UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSTITUTION PARTY OF PENNSYLVANIA, ET AL.	)	
Appellees,	)	
v.	)	**No. 15-3046**
PEDRO CORTES, ET AL.,	)	
Appellants.	)	

APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Pursuant to this Court's Local Appellate Rule 27.4, Appellees Constitution Party of Pennsylvania, Green Party of Pennsylvania, Libertarian Party of Pennsylvania, Joe Murphy, James Clymer, Carl Romanelli, Thomas Robert Stevens and Ken Krawchuk (collectively, the "Minor Parties") respectfully move for summary affirmance of the District Court's July 23, 2015 decision granting in part their motion for summary judgment. As set forth below, this Court has already decided the issues that Appellants Pedro Cortes and Johnathan M. Marks (together, the "Commonwealth") raise in this appeal, when it ruled on a prior appeal in this case. The Court's resolution of those issues is therefore the law of the case, and the Commonwealth may not relitigate them. Accordingly, summary disposition is proper under L.A.R. 27.4, because this appeal does not present a substantial question.

BACKGROUND AND PROCEDURAL HISTORY

The Minor Parties were plaintiffs in the proceedings below. They commenced this action in May 2012, to challenge the constitutionality of Pennsylvania's statutory scheme governing ballot access for non-major party candidates. Specifically, they challenged 25 P.S. § 2911(b),

which requires that such candidates submit nomination papers with the signatures of a specified number of qualified electors, and 25 P.S. § 2937, which authorizes private parties to challenge the sufficiency of those nomination papers. Section 2937 also requires that candidates who defend their nomination papers bear the expense of validating them, by providing workers to review each signature, and by paying their challengers' litigation costs in any case where a court deems it just.

Defendants Cortes and Marks are named in this action in their official capacities only, as the Pennsylvania elections officials charged with administering the challenged provisions.[1] The Minor Parties asserted three counts in their Amended Complaint. Count I asserted that Section 2911(b) and Section 2937 violate the First Amendment as applied; Count II asserted that these provisions violate the Equal Protection Clause as applied; and Count III asserted that Section 2937 is unconstitutional on its face.

The District Court initially concluded that the Minor Parties lack standing, and dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(1). This Court reversed on appeal. *See Constitution Party of Pa. v. Aichele*, 757 F.3d 347 (3rd Cir. 2014). Expressly declining to remand the question, this Court held, as a matter of law, that the Minor Parties had satisfied the legal requirements for standing. *See id.* at 360, 368. The Commonwealth did not request rehearing of that decision. This Court's mandate therefore issued on August 13, 2014.

Following remand, the parties filed cross-motions for summary judgment. On July 24, 2015, the District Court entered its decision (dated July 23, 2015) granting the Minor Parties summary judgment as to their as-applied claims in Count I and Count II of the Amended

1 Pedro Cortes is the current Secretary of State of Pennsylvania. Pursuant to Federal Rule of Civil Procedure 25(c), he was substituted as a defendant in this action for Carol Aichele, his predecessor in office. Johnathan M. Marks is the Commissioner of Elections of Pennsylvania.

Complaint, and granting the Commonwealth summary judgment as to their facial claim in Count III. The Commonwealth filed its notice of appeal on August 21, 2015. The Minor Parties do not cross-appeal.

On September 11, 2015, pursuant to L.A.R. 33.3, the Commonwealth filed its Concise Statement of the Case, which raises the following two issues for appeal:

1. As a matter of law, could the district court properly enter a declaratory judgment against Secretary Cortes and Commissioner Marks on the claims raised in Counts I and II of the complaint?

2. Relatedly, could the district court fashion meaningful relief against Secretary Cortes and Commissioner Marks?

ARGUMENT

I. The District Court's Decision Should Be Summarily Affirmed, Because This Court Has Already Decided the Issues That the Commonwealth Raises on Appeal, and the Law of the Case Doctrine Bars the Commonwealth From Relitigating Them.

Summary action is warranted under L.A.R. 27.4 where "no substantial question is presented" by an appeal. *See* 3rd Cir. L.A.R. 27.4. That is the case here. This Court has already squarely addressed and expressly decided the two issues that the Commonwealth raises in this appeal, when it held as a matter of law that the Minor Parties have standing to pursue their claims. *See Constitution Party of Pa.*, 757 F.3d at 366-68. Under the law of the case doctrine, the Commonwealth is prohibited from relitigating those issues. Summary affirmance is therefore proper, because the Commonwealth has failed to present a substantial question for the Court to decide. *See* 3rd Cir. L.A.R. 27.4.

A. This Court Has Already Decided That the District Court Could Properly Enter a Declaratory Judgment Against Defendants Cortes and Marks.

The first issue that the Commonwealth raises for appeal is whether the District Court may properly enter a declaratory judgment against Defendants Cortes and Marks. This Court decided

that issue, in the affirmative, when it concluded that the Minor Parties satisfied the "causation" element of standing. *See Constitution Party of Pa.*, 757 F.3d at 366-68. Indeed, this Court expressly recognized "the propriety," in ballot access cases, of asserting claims "for declaratory and injunctive relief against state officials charged with administering the election code." *Id.* at 368. "In reviewing other election challenges," the Court explained, "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.* at 367 (emphasis added) (citing *Belitskus v. Pizzingrilli*, 343 F.3d 632, 638 (3rd Cir. 2003)).

