Parties' Count I and Count III claims, therefore, is whether the District Court erred by dismissing them without ruling on their merits. A-10 – A-25. A survey of the Minor Parties' opening brief clearly demonstrates that they did not "waive" this issue.

The very first issue that the Minor Parties raise on this appeal is "Whether the District Court erred by failing to provide a separate analysis of the distinct

claims raised in Count I and Count III." Brief of Appellants at 1. The Minor Parties address this issue in their summary of argument, Brief of Appellants at 9, and they subsequently argue at length that the District Court did in fact err by dismissing Count I and Count III without ruling on the merits of those claims. Brief of Appellants at 10-13. Therefore, the Minor Parties "squarely argued" this issue in their opening brief, and it is not waived. *See Comm. of Pa. Dept. of Public Welfare v. U.S. Dept. of Health and Human Srvcs.*, 101 F.3d 939, 945 (3rd Cir. 1996) (citation omitted).

The Judicial Appellees nevertheless insist that the issue is waived because, they contend, the Minor Parties did not make "a substantive legal argument" that the District Court erred by dismissing the claims raised in Count I and Count III on standing and ripeness grounds. Brief of Jud. Appellees at 7. That is incorrect. Having failed to rule on the merits of the Minor Parties' Count I and Count III claims, A-10 – A-25, the District Court only suggested that its dismissal of their Count II claims on standing and ripeness grounds was also intended to apply to their Count I and Count III claims in its Order denying reconsideration. A-29. To the extent that it is possible to make a substantive legal argument about an opinion that is devoid of substantive analysis, however, the Minor Parties did so.

In their opening brief, the Minor Parties argue that the questions of standing and ripeness raise "separate and distinct" legal issues with respect to each count of

the Amended Complaint, because "the constitutional violations, the injury to the Minor Parties and even the identity of the relevant Appellees differ" in each count. Brief of Appellants at 12-13. Further, the Minor Parties cite the controlling precedent of this Court to establish that the District Court committed "clear error" by improperly combining and conflating these separate and distinct issues. Brief of Appellants at 13 (citing *NL Industries, Inc. v. Commercial Union Ins. Co.*, 65 F.3d 314, 323-24 & n.8 (3rd Cir. 1995)). Lacking any guidance from the District Court as to how its analysis of the Minor Parties' Count II claims could properly apply to their Count I and Count III claims, further argument of the issue would be entirely speculative. Proper disposition of this case is therefore remand, to provide the parties adequate opportunity for briefing of issues that were raised in the proceedings below, but which the District Court manifestly failed to address.

II. THE DISTRICT COURT ERRED BY HOLDING THAT THE MINOR PARTIES LACK STANDING TO OBTAIN DECLARATORY RELIEF FROM SECTION 2937.

1. The Minor Parties Did Not "Waive" the Issue of Whether Section 2937 Is Unconstitutional on Its Face or as Applied.

As in the proceedings before the District Court, the Judicial Appellees make no attempt to defend 25 P.S. § 2937 ("Section 2937") on the merits, nor could they. The cases cited by the Minor Parties in their opening brief leave no doubt that Section 2937 is unconstitutional, because it "violate[s] the bright line rule…that prohibit[s] states from conditioning participation in elections upon an ability to

pay." Brief of Appellant at 13-15. Rather than attempting to defend Section 2937 on constitutional grounds, the Judicial Appellees assert that the Minor Parties "waived" this issue, too, because they did not raise it before the lower court. Brief of Jud. Appellees at 8. That is incorrect.

In the proceedings below, the Minor Parties relied on the very same cases that they now cite on appeal to establish that Section 2937 is unconstitutional. *Compare* Brief of Appellant at 13-15 (citing, *inter alia*, *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974), *with* A-66 – A-67 (same), A-93 – A-95 (same)). Further, because the District Court failed to address these (or any other) First Amendment cases in its Opinion and Order granting dismissal, the Minor Parties moved for reconsideration on the ground that such failure rendered the District Court's standing and ripeness analysis fatally flawed. Mot. for Reconsideration at 2, 4-6. Thus, the Minor Parties not only raised the argument that Section 2937 is unconstitutional under *Bullock*, *Lubin* and their progeny, but they also squarely argued it in the proceedings below. Therefore, that argument is not waived. *See Comm. of Pa. Dept. of Public Welfare*, 101 F.3d at 945.

