UNITED STATES COURT OF APPEALS

for the

THIRD CIRCUIT

Case No. 15-3046

PEDRO CORTES AND JONATHAN M. MARKS,

Appellants,

- v. -

CONSTITUTION PARTY OF PENNSYLVANIA, GREEN PARTY OF PENNSYLVANIA, LIBERTARIAN PARTY OF PENNSYLVANIA, JOE MURPHY, JAMES CLYMER, CARL ROMANELLI, THOMAS ROBERT STEVENS AND KEN KRAWCHUK,,

Appellees.

ON APPEAL FROM THE JUDGMENT ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ON JULY 23, 2015

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

This case was filed in the United States District Court for the Eastern District of Pennsylvania, pursuant to 42 U.S.C. § 1983. The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. Defendant-Appellants appeal from the District Court's final order and judgment dated July 23, 2015. Appendix ("App.") 2, 3. They filed their notice of appeal on August 21, 2015. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF RELATED CASES

In April 2009, some of the Plaintiff-Appellees in this case filed a case in the Federal District Court for the Eastern District of Pennsylvania, which challenged the constitutionality of 25 P.S. § 2937, one of the statutory provisions challenged herein. *See Constitution Party of Pennsylvania v. Cortes*, 712 F. Supp. 2d 387 (E.D. Pa. 2010). The District Court dismissed the case on standing and ripeness grounds, *see id.*, and this Court affirmed in an unreported opinion. *See Constitution Party of Pennsylvania v. Cortes*, No. 10-3205 (3rd Cir. May 19, 2011).

This Court has also decided a prior appeal in the instant case. *See Constitution Party of Pennsylvania v. Aichele ("CPPA")*, 757 F.3d 347 (3rd Cir. 2014). In that appeal, the Court reversed the District Court's decision granting dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1), and held as a matter of law that Plaintiff-Appellees have standing to pursue their claims. *See id.*

STATEMENT OF THE CASE

This case raises a constitutional challenge to the statutory scheme by which Pennsylvania regulates non-major party candidates' access to the ballot. Plaintiff-Appellees are the Constitution Party of Pennsylvania ("CPPA"), the Green Party of Pennsylvania ("GPPA") and the Libertarian Party of Pennsylvania ("LPPA"), which are the three established non-major political parties or bodies in Pennsylvania, as well as the chair of each party and several of their candidates and voter-supporters (collectively, the "Minor Parties"). App. 64-66 (Am. Comp. ¶¶ 1-8). Defendant-Appellants are Pennsylvania Secretary of State Pedro Cortes ("the Secretary") and Pennsylvania Commissioner of Elections Jonathan M. Marks (together, the "Commonwealth"). App. 66-67 (Am. Comp. ¶¶ 9-10). Secretary Cortes and Commissioner Marks are Pennsylvania's chief elections officials, who exercise enforcement authority over the challenged statutory scheme. *See id.* They are sued in their official capacities only. *See id.*

Unlike any other state in the nation, Pennsylvania requires non-major party candidates to 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 more than $80,000 after being denied access to Pennsylvania's ballot. And even where such candidates prevail, they must be prepared to spend $50,000 or more in the successful defense of their nomination papers.

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 with respect to the regulation of elections. Several cases specifically hold that states may not require candidates to pay the cost of verifying signatures on nomination papers they are required by law to submit.

As the District Court correctly concluded, this case falls squarely within that long line of settled precedent. Further, the material facts are undisputed, and the

Commonwealth itself concedes that its statutory scheme is unconstitutional. Consequently, the District Court properly granted summary judgment to the Minor Parties, and its decision should be affirmed.

Allegations in the Amended Complaint[1]

The Minor Parties commenced this action on May 17, 2012, to challenge the constitutionality of 25 P.S. § 2911(b), the provision requiring them to submit nomination papers with a specified number of signatures, in conjunction with 25 P.S. § 2937, the provision authorizing private parties to challenge their nomination papers and collect costs. App. 62-63 (Am. Comp. 1-2). In their Amended Complaint, the Minor Parties assert three claims for relief. App. 82-86 (Am. Comp. ¶¶ 59-87). Count I asserts 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 if they defend nomination papers they are required by law to submit. App. 81-82 (Am. Comp. ¶¶ 59-68). Count II asserts that

1 The Minor Parties filed their Amended Complaint following remand from this Court's decision in the prior appeal, primarily to include allegations of fact arising after they filed their initial Complaint, App. 76-79 (Am. Comp. ¶¶ 41-49), and to clarify that their injuries arise not only from the threat that costs may be imposed against them pursuant to Section 2937, but also from their obligation to provide their own workers, at their own expense, to review and validate signatures on their nomination papers. App. 62-63 (Am. Comp. at 1-2); App. 70-72, 77-79 (Am. Comp. ¶¶ 21, 27, 44-46, 51, 52, 55).

