

§ 1746, which are attached hereto as Exhibit A: 1) First Declaration of Alan Robert Goodrich; 2) First Declaration of John J. Sweeney; 3) First Declaration of Roy Minet; 4) First Declaration of William Redpath; 5) First Declaration of Steve Scheetz; 6) First Declaration of Paul A. Rossi, Esq.; and 7) First Declaration of Richard Winger.

Dated: February 20, 2015

Respectfully submitted,

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

THE CONSTITUTION PARTY OF)	
PENNSYLVANIA, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. <u>5:12-CV-02726</u>
)	
CAROL AICHELE and JONATHAN M.)	
MARKS,)	
)	
Defendants.)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

This case involves the straightforward application of settled principles of constitutional law to a set of material facts that are not in dispute. Pennsylvania, unlike any other state in the nation, requires that minor party and independent candidates submit nomination papers with a specified number of valid signatures – generally at least 20,000, and often many thousands more – and also requires them to bear the financial burden of validating the signatures, by supplying their own representatives to perform such work. In addition, Pennsylvania requires candidates who defend their nomination papers to assume the risk that they will be ordered to pay their private party challengers' costs, even if they are not found to have engaged in fraud, bad faith or any other misconduct. Twice in recent elections, defending candidates have been ordered to pay their challengers tens of thousands of dollars after being denied access to Pennsylvania's ballot.

It is no coincidence that Pennsylvania's ballot access scheme for minor party and independent candidates is unique. In the few other states that required candidates to bear the cost of validating nomination papers they are required by law to submit, federal courts have, without exception, struck down such requirements as unconstitutional. The courts in those cases applied

long-settled precedent holding that states may not require candidates, voters or political parties to bear the financial burden of the state's legislative choices regarding the regulation of elections. This case falls squarely within that line of precedent. It is ripe for adjudication, and the material facts are undisputed. The Court should declare Pennsylvania's statutory scheme unconstitutional.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This case is before the Court on remand from the Court of Appeals for the Third Circuit. The Third Circuit reversed this Court's March 8, 2013 decision granting dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1), and held that Plaintiffs have standing to pursue their claims challenging the constitutionality of 25 P.S. § 2911(b) and 25 P.S. § 2937.¹ *See Constitution Party of Pennsylvania v. Aichele* ("CPPA"), 757 F.3d 347 (3rd Cir. 2014). Following remand, the Minor Parties filed an Amended Complaint (Dkt. No. 46). Defendants Carol Aichele, Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Pennsylvania Bureau of Commissions, Elections and Legislation (collectively, "the Commonwealth"), moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (Dkt. No. 48). The Commonwealth subsequently withdrew its Rule 12(b)(6) motion (Dkt. No. 53), and the Court ordered that dispositive motions be filed no later than March 20, 2015. The parties have agreed that discovery is not necessary.

Although the Third Circuit did not reach the merits, in holding that the Minor Parties have standing to assert their claims, it necessarily resolved several questions of law that bear on the merits. Its decision thus provides helpful guidance regarding the proper resolution of the parties' cross-motions for summary judgment.

¹ Plaintiffs are the Constitution Party of Pennsylvania ("CPPA"), Green Party of Pennsylvania ("GPPA"), Libertarian Party of Pennsylvania ("LPPA"), Joe Murphy, James N. Clymer, Carl J. Romanelli, Thomas Robert Stevens and Ken Krawchuk (collectively, the "Minor Parties").

The Third Circuit's Decision

The complete factual background and procedural history of this case are set forth in the Third Circuit's opinion, and need not be repeated here.² *See CPPA*, 757 F.3d at 350-57. In brief, the Minor Parties commenced this action under 42 U.S.C. § 1983. They allege that Pennsylvania's ballot access scheme for non-major party candidates is unconstitutional, because it requires them both to submit nomination papers pursuant to Section 2911(b), and to bear the expense of validating those papers when challenged by a private party pursuant to Section 2937 – including paying the challengers' litigation costs, in cases where a court deems it “just”. *Id.* at 349-50. In their original Complaint (and the Amended Complaint), the Minor Parties assert three counts. *Id.* at 356. Count I alleges that Section 2911(b) and Section 2937 violate the Minor Parties' freedoms of speech, petition, assembly and association for political purposes, as guaranteed by the First and Fourteenth Amendments, by imposing substantial financial burdens on them to defend nomination papers they are required by law to submit. *Id.* Count II alleges that the same provisions violate the Minor Parties' right to equal protection of law, as guaranteed by the Fourteenth Amendment, by requiring them to bear the costs of validating nomination papers, while major party candidates are placed on the general election ballot automatically, by means of publicly funded primary elections. *Id.* Count III alleges that Section 2937 is unconstitutional on its face, because it authorizes the imposition of costs against candidates even if they do not engage in misconduct, thereby chilling First Amendment rights to freedom of speech, petition, assembly, and association. *Id.*

In reversing this Court's dismissal pursuant to Rule 12(b)(1), the Third Circuit prefaced