Not only did this Court expressly conclude that the District Court may properly enter a declaratory judgment against Defendants Cortes and Marks, but also, it explicitly rejected the Commonwealth's assertions to the contrary. The Court reasoned as follows:

> The Commonwealth argues that, because private parties are the ones who bring lawsuits objecting to the nomination papers, the independent decisions of those objectors constitute a break in any actionable link to the Commonwealth's conduct. Essentially, the argument is that Commonwealth officials only accept the nomination papers for filing, and they do none of the things about which the [Minor] Parties complain. We cannot agree with that self-serving characterization. … 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. To hold otherwise would mean that political bodies could never seek prospective relief because the objectors to their nomination papers will always be unknown until it is too late to actually obtain a meaningful injunction. … 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.

Id. at 366-67 (emphasis added). Based on this analysis, the Court concluded that the Minor Parties' injury "can fairly be traced to the actions of the Commonwealth officials." *Id.* at 368. It necessarily follows that the District Court may properly enter a declaratory judgment against

these officials. *See id.* Thus, the Court has decided this issue.

B. This Court Has Already Decided That the District Court Can Fashion Meaningful Relief Against Defendants Cortes and Marks.

The second issue the Commonwealth raises is whether the District Court can fashion meaningful relief against Defendants Cortes and Marks. Once again, this Court decided that issue, in the affirmative, when it concluded that the Minor Parties satisfy the "redressability" element of standing. *See id.* at 368. "If the Commonwealth officials do not enforce the election provisions at issue," this Court reasoned, "then the [Minor] Parties will not be burdened by the nomination scheme embodied in §§ 2911(b) and 2937, allowing [their] candidates to run for office and build functioning political parties." *Id.* It necessarily follows that a judgment barring Defendants Marks and Cortes from enforcing these provisions will provide the Minor Parties with meaningful relief.[2] Indeed, the Court expressly concluded that the Minor Parties cannot obtain "meaningful" relief, except by means of a judgment entered against these officials. *See id.* at 367. Thus, the Court has decided this issue, too.

C. The Law of the Case Doctrine Bars the Commonwealth From Relitigating Issues That This Court Has Already Decided.

The law of the case doctrine "limits relitigation of an issue once it has been decided" in an earlier stage of the same litigation. *Hamilton v. Leavy*, 322 F. 3d 776, 786-87 (3rd Cir. 2003) (quoting *In re Continental Airlines, Inc.*, 279 F.3d 226, 232 (3rd Cir. 2002)). Courts apply the doctrine "with the intent that it will promote finality, consistency, and judicial economy." *Id.* (citing *In re City of Philadelphia Litig.*, 158 F.3d 711, 717-18 (3rd Cir. 1998)). Under the doctrine, therefore, "when a court decides upon a rule of law, that decision should continue to

2 Consistent with this Court's analysis, the District Court has in fact fashioned meaningful relief against Defendants Cortes and Marks. On remand, it entered a judgment declaring Section 2911(b) and Section 2937 unconstitutional as applied to the Minor Parties. (Dkt. No. 68).

govern the same issues in subsequent stages in the same case." *American Civil Liberties Union v. Mukasey*, 534 F.3d 181, 187 (3rd Cir. 2008) (citation omitted).

As applied here, the law of the case doctrine bars the Commonwealth from relitigating the issues it raises in this appeal, because this Court already decided them in a previous appeal. *See supra* Part I-A, B. In essence, the Commonwealth is asking this Court to reconsider its conclusion that the Minor Parties satisfy the "causation" and "redressability" elements of standing, even though the Court entered its opinion deciding those issues more than a year ago, *see Constitution Party of Pa.*, 757 F.3d at 366-68, and the Commonwealth failed to file a petition for rehearing. That is precisely what the law of the case doctrine prescribes. *See Hamilton*, 322 F. 3d at 786-87; *American Civil Liberties Union*, 534 F.3d at 187; *see also United Artists v. Township of Warrington*, 316 F. 3d 392, 397-98 (3rd Cir. 2003) (law of the case doctrine applies when a court's "prior decisions in an ongoing case either expressly resolved an issue or *necessarily resolved it by implication*") (emphasis original) (citation omitted).[3]

Furthermore, in entering its mandate on August 13, 2014, this Court specified that the District Court shall proceed "in accordance with the opinion of this Court." That pronouncement operated "to make the opinion a part of the mandate as completely as though the opinion had been set out at length." *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F. 2d 943, 949 (3rd Cir. 1985)). All issues resolved in the Court's prior opinion – including those the Commonwealth raises herein – are therefore the law of the case, and cannot be relitigated. *See id*.

3 This Court has permitted reconsideration of an issue decided earlier in the course of litigation under certain "extraordinary circumstances," but no such circumstances are present here. *See Public Interest Research Group v. Magnesium Elektron Inc.*, 123 F.3d 111, 116-17 (3rd Cir. 1997) (specifying that reconsideration of a previously decided issue may be warranted if: 1) new evidence is available that contradicts a prior conclusion; 2) a supervening new law has been announced; or 3) the earlier decision was clearly erroneous and would create manifest injustice).

CONCLUSION

The District Court's decision should be summarily affirmed pursuant to L.A.R. 27.4, because this Court has already decided the issues the Commonwealth raises for appeal, and they do not present a substantial question.

September 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, I filed the foregoing Motion for Summary Affirmance, on behalf of all Appellees, by means of the Court's CM/ECF system, which will effect service upon all counsel of record, including the following:

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