Section 2911(b) and Section 2937 violate the Minor Parties' right to equal protection of the law, as guaranteed by the Fourteenth Amendment, by requiring them to bear the expense of validating nomination papers with tens of thousands of signatures, whereas candidates of the Republican and Democratic parties are placed on the ballot automatically, by means of publicly funded primary elections. App. 83-85 (Am. Comp. ¶¶ 69-78). Count III asserts that Section 2937 is unconstitutional on its face, because it authorizes the imposition of costs against defending candidates, even if they do not engage in fraud, bad faith or other misconduct, and thus chills the Minor Parties' free exercise of their rights to speech, petition, assembly and association for political purposes. App. 85-86 (Am. Comp. ¶¶ 79-87). In their prayer for relief, the Minor Parties request a declaratory judgment holding Section 2911(b) and Section 2937 unconstitutional as applied, a declaratory judgment holding Section 2937 unconstitutional on its face, and such other relief as may be proper. App. 87 (Am. Comp. ¶ 88).

In support of their claims, the Minor Parties attached 15 sworn Declarations to their Amended Complaint, which provide detailed evidence of the injury Pennsylvania's statutory scheme causes them. App. 88-139. In particular, the Declarations include multiple examples of Minor Party candidates who were compelled to withdraw nomination papers, despite their good faith belief that they

had complied with Section 2911(b), because they could not assume the financial burden of defending a challenge filed pursuant to Section 2937. Some of the Declarations were submitted while the case was pending below, to apprise the District Court of injury the Minor Parties were then sustaining during the ongoing 2012 election. App. 53-54 (Dkt. Nos. 13, 22, 23); App. 135-139 (Declarations of James N. Clymer).

Pennsylvania's Statutory Scheme

The Pennsylvania Election Code distinguishes between political parties and minor political parties. App. 68 (Am. Comp. ¶¶ 13-14). Political parties nominate their candidates by means of publicly-funded primary elections, the winner of which automatically appears on the general election ballot. App. 68 (Am. Comp. ¶ 15). Only the Republican Party and the Democratic Party meet the statutory definition of "political party," and consequently only they are permitted to hold publicly-funded primary elections. App. 68 (Am. Comp. ¶ 16).

Candidates of all other political parties or bodies and independent candidates may appear on the general election ballot only by submitting nomination papers to the Secretary pursuant to Section 2911(b). App. 69-69 (Am. Comp. ¶ 17). The Secretary must review the nomination papers to determine whether they contain the number of signatures required by Section 2911(b), and whether they are

facially defective in any way. App. 69 (Am. Comp. ¶ 20); *see* 25 P.S. § 2936. Once the Secretary accepts the nomination papers, they are deemed valid unless a private party files a challenge pursuant to Section 2937. App. 70 (Am. Comp. ¶ 21).

To comply with Section 2911(b), the Minor Parties' candidates for statewide office must submit nomination papers with valid signatures equal in number to two percent of the entire vote cast for any candidate elected to statewide office in the prior election. App. 69 (Am. Comp. ¶ 18). In recent elections, this number has ranged from 19,056 valid signatures to as many as 67,070 valid signatures. App. 69 (Am. Comp. ¶ 18). By contrast, Republican and Democratic candidates only need to submit, at most, 2,000 valid signatures to appear on the primary election ballot, and the primary winner automatically appears on the general election ballot. App. 68-69 (Am. Comp. ¶ 15, 19); *see* 25 P.S. §§ 2872.1, 2882.