² The relevant facts supporting this motion are also set forth in Plaintiffs' Statement of Material Facts as to Which There Is No Genuine Dispute (hereinafter, “Pl. SMF”), submitted herewith.

its discussion by observing that “it would be a sad irony indeed if the state that prides itself on being the cradle of American liberty had unlawfully restrictive ballot access laws.” *Id.* at 357. The Third Circuit then determined that this Court had applied an improper standard in granting dismissal under Rule 12(b)(1), because it failed “to accept[] the allegations in the Complaint and the supporting declarations as true,” as it was required to do. *Id.* at 359. Reviewing the record, the Third Circuit found that the Minor Parties “allege and have adduced proof – uncontroverted at this stage,” that “the threat of high costs” assessed pursuant to Section 2937 “has imposed, and will continue to impose, a real and chilling effect on political activity.” *Id.* at 359-60. It further found that “the undisputed facts establish” that the Minor Parties “would face similar obstacles in the future.” *Id.* at 360 n.15. The Third Circuit therefore concluded that, rather than remanding the question to this Court, it could decide whether the Minor Parties have standing as a matter of law. *Id.* at 360.

The Third Circuit began its analysis by reciting the elements of standing – injury-in-fact, causation and redressability. *See id.* (citations omitted). With respect to injury-in-fact, it first observed that this Court had “overlooked” the Minor Parties’ undisputed allegations and evidence. *Id.* at 362. It then noted that “the factual support needed to establish standing depends considerably upon whether the plaintiff is himself an object of the action,” because “if he is, there is ordinarily little question that the action or inaction has caused him injury.” *Id.* (citation and quotation marks omitted). The Third Circuit further found that the Minor Parties “are indeed the target of § 2911(b), which operates in conjunction with § 2937.” *Id.* Moreover, it reasoned, “we will not be so blind as to ignore the uncontested facts set forth in the [Minor] Parties’ declarations, which establish how § 2937 in practice has been applied only to non-major parties.”

Id. at 362 n.18.

The Third Circuit next addressed several “noteworthy developments in Pennsylvania law” that affect its analysis. *Id.* at 362. First, in the last decade, Section 2937 “has been a vehicle for imposing significant litigation expenses on non-major parties and their candidates.” *Id.* at 363. This “history of past enforcement” supports a finding of injury-in-fact, because it suggests that there is “a substantial threat of future enforcement.” *Id.* (citation omitted).

In addition, the Third Circuit recognized that the Supreme Court of Pennsylvania had recently clarified that costs may be assessed under Section 2937 whenever a court deems it “just”. *Id.* (citing *In re Farnese*, 17 A.3d 357, 369-70 (Pa. 2011)). Although this includes cases of “fraud, bad faith or gross misconduct,” the Third Circuit found, it is “not ... limited to that kind of malfeasance.” *Id.* Rather, “a candidate can proceed in good faith to seek a spot on the ballot and still be subjected to high litigation costs.” *Id.* Accordingly, this Court’s “determination that future harm was too speculative” to support a finding of injury-in-fact misreads *Farnese*. *Id.* at 363 n.19. The argument “is not that, under *Farnese*, courts will start randomly ordering costs but that citizens do not know what conduct will lead to such orders.” *Id.* The “alleged uncertainty itself,” the Third Circuit concluded, is what gives rise to the Minor Parties’ injury. *Id.*

The Third Circuit acknowledged that it was not deciding whether the standard for cost shifting under Section 2937 is “unconstitutionally vague and overbroad”. *Id.* at 363. Nonetheless, it observed:

What is not open to debate on the record before us, viewed in the plaintiff-friendly light that it must be, is that the award of costs in past cases has had a chilling effect on protected First Amendment activity. Political actors have used the recent precedents from Pennsylvania courts as a cudgel against non-major parties and their candidates.

Id. Citing evidence of specific and direct threats made against the Minor Parties, the Third

Circuit continued:

The threat of cost shifting, entirely believable in light of recent history, chills the [Minor] Parties' electioneering activities. That is the injury, and cogent precedent shows it to be intolerable.

Id. at 364 (citation omitted). Summarizing its injury-in-fact analysis, the Third Circuit concluded:

there are ample allegations of a present and continuing injury, despite the Commonwealth's desire to minimize the problem as involving nothing more than "potential financial burdens." It is quite true that a "chain of contingencies" amounting to "mere speculation" is insufficient for an injury-in-fact. But the injury alleged by the [Minor] Parties is not a speculative series of conditions. Construed in the light most favorable to the [Minor] Parties, their Complaint establishes that, when they submit nomination papers as they must under § 2911(b), they face the prospect of cost-shifting sanctions, the very fact of which inherently burdens their electioneering activity. They have produced sworn and uncontested declarations that their plans for seeking public office are directly impeded by the relevant provisions of the election code. ... As those are the undisputed facts before us, the [Minor] Parties have established injury-in-fact.