The Judicial Appellees nevertheless contend that the Minor Parties waived the issue of whether Section 2937 is unconstitutional on its face. The substance of the Minor Parties' challenge, however, is that Section 2937 is unconstitutional both as applied and on its face. The Amended Complaint specifically alleges that

Section 2937 subjects candidates for public office to "the threat of substantial financial burdens, without notice or limitation, upon their lawful and peaceful exercise of the freedoms" guaranteed to them by the First and Fourteenth Amendments. Am. Comp. ¶ 57. Further, in the briefing below, the Minor Parties argued that Section 2937 "penalizes candidates, without notice, for engaging in constitutionally protected conduct," that the statute "makes no distinction between the legitimate exercise of First Amendment freedoms and conduct that is properly subject to sanctions," and that it is therefore "susceptible of sweeping and improper application." A-70. Such allegations and arguments form the very essence of a facial overbreadth challenge. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (facial overbreadth challenges allowed where "rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations").

Moreover, in the proceedings below, the Minor Parties not only argued that Section 2937 is unconstitutional as applied, but also that it is "clearly" and "patently" unconstitutional, A-94, Mot. for Reconsideration at 2, and further, that the question presented by their challenge – whether Pennsylvania may require them to assume the risk of incurring substantial costs as a condition of running for public office – is "purely one of law," which *Bullock*, *Lubin* and their progeny conclusively resolve in the negative, without need for further development of facts.

Mot. for Reconsideration at 6. That argument constitutes a facial challenge. Regardless of how their claim may be construed, however, the Minor Parties plainly did not "waive" their challenge to the constitutionality of Section 2937. Rather, the Judicial Appellees fail to defend it.

2. The District Court Applied the Wrong Standard to Determine Whether the Minor Parties Have Standing to Seek Declaratory Relief from Section 2937.

Despite the District Court's complete failure to acknowledge that this case concerns the First Amendment in any way, A-11 – A-25, the Judicial Appellees contend that its rote application of the standing and ripeness doctrines to dismiss the Minor Parties' Count II claims was proper. It was not. As this Court has made clear, First Amendment claims are subject to a "relaxed" standard with respect to standing and ripeness. *See Peachlum v. City of York*, 333 F.3d 429, 434-35 (3rd Cir. 2003). The District Court therefore erred by dismissing the Minor Parties' claim for declaratory relief from Section 2937 on such grounds, without even addressing the First Amendment issues at stake in this case. *See id.*

The Judicial Appellees claim that *Peachlum* is "inapposite," because it involved a "facial overbreadth challenge," but that is inaccurate. Brief of Jud. Appellees at 9. In fact, the statute at issue in *Peachlum* was challenged both facially *and* as applied. *See Peachlum*, 333 F.3d at 431. Moreover, while the Court observed that standing and ripeness standards are "most relaxed" with respect to

facial challenges, *id.* at 438, it expressly recognized that they are relaxed with respect to all First Amendment claims. *See id.* at 434-35. Therefore, even if the Minor Parties had not brought a facial challenge to Section 2937, their claims would still be subject to the relaxed standard set forth in *Peachlum*.

Indeed, this case implicates the very concerns that the Court identified in *Peachlum* as grounds for applying a relaxed standard. *See id.* at 435 ("in pre-enforcement context, courts are primarily concerned with the chilling effect occasioned by the mere existence of the statute") (citation omitted). Here, as in *Peachlum*, the challenged statute "threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *See id.* at 438 (citation omitted). The Minor Parties have even cited several specific examples of candidates who withdrew their nomination papers rather than risk incurring costs under Section 2937. Am. Comp. ¶¶ 34, 37; Brief of Appellant at 17-18. Section 2937 has therefore produced precisely the sort of "chilling effect" contemplated in *Peachlum*, and the District Court should have applied the relaxed standing and ripeness standard set forth therein. *See Peachlum*, 333 F.3d at 434-35.

3. The Minor Parties Have Standing to Obtain Declaratory Relief From Section 2937.

The District Court concluded that the Minor Parties lack standing to seek declaratory relief from Section 2937 on the basis of a cursory, two-paragraph analysis that fails even to acknowledge that the Minor Parties' claim arises under the First Amendment, much less to address any of the case law on which the Minor Parties rely to support their claim. A-17 – A-18. In an attempt to buttress that conclusory and flawed analysis, the Judicial Appellees assert that the Minor Parties cannot establish each element of the standing doctrine – injury-in-fact, traceability and redressability – but their discussion is riddled with inaccuracies and errors. Brief of Jud. Appellees at 9-16.