Pennsylvania's Statutory Scheme as Applied to the Minor Parties

CPPA, GPPA and LPPA were all qualified minor parties in 2002, 2004 and 2006, because each party had a candidate on the preceding general election ballot who polled the requisite number of votes. App. 70 (Am. Comp. ¶ 23). Following the 2004 election, two independent candidates were ordered to pay $81,102.19 in costs to the parties who challenged their nomination papers pursuant to Section 2937. App. 70-71 (Am. Comp. ¶ 24) (citing *In re: Nomination Paper of Ralph*

Nader, 905 A.2d 450 (Pa. 2006)). Although Section 2937 was enacted in 1937, this was the first reported case in which a candidate was ordered to pay costs under the statute. *Id.*

In the 2006 election, the threat of incurring costs pursuant to Section 2937 had an immediate chilling effect, and caused several Minor Party candidates either to withhold or withdraw their nomination papers. App. 71 (Am. Comp. ¶ 25). Such candidates include Hagan Smith, CPPA's nominee for Governor; Marakay Rogers and Christina Valente, GPPA's nominees for Governor and Lieutenant Governor, respectively; and Plaintiff Krawchuk, LPPA's nominee for U.S. Senate. App. 71 (Am. Comp. ¶ 25) (citing First Clymer Dec. ¶ 6; Murphy Dec. ¶ 6; Kane Dec. ¶ 8; Valente Dec. ¶ 5; Robertson Dec. ¶ 5; Krawchuk Dec. ¶ 5). Only one Minor Party candidate for statewide office in 2006, Plaintiff Romanelli, the GPPA nominee for U.S. Senate, was willing to submit and defend the nomination papers required by Section 2911(b). App. 71 (Am. Comp. ¶ 26). Mr. Romanelli did so based on his good faith belief that the 93,829 total signatures he submitted satisfied Section 2911(b)'s requirement of 67,070 valid signatures. App. 71 (Am. Comp. ¶ 26). Mr. Romanelli was nevertheless removed from the ballot following a challenge filed pursuant to Section 2937, and he was ordered to pay his challengers $80,407.56 in costs and fees. App. 71 (Am. Comp. ¶ 26) (citing Romanelli Dec. ¶ 5). A primary

basis for the imposition of costs against Mr. Romanelli was his inability to supply the requisite number of workers to review signatures on his nomination papers. App. 71-72 (Am. Comp. ¶ 27) (citing *In Re Rogers*, 942 A.2d 915, 923-26 (Pa. Commw. 2008). Mr. Romanelli had been ordered to provide nine workers each day of the proceedings, from 8:30 AM until 5:00 PM, at his own expense, but he was only able to provide an average of six workers daily. *Id.*

Because no minor party candidate for statewide office appeared on Pennsylvania's 2006 general election ballot, CPPA, GPPA and LPPA all lost their status as qualified minor parties following the 2006 election. App. 72 (Am. Comp. ¶ 28); *see* 25 P.S. 2831(a).

In 2008, during a criminal investigation into the major parties' illegal use of taxpayer funds and resources to prepare challenges filed pursuant to Section 2937, LPPA submitted nomination papers with more than the 24,666 signatures required by Section 2911(b). App. 72 (Am. Comp. ¶¶ 29-30). No challenge was filed, and LPPA's candidates appeared on the 2008 general election ballot. *Id.* Although CPPA and GPPA regularly complied with Section 2911(b) in the preceding election cycles, they were unable to do so in 2008, primarily because their supporters believed that any petition drive would inevitably result in a financial burden the parties were unable to bear, including the assessment of costs against their

nominees. App. 73 (Am. Comp. ¶ 31) (citing First Clymer Dec. ¶ 7; Murphy Dec. ¶ 7; Kane Dec. ¶¶ 11, 13-15; Romanelli Dec. ¶ 10).

In 2010, following the apparent conclusion of the criminal investigation, the Minor Parties again submitted nomination papers pursuant to Section 2911(b), and each one was challenged pursuant to Section 2937. App. 73 (Am. Comp. ¶ 32). Democratic candidates or their allies filed challenges against GPPA and its 2010 nominees, while Republican candidates or their allies filed challenges against LPPA and its 2010 nominees. *Id.* In some cases, the challengers made explicit threats to seek costs pursuant to Section 2937, unless the Minor Parties immediately withdrew their nomination papers. *Id.*

For example, after challenging LPPA's nomination papers, an attorney representing three voters aided by and affiliated with the Pennsylvania Republican Party explicitly threatened to seek "$92,255 to $106,455" in fees and costs if LPPA and its nominees did not immediately withdraw their nomination papers. App. 73 (Am. Comp. ¶ 33). On August 16, 2010, the challengers' attorney sent LPPA's attorney an email stating the following:

> Following up on our conversation earlier this evening, I do not have exact figures on what our costs will be if this signature count continues and my clients are required to complete the review and/or move forward with a hearing. However, a rough estimate would be $92,255 to $106,455 which would include costs such as legal fees, travel and lodging, compensable time for reviewers/support staff, process servers' fees and expenses, hearing