Id. at 364-65 (citations omitted). In reaching that conclusion, the Third Circuit emphasized that, "in this case, we are addressing a fundamental First Amendment right to political participation – not an inconvenience or burden, but wholesale disenfranchisement." *Id.* at 365 n.21.

Turning to causation, the Third Circuit expressly rejected the Commonwealth's argument that "Commonwealth officials only accept the nomination papers for filing, and they do none of the things about which the [Minor] Parties complain." *Id.* at 366. Even though "the direct source of injury" may be a third party, the Third Circuit reasoned, "standing has been found where the record present[s] substantial evidence of a causal relationship between the government policy and the third party conduct, leaving little doubt as to causation and likelihood of redress." *Id.* (citation omitted). The Third Circuit then observed that this Court's analysis of causation "largely ignore[d] the Complaint and the declarations submitted with it," and that, "to the extent that the Court addressed the [Minor] Parties' allegations and proof, it certainly did not take them as true.

Id. Specifically:

Candidates and canvassers refuse to participate in the political process because, they have declared, they cannot bear the risk of litigation costs imposed under § 2937. That is a direct and un-refuted statement of causation. Because the “mere existence of the ... law causes these [electoral] decisions to be made differently than they would absent the law ... the standing inquiry’s second requirement of a causal connection between the plaintiffs’ injuries and the law they challenge” is satisfied.

Id. at 366-67 (citation omitted).

Having concluded that the Minor Parties satisfy the causation element, the Third Circuit stated its reasons for rejecting the Commonwealth’s “self-serving characterization” of the challenged statutory scheme. *Id.* at 366. “The Commonwealth cannot hide behind the behavior of third parties when its officials are responsible for administering the election code that empowers those third parties to have the pernicious influence alleged in the Complaint,” it explained. *Id.* at 367. “Under this specific statutory scheme,

it is not the actions of other actors alone that cause the injury. Those third parties could take no action without the mechanisms by which the Commonwealth’s officials oversee the election code provisions at issue here. Therefore, the record present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and likelihood of redress.

In fact, in reviewing other election challenges, it appears to be standard operating procedure for plaintiffs to bring these type of suits against the officials who administer the state election system, which here includes the Secretary of the Commonwealth and state election commissioners.

Id. (citations and quotation marks omitted). Accordingly, the Minor Parties “have established that their injury-in-fact can fairly be traced to the actions of the Commonwealth officials, and the causation element is satisfied.” *Id.* at 368.

Finally, the Third Circuit concluded that the Minor Parties satisfy the third element of standing, redressability:

By establishing causation, the [Minor] Parties have also established redressability. ... If the Commonwealth officials do not enforce the election provisions at issue, then the [Minor] Parties will not be burdened by the nomination scheme embodied in §§ 2911(b) and 2937, allowing the [their] candidates to run for office and build functioning political parties.

Id. The Third Circuit therefore held that the Minor Parties “have standing to pursue their claims and have them heard.” *Id.* Accordingly, it reversed this Court’s order dismissing the Complaint.

The New Allegations in the Amended Complaint

The Amended Complaint asserts the same three counts as the original Complaint, Am. Comp. ¶¶ 59-87, but makes three substantive changes. First, it dismisses all claims against the Pennsylvania Attorney General, as directed by the Third Circuit. *See CPPA*, 757 F.3d at 350 n.3.

Second, the Amended Complaint includes allegations relating to the injuries the Minor Parties incurred after they filed the original Complaint in May 2012. Am. Comp. ¶¶ 41-49. Specifically, in the 2012 election cycle, private parties challenged the nomination papers filed by Plaintiffs CPPA and GPPA. Am. Comp. ¶ 42. Both CPPA and GPPA were then ordered to provide “20 individuals, in addition to counsel,” each day of the challenge proceedings, for the purpose of validating the signatures on their nomination papers. Am. Comp. ¶ 44. Eleven days later, CPPA was compelled to withdraw its nomination paper, because it could not continue to supply the requisite 20 workers, nor could it risk the imposition of costs against it under Section 2937 if it failed to do so. Am. Comp. ¶ 45. LPPA successfully defended its nomination paper, but incurred the substantial financial burden of providing 20 workers each day of the proceedings, including expenses for their travel, food and lodging. Am. Comp. ¶ 46.

In the 2014 election cycle, after a decade of laboring under the new ballot access scheme that Pennsylvania adopted in the 2004 election cycle, CPPA, GPPA and LPPA were all unable to

submit nomination papers with enough signatures to comply with Section 2911(b). Am. Comp. ¶ 48. As a result, once again, no candidates for statewide office appeared on Pennsylvania’s 2014 general election ballot, except for Republicans and Democrats. Am. Comp. ¶ 48. GPPA did submit a nomination paper for a Pennsylvania state senate candidate in 2014, and private parties filed a challenge. Am. Comp. ¶ 49. GPPA’s challengers requested an award of costs and attorneys’ fees pursuant to Section 2937. Am. Comp. ¶ 49.