First, the Minor Parties do not claim, as the Judicial Appellees suggest, that their injury-in-fact arises from any "mandatory fee" that Section 2937 imposes. Brief of Jud. Appellees at 11-12. Rather, the Minor Parties challenge the statute because it requires them to assume the risk of incurring a substantial financial burden – as much as $80,000 or more – if they defend nomination petitions that they are required by law to submit. Am. Comp. ¶¶ 52-53. The Judicial Appellees admit this fact, but nevertheless contend that the Minor Parties have not suffered any injury because "costs are only assessed against a candidate if a [nomination petition] challenge is successful." Brief of Jud. Appellees at 11-12. The possibility that costs may not be assessed against a candidate does not alleviate the injury that Section 2937 causes, however, because the *Bullock-Lubin* line of cases establishes

that states may not require candidates or voters to incur a financial burden as a condition of their participation in the electoral process. Brief of Appellants at 14-15. The mere threat that costs may be assessed against candidates pursuant to Section 2937, and the chilling effect arising therefrom, therefore constitutes an injury sufficient to confer standing upon the Minor Parties. *See Peachlum*, 333 F.3d at 434-35, 438.

Even if the Judicial Appellees were correct that costs are only assessed against candidates under Section 2937 in "extreme circumstances," Brief of Jud. Appellees at 13, that would not alleviate the Minor Parties' injury. The text of the statute, as construed by the Pennsylvania Supreme Court, permits a court to assess costs against any candidate, simply for defending nomination petitions that are found to be deficient. *See In Re: Nomination Paper of Ralph Nader*, 905 A.2d 450, 460 (Pa. 2006) (holding assessment of costs under Section 2937 to be entirely discretionary). The statute thus places all minor party and independent candidates at risk of incurring a substantial financial burden if they defend nomination

petitions that they are required by law to submit, even if the petitions are only dismissed based on technical grounds.[1]

The Judicial Appellees also claim that the Minor Parties' injury cannot be traced to them, but they are the state officials who administer Section 2937 in violation of the Minor Parties' constitutional rights. *See generally Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (permitting suit against state official to enjoin enforcement of unconstitutional state statute). As discussed more fully below,

[1] In this context, the Minor Parties implored the District Court to make a close examination of the facts that Pennsylvania courts have found to justify the assessment of costs under Section 2937. Mot. for Reconsideration at 7. In one such case, two independent candidates were ordered to pay more than $80,000 in costs, a draconian sanction that the Pennsylvania Supreme Court deemed proper based upon a handful of phony signatures, equal to 1.3 percent of the total, which were planted by pranksters or saboteurs and inadvertently submitted on a nomination petition signed by more than 50,000 living, breathing Pennsylvanians. *See In Re: Nomination Paper of Ralph Nader*, 860 A.2d 1, 8 n.13 (Pa. 2004) (Saylor, J. dissenting). Thus, even though 98.7 percent of the candidates' signatures were found to be either valid, or invalid based exclusively on narrow technical grounds – for example, because signers used informal names like "Bill" instead of "William," or because their current and registered addresses did not match – the nomination petition was deemed sufficiently "fraudulent" to warrant the imposition of costs under Section 2937. *See* Mot. for Reconsideration at 7. In another case, Appellant Green Party of Pennsylvania's 2006 nominee for U.S. Senate was ordered to pay more than $80,000 following a successful challenge to his nomination petitions, because he was found to have acted in "bad faith" by failing to comply with court orders directing him to ensure that nine people were present to represent him in the challenge proceedings every day. *See In Re: Nomination Paper of Marakay Rogers*, 942 A.2d 915, 923-26 (Pa. Commw. 2008). In that case, therefore, the candidate was penalized because he lacked the resources to defend the challenge to his nomination petitions, in clear violation of the Supreme Court's prohibition that states may not require candidates to "shoulder the costs" of

Pennsylvania is unique in that it employs judicial officials, rather than executive branch elections officials, to verify candidates' nomination petitions. The Judicial Appellees therefore have an institutional interest in defending Section 2937, insofar as they are the state officials charged with administering it. *See infra* Part IV.