> preparation, lay and expert witness fees and costs, photocopies, meals, legal research and conference call expenses, to name a few. These costs are comparable to the costs awarded in recent years by the Commonwealth Court in similar nomination paper challenges, including *In re: Nomination Papers of Nader* and *In re: Nomination Papers of Rogers (Romanelli*) which, as you know, were assessed not only against the candidates but also their lawyers and their law firms.
>
> Please let me know if you need any further information in order to discuss with your clients a withdrawal of their candidacy for Governor, Lieutenant Governor and United States Senator. As I stated, the sooner that your clients agree to withdraw, the more likely my clients will agree to not pursue recovery of all their costs incurred in pursuing this matter.

App. 73-74 (Am. Comp. ¶ 34) (citing Robertson Dec. ¶ 9).

As a result of this threat, and on the advice of counsel, LPPA and its nominees withdrew their nomination papers the next day, August 17, 2010. App. 74 (Am. Comp. ¶ 35). They did so despite their belief that the papers included more than the 19,056 valid signatures required by Section 2911(b), because they were unable to assume the risk of incurring costs pursuant to Section 2937. *Id.* (citing Robertson Dec. ¶¶ 8-10; Rogers Dec. ¶¶ 5-6; Valleley Dec. ¶¶ 5-6; Jamison Dec. ¶¶ 5-6).

Similarly, Melvin Packer, GPPA's 2010 nominee for U.S. Senate, withdrew his nomination papers after Joe Sestak, the 2010 Democratic nominee for U.S. Senate, challenged them pursuant to Section 2937. App. 74 (Am. Comp. ¶ 36). Mr. Packer did so despite his belief that the papers included more than the 19,056 valid

signatures required by Section 2911(b), because he was unable to assume the risk of incurring costs pursuant to Section 2937. *Id.* (citing Packer Dec. ¶¶ 4-6). On August 13, 2010, Mr. Packer filed a letter withdrawing his nomination papers, which stated his belief that he had "no other choice," due to the "financial risks" he faced if he defended Mr. Sestak's challenge and incurred costs pursuant to Section 2937. App. 75 (Am. Comp. ¶ 37) (citing Packer Dec. ¶ 7).

CPPA's 2010 nominee for Governor, John Krupa, also declined to submit his nomination papers, due to the threat of incurring costs pursuant to Section 2937. App. 75 (Am. Comp. ¶ 38) (citing Clymer Dec. ¶ 6). Nomination paper challenges were also filed against "tea party" and independent candidates in 2010, causing them to withdraw rather than assume the risk of incurring such costs. App. 75 (Am. Comp. ¶ 38). As a result, no candidate for statewide office, except the Republican and Democrat, appeared on Pennsylvania's 2010 general election ballot. *Id.*

On March 29, 2011, the Supreme Court of Pennsylvania entered a decision clarifying the standard under which costs may be assessed under Section 2937. *See In Re Farnese*, 17 A.3d 357 (Pa. 2011). Expressly rejecting the "heightened rule" that costs may be assessed only where a party is found to have engaged in "fraud, bad faith, intention or gross misconduct," the Court held instead that costs may be imposed whenever it would be "just," based on "the particular facts, the nature of

the litigation, and other considerations as may appear relevant." App. 75 (Comp. ¶ 39 (quoting *In Re Farnese*, 17 A.3d at 370-72).

The Initial Proceedings Before the District Court

When the Minor Parties commenced this action, in May 2012, they were in the midst of their 2012 petition drive. App. 76 (Am. Comp. ¶ 41). During the pendency of the proceedings below, each Minor Party successfully completed its petition drive and submitted to the Secretary nomination papers containing signatures exceeding the number required by Section 2911(b). App. 76 (Am. Comp. ¶ 41). On August, 8, 2012, private parties challenged the CPPA and LPPA nomination papers pursuant to Section 2937. App. 76 (Am. Comp. ¶ 42 (citing *In Re Nomination Paper of Virgil H. Goode*, No. 508 M.D. 2012 (Pa. Commw. 2012) (CPPA challenge); *In Re Nomination Paper of Margaret K. Robertson*, No. 507 M.D. 2012 (Pa. Commw. 2012) (LPPA challenge)). The attorney representing the challengers in each proceeding was the same attorney who informed LPPA that his clients would seek "$92,255 to $106,455" in costs if they did not immediately withdraw their 2010 nomination papers. Ap. 76 (Am. Comp. ¶ 42).