The third substantive change the Amended Complaint makes is the inclusion of allegations clarifying that the Minor Parties’ injury arises not only from the threat that costs may be assessed against them pursuant to Section 2937, but also from the requirement that they bear the expense of validating the signatures on the nomination papers they are required to submit pursuant to Section 2911(b). Am. Comp. at 1-2; ¶¶ 21, 27, 44-46, 51, 52, 55, 63, 75. Specifically, when private parties challenge their nomination papers, the Minor Parties must provide their own workers each day of the challenge proceedings, to validate the signatures on the papers. Am. Comp. ¶¶ 27, 44. Thus, in the 2006 election, Plaintiff Romanelli, a GPPA candidate, was ordered to provide 9 workers each day, and his inability to ensure full compliance – he averaged 6 workers a day – was a primary basis for the assessment of costs against him under Section 2937. Am. Comp. ¶ 27; *see also CPPA*, 757 F.3d at 354. Additional allegations relating to the injuries incurred by CPPA and GPPA during the 2012 election, including their obligation to provide 20 workers each day of the challenge proceedings, are summarized above. Am. Comp. ¶¶ 44-46.

STANDARD OF REVIEW

Under Federal Rule of Procedure 56(a), “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). A dispute is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A disputed fact is “material” if it might affect the outcome of the case under governing law. *Id.*

In ruling upon a motion for summary judgment, the Court views all inferences “in the light most favorable to the nonmoving party.” *Doe v. Luzerne County*, 660 F.3d 169, 174 (3rd Cir. 2011) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). However, “the nonmoving party cannot establish a genuine dispute as to a material fact by pointing to unsupported allegations in the pleadings.” *Id.* at 175 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). Instead, to defeat a motion for summary judgment, the nonmoving party must raise more than “some metaphysical doubt as to the material facts,” *Matsushita*, 475 U.S. at 586, and the court must determine that “a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented.” *Anderson*, 477 U.S. at 252. The Court may not “weigh the evidence or make credibility determinations,” because “these tasks are left for the fact finder.” *Doe*, 660 F.3d at 175 (citing *Pichler v. UNITE*, 542 F.3d 380, 385 (3d Cir.2008)).

ARGUMENT

I. The Court Should Grant the Minor Parties Summary Judgment as to Count I and Count II of the Amended Complaint, Because Pennsylvania’s Statutory Scheme Cannot Withstand Constitutional Scrutiny Under *Anderson v. Celebrezze*.

The Supreme Court has recognized that constitutional challenges to state election laws “cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). It therefore established an analytical process that courts must follow in deciding such cases. Specifically, a reviewing court:

must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. This test, as construed by the Third Circuit, is “less categorical” than the traditional three tiers of strict, intermediate and rational basis scrutiny. *See Rogers v. Corbett*, 468 F.3d 188, 194 (3rd Cir. 2006). “Ballot access cases should not be pegged into the three aforementioned categories,” the Third Circuit explained, but rather, “our scrutiny is a weighing process” that balances the burdens imposed on a plaintiff's constitutional rights against the state interests asserted. *Id.* The *Anderson* analysis nonetheless tracks the traditional levels of scrutiny: although “the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions,” a regulation that imposes “severe” burdens on a plaintiff's constitutional rights “must be narrowly drawn to advance a state interest of compelling importance.” *Belitskus v. Pizzigrilli*, 343 F.3d 632, 644 (3rd Cir. 2003) (citations omitted).

Anderson was decided on First Amendment grounds, but as the Court observed, “a burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.” *Anderson*, 460 U.S. at 793. Courts applying *Anderson* scrutiny to state election laws have therefore treated Equal Protection claims as functionally inseparable from First Amendment claims. *See, e.g., Republican Party of Arkansas*, 49 F.3d 1293 n.2 (“In election cases, equal protection challenges essentially constitute a branch of the associational rights tree”). The Third Circuit has adopted this approach, concluding that *Anderson* establishes the proper method for

analyzing both Equal Protection and First Amendment claims. *See Rogers*, 468 F.3d at 193-94.

Despite the flexibility afforded by the *Anderson* analysis, federal courts have reached remarkably uniform results when applying it to statutory schemes that impose burdens similar in kind to Pennsylvania's. Without exception, federal courts have struck down state laws that require voters, candidates or political parties to bear the cost of the state's legislative choices regarding the regulation of elections. *See, e.g., Belitskus*, 343 F.3d 632 (enjoining enforcement of Pennsylvania's mandatory filing fees for candidates); *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289 (8th Cir. 1995) (holding that Arkansas cannot require political parties to hold and pay for primary elections); *Dixon v. Maryland State Bd. of Elections*, 878 F.2d 776 (4th Cir. 1989) (declaring mandatory filing fee of \$150 for non-indigent write-in candidates unconstitutional). Several courts have specifically held it unconstitutional for states to require that minor parties pay to validate the signatures on nomination papers they are required by law to submit. *See, e.g., Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (declaring unduly burdensome signature verification fees unconstitutional); *McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373 (M.D. N.C. 1994) (declaring five-cent per signature verification fee unconstitutional), *aff'd on other grounds*, 65 F.3d 1215 (4th Cir. 1995); *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928 (M.D. Fl. 1984) (declaring ten-cent per signature verification fee unconstitutional), *aff'd on other grounds*, 759 F.2d 1511 (11th Cir.1985).