Finally, the Judicial Appellees are simply wrong to assert that the Minor Parties make no "concrete factual allegations" in support of their claim that a declaratory judgment would redress their injury, "such as the identification of potential candidates who had or desired to submit nominating petitions." Brief of Jud. Appellees at 16. In fact, the Amended Complaint identifies specific candidates of each Minor Party who "either refused to submit or else withdrew [their] nomination petitions…due to the threat that they would be taxed with costs and fees pursuant to Section 2937." Am. Comp. ¶¶ 34, 37. The Minor Parties' opening brief cites several more cases from the 2010 election, in which "every candidate recruited by the Minor Parties to run for statewide office once again withdrew their nomination petitions, to avoid the risk of incurring costs after being challenged under Section 2937." Brief of Appellants at 17-18. These concrete and specific allegations amply support the Minor Parties' claim that their "ability to recruit

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conducting elections without "providing [a] reasonable alternative means of access to the ballot." *Bullock*, 405 U.S. at 149.

candidates to run for public office…has been severely constrained." Am. Comp. ¶ 54.

In sum, the District Court's conclusion that the Minor Parties lack standing to seek declaratory relief from Section 2937 only underscores its error in failing to apply the proper standard set forth in *Peachlum*.

III. THE MINOR PARTIES' CLAIMS ARE RIPE BECAUSE THEY FACE A SUBSTANTIAL THREAT OF REAL HARM.

The Judicial Appellees' entire discussion of the ripeness doctrine rests on a false premise. They contend that the Minor Parties' claim for declaratory relief from Section 2937 is not ripe, simply because the statute imposes costs on candidates only "due to [their] failure to compile a sufficient number of signatures." Brief of Jud. Appellees at 16. But that does not bring Section 2937 in line with the Constitution. On the contrary, by forcing candidates to assume the risk of incurring costs if they defend nomination petitions that they are required by law to submit, without providing any non-monetary alternative for ballot access, Section 2937 conditions participation in the electoral process upon an ability to pay, which is precisely what the *Bullock-Lubin* line of cases prohibits. *See* Brief of Appellants at 14-15.

It follows that the Minor Parties' claim for declaratory relief from Section 2937 does not rest upon "contingent future events," as the Judicial Appellees assert, but rather is ripe for adjudication. Indeed, the question presented is purely

one of law: May Pennsylvania, consistent with the Constitution, require candidates to assume the risk of incurring $80,000 or more in costs as a condition of running for public office? *Bullock*, *Lubin* and the cases following them clearly establish that the answer is No. *See* Brief of Appellants at 14-15. Therefore, because this case involves "fundamental rights," the issues are "predominantly legal," and "additional factual development" is not needed, the Minor Parties' claim can and should be adjudicated now. *Peachlum*, 333 F.3d at 435 (citation omitted).

IV. THE AMENDED COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY AND THE JUDICIAL APPELLEES ARE PROPER PARTIES.

As alternative grounds for dismissal, the Judicial Appellees assert that the Minor Parties' Count II claim raises no case or controversy, and that, even if it does, the Judicial Appellees are not proper parties to defend this action under 42 U.S.C. § 1983 ("Section 1983"). Neither assertion can support dismissal of this action.

1. The Amended Complaint Presents a Justiciable Controversy That May Be Resolved By Granting the Minor Parties Prospective Declaratory Relief.

The Minor Parties' constitutional challenge to Section 2937 presents a justiciable controversy that may resolved by means of a declaratory judgment holding Section 2937 unconstitutional insofar as it authorizes the assessment of costs against candidates who defend nomination petitions that they are required by

law to submit. Indeed, 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 power of the federal courts to award the prospective *declaratory* relief that the Minor Parties seek. Moreover, federal courts have not hesitated to grant such relief in cases such as this, where states condition electoral participation upon an ability to pay. *See* Brief of Appellants at 14-15 (citing cases striking down election laws that imposed financial burdens without providing alternate means of ballot access).

The Judicial Appellees claim that no Article III case or controversy exists between the Minor Parties and themselves, because they are merely "neutral adjudicators" in Section 2937 proceedings, Brief of Jud. Appellees at 21, but this claim fails to acknowledge the administrative or enforcement function that they perform in Pennsylvania's unique electoral scheme. 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." 25 P.S. § 2937. In every other state, executive branch elections officials perform this function, and are subject to suit in disputes arising

therefrom.[2] *See* Brief of Appellants at 14-15. Section 2937 is not immunized from judicial review, simply because Pennsylvania's unique electoral scheme requires judicial officers to perform this executive function.

As the Judicial Appellees admit, "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." Brief of Jud. Appellees at 27 (quoting *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 21-22 (1st Cir. 1982)). In this case, the Judicial Appellees have that institutional obligation, because they administer the statute in question. 25 P.S. § 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 the assessment of costs

[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 the Judicial Appellees 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).

against candidates who defend nomination petitions that they are required by law to submit. Am. Comp. ¶¶ 51-58.