In sharp contrast with this settled precedent, the Commonwealth cannot cite a single case upholding a statutory scheme such as Pennsylvania's, which requires that candidates bear the costs of validating nomination papers they are required by law to submit. *See* 25 P.S. §§ 2911(b), 2937. That is because no such case exists. Under *Anderson*, and the precedent on which it relies,

Pennsylvania's statutory scheme is unconstitutional.

A. Pennsylvania's Statutory Scheme Imposes Severe and Unequal Burdens on the Minor Parties' First and Fourteenth Amendment Rights.

Pennsylvania's statutory scheme harms the Minor Parties in three distinct but related ways: as voters, as candidates and as aspiring political parties. In each instance, the challenged provisions burden rights that are protected by the Constitution. With respect to the rights of voters, the Supreme Court has recognized that state laws restricting ballot access burden "two different, although overlapping, kinds of rights – the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). "Both of these rights," the Court found, "rank among our most precious freedoms." *Id.*

The Court has not attached the same "fundamental status" to the rights of candidates, but it has recognized that candidates' rights and voters' rights "do not lend themselves to neat separation," because "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). Of particular concern are laws "tending to limit the field of candidates from which voters might choose." *Id.* As the Court explained in *Anderson*, "the exclusion of candidates ... burdens voters' freedom of association, because ... a candidate serves as a rallying point for like-minded citizens." *Anderson*, 460 U.S. at 787-788.

Finally, the Court has recognized "the constitutional right of citizens to create and develop new political parties." *Norman v. Reed*, 502 U.S. 279, 288 (1992). This right "derives from the First and Fourteenth Amendments, and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends." *Id.* Further, it is "an integral

part of [the] basic constitutional freedom” to associate for the “advancement of political beliefs and ideas.” *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

The undisputed evidence in this case, as set forth in Plaintiffs’ Statement of Material Facts as to Which There Is No Genuine Dispute, establishes that Pennsylvania’s ballot access scheme imposes severe burdens on each of the Minor Parties’ foregoing rights. Since 2004, when Section 2937 was first construed to authorize the imposition of costs against defending candidates, voters in Pennsylvania have repeatedly been denied the choice of voting for the Minor Parties’ candidates. Pl. SMF ¶¶ 17-18, 29, 40. As a result, in 2006, 2010 and 2014, voters had no choice but to vote for Republicans or Democrats for statewide office. *Id.* The Supreme Court has recognized that such a deprivation of voter choice constitutes a severe burden. *See Williams*, 393 U.S. at 31 (“the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot”). This burden is compounded by the fact that Commonwealth officials routinely decline to tally and report valid write-in votes for the Minor Parties’ candidates. Pl. SMF ¶ 51. Such an injury “is of great magnitude,” because it is “no different in effect from refusing to allow [the Minor Parties] to cast their ballots in the first place.” *Dixon*, 878 F.2d at 782-83.

The closely related burden on the Minor Parties’ candidates is equally severe. Twice since 2004, defending candidates have been ordered to pay their challengers tens of thousands of dollars in costs after being denied ballot access pursuant to Section 2937. Pl. SMF ¶¶ 16, 18, 49. The threat of incurring costs pursuant to Section 2937 caused every Minor Party candidate but one to withdraw from the 2006 election, despite their good faith belief that they had complied with Section 2911(b). Pl. SMF ¶ 17. In 2010, the same thing happened again – and this time, no

Minor Party candidates were willing to assume the risk of incurring such costs. Pl. SMF ¶¶ 25-28. In 2012, that threat caused CPPA to withdraw its nomination paper – again, despite CPPA’s good faith belief that it complied with Section 2911(b). Pl. SMF ¶ 36. Such withdrawals were compelled under financial duress, often in response to explicit threats from challengers to seek \$100,000 or more in costs pursuant to Section 2937. Pl. SMF ¶¶ 17, 25-28, 36-37, 44, 50. As the Third Circuit found, such threats are “entirely believable in light of recent history,” and they have caused “a chilling effect on First Amendment activity” – an injury, the Court concluded, that is “intolerable” under Supreme Court precedent. *CPPA*, 757 F.3d at 363-64 (citation omitted).

Candidates who do not withdraw their nomination papers when challenged pursuant to Section 2937 are subject to the additional burden of providing their own workers, at their own expense, to review the signatures they are required to submit pursuant to Section 2911(b). This mandatory requirement that candidates bear such an expense, without any alternative means of ballot access, constitutes a severe burden. *See Belitskus*, 343 F.3d at 644-45. Plaintiff Romanelli, CPPA’s 2006 nominee for United States Senate, was required to provide nine such workers each day of the challenge proceedings for a six week period totaling 29 days of hearings. Pl. SMF ¶ 19. His failure to comply fully with that requirement was a primary basis for the imposition of costs against him pursuant to Section 2937. Pl. SMF ¶¶ 19, 49. In 2012, CPPA and LPPA were each required to provide 20 workers each day of the challenge proceedings. Pl. SMF ¶¶ 22, 35. CPPA’s inability to comply with that requirement was a direct cause of its withdrawal from the 2012 election. Pl. SMF ¶ 36.

The undisputed evidence also demonstrates that Pennsylvania’s ballot access scheme

imposes severe burdens on CPPA, GPPA and LPPA as political parties. Each of these parties routinely achieved ballot access pursuant to Section 2911(b) in the elections immediately preceding 2004, but have generally been prevented from doing so since then, resulting in their loss of status as qualified political parties. Pl. SMF ¶¶ 1-3 15, 20, 23. Each of these parties has members who want to run for public office as their nominees in future elections, but who cannot afford to incur costs pursuant to Section 2937. Pl. SMF ¶¶ 45, 48. Each of these parties' members and supporters are increasingly unwilling to dedicate the time and resources necessary to conduct a successful petition drive, because they know that the filing of a challenge pursuant to Section 2937 may force the parties' withdrawal, whether or not they comply with Section 2911(b). Pl. SMF ¶ 46. Because Pennsylvania law provides no alternative means for CPPA, GPPA and LPPA to place their nominees on the ballot, Section 2911(b) and Section 2937 interfere with their core functions of presenting their candidates to the electorate and building support for their platforms. Pl. SMF ¶ 47. The Supreme Court has also recognized this burden as severe. *See Williams*, 393 U.S. at 31 ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes").

When the Minor Parties do defend the validity of their nomination papers, the financial burdens imposed on them are all-consuming. In 2012, for example, CPPA expended at least \$10,000 to \$15,000 in resources to mount its defense before it was compelled to withdraw under financial duress. Pl. SMF ¶ 50. LPPA expended well in excess of \$47,500 on its successful defense in 2012, exhausting its resources. Pl. SMF ¶¶ 52-57. Such burdens, which arise directly from the requirement that Minor Parties bear the expense of validating their own nomination papers, surely qualify as severe in the electoral context. Pl. SMF ¶¶ 50, 52-57; *see Belitskus*, 343

F.3d at 640-45. Further, although LPPA prevailed in 2012, its attorney was obliged to abandon potentially valid legal arguments, and to stipulate as to the invalidity of a substantial number of potentially valid signatures, to avoid the threat that costs may be imposed pursuant to Section 2937. Pl. SMF ¶¶ 60-61. As a result of this coercive process, the Minor Parties are denied a full and fair opportunity to defend their right to participate in Pennsylvania's elections, and they face increasing difficulty finding competent legal counsel to defend them when their nomination papers are challenged pursuant to Section 2937. Pl. SMF ¶¶ 58-62.

In addition to being severe, the foregoing burdens are also patently unequal. In recent years, the Minor Parties were required to submit between 19,056 and 67,070 valid signatures pursuant to Section 2911(b), and to bear the expense of validating them, whereas major party candidates appear on the general election ballot automatically, by means of publicly-financed primary elections. Pl. SMF ¶¶ 9-10. As a result, the major parties can challenge the Minor Parties' access to the general election ballot pursuant to Section 2937, thus forcing them to incur the risk and expense of mounting a defense, but the Minor Parties cannot challenge the major parties' access to the general election ballot. Pl. SMF ¶ 31. The major parties have aggressively exploited this unequal treatment under the law, the Third Circuit found, wielding the threat of a challenge pursuant to Section 2937 as "a cudgel" against the Minor Parties. *CPPA*, 757 F.3d at 363.

In reviewing the evidence on appeal, the Third Circuit left no doubt as to the severity of the burdens that Pennsylvania's statutory scheme imposes. The operation of Section 2911(b) and Section 2937 "inherently burdens [the Minor Parties'] electioneering activities," it found, and as a result, their "plans for seeking public office are directly impeded." *Id.* at 364-65. The Court

thus emphasized that “in this case, we are addressing a fundamental First Amendment right to political participation – not an inconvenience or burden, but wholesale disenfranchisement.” *Id.* at 365 n.21 (emphasis added).

This Court must apply a more demanding evidentiary standard than the “plaintiff-friendly” one that the Third Circuit applied, *compare id.* at 363 *with Doe*, 660 F.3d at 174, but the Third Circuit’s analysis and conclusions remain valid nonetheless. The Commonwealth has not produced any evidence to rebut or impeach the evidence the Third Circuit cited – in fact, thus far the Commonwealth has not produced any evidence whatsoever. Further, while the Third Circuit confined its analysis to the burden imposed by the threat that costs may be assessed pursuant to Section 2937, the Amended Complaint includes additional allegations demonstrating that Pennsylvania’s statutory scheme imposes severe burdens on the Minor Parties in addition to that threat, due to the requirement that they supply their own workers to validate the signatures on their nomination papers. *See supra* at 8-9. These allegations, like those in the original Complaint, are supported by competent evidence, including the seven sworn Declarations attached hereto as Exhibit A, which supplement the 17 Declarations the Minor Parties previously submitted. The evidence in the record on remand is therefore even stronger, and more comprehensive, than the evidence on which the Third Circuit relied in concluding that the burdens on the Minor Parties’ First and Fourteenth Amendment rights amount to “wholesale disenfranchisement.” *CPA*, 757 F.3d at 365 n.21.