Under the facts of this case, therefore, the Judicial Appellees cannot properly be considered neutral adjudicators insofar as they are charged with administering or enforcing Section 2937. Rather, they "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). Consequently, the Minor Parties' claim for declaratory relief against the Judicial Appellees, in their capacity as administrators or enforcers of a challenged provision of the Pennsylvania Election Code, satisfies the Article III case or controversy requirement. *See id.*; *In re Justices*, 695 F.2d at 21-21.

2. The Judicial Appellees 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). This Court 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 (3rd Cir. 1985) (permitting suit against judicial defendants as administrators or enforcers of Pennsylvania's statutory parole scheme). Accordingly, to the extent that the Judicial Appellees act as administrators or enforcers of Pennsylvania's Election Code, they are proper parties to this suit.

In *Georgevich*, this Court 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. *See 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.*, Brief of Appellants at 14-15, so too are the Judicial Appellees. *See Georgevich*, 772 F.2d at 1087.

The Judicial Appellees contend that *Listenbee* supports their claim that they are not proper parties to this action, but their reliance on that case is misplaced. Brief of Jud. Appellees at 24-26. 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 facts of this case, by contrast, the Judicial Appellees 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.

An examination of the first case in which costs were assessed against candidates under Section 2937 reinforces the conclusion that the Judicial Appellees were acting as administrators or enforcers of the Pennsylvania Election Code. *See In re Nomination Paper of Nader*, 905 A.2d 450. 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). That is because they were performing an *administrative* function – the line-by-line review of signatures on nomination petitions – which executive branch elections officials perform in every other state. *See supra* n.2. As such, the Judicial Appellees' "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)).

There can be no dispute that judicial officers may be proper parties in cases where "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. The Minor Parties thus named the Judicial Appellees to defend this action, in order to ensure that all necessary parties are included, but they have no particular interest in pursuing claims against the Judicial Appellees, if complete relief may be had from the other state officials named herein. Significantly, however, none of those officials – including the Attorney General, the Secretary of State and the Commissioner of Elections – has offered any defense of Section 2937 on constitutional grounds. Instead, each one claims not to be a proper party to defend this action. In this way, Pennsylvania seeks to shield Section 2937 permanently from judicial review. Such a result would be an offense not only to the separation of powers, but also to the democratic form of government established by the Constitution.

Section 2937 is a retrograde statute that belongs to a time long since consigned to the dustbin of history. More than forty years ago, in striking down Virginia's poll tax, the Supreme Court observed that it had "long been established that a State may not impose a penalty upon those who exercise a right guaranteed

by the Constitution." *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (citation omitted). More recently, following *Bullock* and *Lubin*, this Court struck down Pennsylvania's mandatory filing fees, on the ground that states must provide a reasonable, non-monetary alternative for ballot access. *See Belitskus v. Pizzingrilli*, 343 F.3d 632, 651 (3rd Cir. 2003). Yet, in the very next election cycle, Pennsylvania began to impose draconian costs against candidates under Section 2937, simply because they attempted to access the ballot in the only manner provided for by state law. Am. Comp. ¶¶ 32-33; *see infra* n.1. Section 2937 is clearly unconstitutional, and nothing should prevent the Court from so holding in this case.

CONCLUSION

For the foregoing reasons, and those set forth in their opening brief, Appellants, the Constitution Party of Pennsylvania, the Green Party of Pennsylvania, the Libertarian Party of Pennsylvania, Hillary A. Kane, Michael J. Robertson and Wes Thompson, respectfully request that the decision below be reversed in its entirety, and that this matter be remanded to the United States District Court for the Eastern District of Pennsylvania.

Dated: January 7, 2011

Respectfully submitted,

/s/ Oliver B. Hall

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to Third Circuit Local Appellate Rule 46.1 that the attorney whose name appears on the foregoing Appellate Brief, Oliver B. Hall, is a member of the bar of this Court.

Dated: January 7, 2011 /s/ Oliver B. Hall
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a) AND L.A.R. 31.1

This brief complies with the word limit requirements of F.R.A.P. 32(a) because:

a. The brief is 4,392 words, and prepared in Times New Roman, 14 Point Font.

This brief complies with the electronic filing requirements of L.A.R. 31.1(c) because:

a. The text of this electronic brief is identical to the text of the paper copies;

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/s/ Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2011, I served a copy of the foregoing Reply Brief of Appellants, on behalf of all Plaintiff-Appellants, by the Court's ECF system, and by First Class Mail, upon the following:

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