B. The Interests Asserted By the Commonwealth Cannot Justify the Severe and Unequal Burdens Its Statutory Scheme Imposes.

In the Rule 12(b)(6) motion that the Commonwealth withdrew (Dkt. No. 48), it asserted a single state interest as justification for the burdens that its statutory scheme imposes. According

to the Commonwealth, the imposition of costs pursuant to Section 2937 helps “ensur[e] that only those candidates who have met the requirements established by the Legislature have their names placed on the ballot,” by helping to “prevent the filing of frivolous, fraudulent, and/or patently deficient nomination papers by minor party candidates.” Comm. Mot. to Dismiss at 11. Little discussion is needed to show that this interest cannot justify the burdens that Pennsylvania’s statutory scheme imposes.

The Supreme Court made clear long ago that the Constitution forbids states from using financial status as a means of distinguishing “serious” from so-called “frivolous” candidates. *See Lubin v. Panish*, 415 U.S. 709 (1974) (holding filing fees for candidates unconstitutional in the absence of non-monetary alternatives); *Bullock*, 405 U.S. 134 (1972) (holding non-trivial filing fees for candidates unconstitutional). In *Bullock*, the Court found that mandatory filing fees are “extraordinarily ill-fitted to that goal.” *Bullock*, 405 U.S. at 146. And in *Lubin*, the Court “expressly rejected the validity of filing fees as the sole means of determining a candidate’s seriousness.” *Lubin*, 415 U.S. at 717. As the Fourth Circuit has explained, mandatory fees “bar neither a wealthy frivolous candidate, who can afford the fee, nor a destitute one, who is entitled to a waiver.” *Dixon*, 878 F.2d at 784.

The same logic applies to signature verification fees. In *Fulani*, for example, the 11th Circuit concluded that states “cannot use [a signature verification fee] to decide who deserves to be on the ballot,” because “a party’s ability to pay a verification fee is not rationally related to whether that party has a modicum of support.” *Fulani*, 973 F.2d at 1547. For the same reason, the Minor Parties’ ability to bear the expense of validating the signatures on their nomination papers, and to assume the risk that costs may be imposed against them pursuant to Section 2937, bears

no rational relation to their level of seriousness as candidates and political parties. As *Fulani* recognized, “it is constitutionally impermissible for a state to measure a party’s level of support by the state of its finances.” *Id.*; *see also Clements v. Fashing*, 457 U.S. 957, 964 (1982) (“Economic status is not a measure of a prospective candidate’s qualifications to hold elective office”).

Although the Commonwealth did not assert any interest as justification for its requirement that the Minor Parties provide their own workers to validate the signatures on their nomination papers, the clear purpose and effect of that requirement is to force the Minor Parties, rather than the Commonwealth itself, to bear the expense of determining whether they complied with Section 2911(b). This, too, is constitutionally impermissible. In *Bullock*, the Court made clear that states cannot require candidates to “shoulder the costs” of its “legislative choice” with respect to regulating elections. *Bullock*, 405 U.S. at 147-49 (rejecting assertion that states may “shift” such costs to candidates or voters). Following *Bullock*, lower courts have concluded that “costs which ‘appear to be simply concomitant of the State’s legislative choice to hold an election’ are not costs which a state may charge to candidates.” *McLaughlin*, 850 F. Supp. at 388-89 (quoting *Dixon*, 878 F.2d at 783); *see also Belitskus*, 343 F.3d at 646. Thus, where a state requires candidates to submit nomination papers with a specified number of signatures, as Pennsylvania does pursuant to Section 2911(b), “the only reasonable alternative is for the State to bear the cost of signature verification.” *Clean-Up ‘84*, 590 F. Supp. at 933.

Based on the foregoing precedent, the only interests the Commonwealth has asserted, or reasonably might assert, as justification for the burdens imposed by its statutory scheme fail as a matter of law. But even if the Commonwealth asserts some new interest that it has previously

failed to identify, it still must show that its interest renders the burdens imposed by its statutory scheme necessary. *See Anderson*, 460 U.S. at 789. This it cannot do. The fact that Pennsylvania is the only state in the nation that requires candidates to bear the expense of validating their own nomination papers demonstrates that such a burden is not necessary to further any legitimate, much less compelling, state interest. *Cf. Republican Party of Arkansas*, 49 F.3d at 1301 (rejecting contention that requiring political parties to pay for primary elections serves a state interest of compelling importance on ground that no other state imposes such a requirement).

In the signature verification fee cases cited herein, courts have consistently cited the state's failure to demonstrate a "necessity" for the burdens imposed by such fees as grounds for holding them unconstitutional. *See, e.g., Fulani*, 973 F.2d at 1544; *McLaughlin*, 850 F. Supp. at 391; *Clean-Up '84*, 590 F. Supp. at 931. The Commonwealth's failure to make such a showing here compels the same result. The Court should hold Section 2911(b) and Section 2937 unconstitutional as applied to the Minor Parties.

II. The Court Should Grant the Minor Parties Summary Judgment as to Count III of the Amended Complaint, Because Section 2937 Is Overbroad and Impermissibly Burdens Protected First Amendment Conduct.

It is undisputed that Pennsylvania may enact reasonable ballot access restrictions that impose different requirements on major party, minor party and independent candidates. *See American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 715 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971). Section 2937 goes one fatal step further, however, by authorizing the imposition of substantial costs upon candidates who attempt in good faith to comply with those requirements. As such, the statute is unconstitutional on its face, because it penalizes citizens who engage in quintessentially protected First Amendment conduct. *See*

Norman, 502 U.S. at 288 (recognizing First Amendment right to establish and build new political parties); *Kusper*, 414 U.S. at 57 (same); *see also Clean-Up '84*, 759 F.2d 1511, 1513 (11th Cir. 1985) (recognizing First Amendment right to engage in “solicitation of signatures for petitions” for the purpose of “communication of ideas to voters”) (citations omitted).

A statute is unconstitutional on its face if it is “unconstitutional in every conceivable application, or it seeks to prohibit such a broad range of protected conduct that it is overbroad.” *Clean-Up '84*, 759 F.2d at 1513 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)). The touchstone of such a statute is that it poses “an unacceptable risk of the suppression of ideas.” *City Council*, 466 U.S. at 797. Under the “overbreadth” doctrine, therefore, a statute will be held facially unconstitutional when it has “such a deterrent effect on free expression that [it] should be subject to challenge even by a party whose own conduct may be unprotected.” *Id.* at 798 (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940)). The requisite showing is that there is “a realistic danger” that the challenged statute “will significantly compromise recognized protections of parties not before the Court.” *Id.* at 801.

The evidence in this case establishes such a danger. The Third Circuit found that the Minor Parties “have adduced proof” that “the threat of high costs” assessed pursuant to Section 2937 “has imposed, and will continue to impose, a real and chilling effect on political activity.” *CPPA*, 757 F.3d at 359-60. It further found that “the prospect of cost-shifting sanctions” pursuant to Section 2937 “inherently burdens [the Minor Parties’] electioneering activity,” and that the threat of incurring such a sanction has produced “a chilling effect on protected First Amendment activity.” *Id.* at 363-64. In addition, the Third Circuit concluded, “the undisputed facts establish” that the Minor Parties “would face similar obstacles in the future.” *Id.* at 360 n.15. Although the

Third Circuit was not ruling on the merits, *id.* at 363, these are precisely the findings necessary to support a holding that Section 2937 is unconstitutionally vague and overbroad. *See City Council*, 466 U.S. at 798.

The constitutional infirmity of Section 2937 arises from its failure to distinguish between protected First Amendment conduct, and conduct that properly may be subject to sanctions. The Pennsylvania Supreme Court's recent decision in *In Re Farnese* makes this defect clear. *See In Re Farnese*, 17 A.3d 357. Expressly rejecting the "heightened rule" that costs may be imposed against candidates who submit nomination petitions pursuant to Section 2911(b) only where they engage in "fraud, bad faith, intention, or gross misconduct," the Court concluded instead that costs may be assessed whenever it is deemed "just," based on "the particular facts, the nature of the litigation, and other considerations as may appear relevant." *Id.* at 370-72. Thus, candidates who defend their nomination petitions when challenged pursuant to Section 2937 may be required to pay costs even if they are not found to have engaged in any wrongdoing. The Constitution forbids such infringement on core First Amendment freedoms.

The Minor Parties have submitted evidence that Section 2937 is causing citizens to refrain from circulating, submitting and defending nomination petitions, and to abandon their efforts to associate for political purposes within Pennsylvania's electoral arena, due to the threat that such activities may be thwarted or even penalized as a result of its enforcement. Pl. SMF ¶¶ 44-48. The rights of these parties who are not before the court, and those of all Pennsylvania voters who desire a free choice of candidates for public office, urgently demand the protection of this Court. Section 2937 should be declared unconstitutional on its face.

CONCLUSION

For the foregoing reasons, summary judgment should be entered in Plaintiffs' favor as to Count I, Count II and Count III of the Amended Complaint. The challenged provisions of Pennsylvania law, 25 P.S. § 2911(b) and 25 P.S. § 2937, should be declared unconstitutional as applied to Plaintiffs, and 25 P.S. § 2937 should be declared unconstitutional on its face.

Dated: March 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2015, I caused the foregoing Plaintiffs' Motion for Summary Judgment to be served electronically, via the Court's CM/ECF system, which will effect service on all counsel of record, including:

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