Based on this imminent threat, the Minor Parties filed a Motion for Temporary Restraining Order or Preliminary Injunction on August 8, 2012 – the same day the CPPA and LPPA nomination papers were challenged. App. 77 (Am.

Comp. ¶ 43) (Dckt. No. 12). The Minor Parties requested that the District Court enjoin the Secretary from enforcing the Section 2911(b) signature requirement against them, because they had substantially complied with it, and because in the absence of such relief, "they will be forced to withdraw their nomination papers and forego participation in Pennsylvania's 2012 general election." *Id.*

Seven months passed before the District Court ruled on the Minor Parties' emergency motion for preliminary relief. Then, on March 8, 2013, the District Court denied the motion as moot. App. 55-56 (Dkt. No. 35). In the interim, CPPA had been forced to withdraw from the 2012 election, because it was unable to comply with an order directing that it "shall have present 20 individuals, in addition to counsel" during each day of the challenge proceedings, for the purpose of verifying the signatures on the CPPA nomination papers, and because it could not afford to incur additional costs pursuant to Section 2937. App. 77 (Am. Comp. ¶ 45 (citing Third Clymer Dec. ¶¶ 7-14) (Dckt. No. 23-1)); *see In Re: Rogers*, 942 A.2d at 923-26 (finding candidate's failure to supply requisite number of workers each day of challenge proceedings grounds for the imposition of $25,481.13 in costs). Meanwhile, LPPA successfully defended the challenge to its nomination papers – but only by incurring the substantial expense of complying with an order identical to the one that precipitated CPPA's withdrawal. App. 78 (Am. Comp. ¶

46). Thus, although the Minor Parties' motion for preliminary relief had become moot, that is only because the 2012 election was long since over, and both CPPA and LPPA had already sustained the injury they sought to avoid by seeking such relief seven months earlier.

On March 8, 2013, the District Court also entered its opinion and order dismissing the case pursuant to Rule 12(b)(1), and holding that the Minor Parties lacked standing. App. 55-56 (Dkt. Nos. 34, 35).

The Court of Appeals' Decision in the Prior Appeal

This Court reversed the District Court's dismissal on July 9, 2014. *See CPPA*, 757 F.3d 347. It concluded that the District Court had applied an improper standard under Rule 12(b)(1), and held, as a matter of law, that the Minor Parties have standing to pursue their claims. *See id.* at 358-60, 368. Although the Court did not reach the merits, it necessarily resolved several questions of law that bear directly on this appeal. For instance, in concluding that it could rule on standing as a matter of law, the Court 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, and that "the undisputed facts establish" that the Minor Parties "would face similar obstacles in the future." *Id.* at

360 n.15.

The Court began its analysis by reciting the elements of standing – injury-in-fact, causation and redressability. *See id.* at 360 (citations omitted). With respect to injury-in-fact, it observed 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*. at 362 (citation and quotation marks omitted). Further, the Court found, 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 Court 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 Court 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 at 369-70). Although this includes cases of "fraud, bad faith or gross misconduct," the Court 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*. The "alleged uncertainty itself," the Court concluded, is what gives rise to the Minor Parties' injury. *Id.*

The Court 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. (emphasis added). Citing evidence of specific and direct threats made against the Minor Parties, the Court 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, this Court 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 Court 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 Court 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 Court 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 Court concluded that such a relationship exists here:

> 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 Court 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) (emphasis added). 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 Court 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. (emphasis added). The Court therefore held that the Minor Parties "have standing to pursue their claims and have them heard." *Id*. Accordingly, it reversed the District Court's order granting dismissal under Rule 12(b)(1).

Proceedings on Remand to the District Court

Following remand, the Minor Parties filed their Amended Complaint. App. 57 (Dkt. No. 46). The parties then filed cross-motions for summary judgment. App. 58-59 (Dkt. Nos. 59, 60). On July 23, 2015, the District Court entered its opinion and order granting summary judgment to the Minor Parties as to Count I and Count II of the Amended Complaint (the as-applied claims against Section 2911(b) in conjunction with Section 2937) and granting summary judgment to the Commonwealth as to Count III (the facial claim against Section 2937 only). App.

59-60 (Dkt. Nos. 66, 67, 68).

In granting the Minor Parties summary judgment as to Count I and Count II, the District Court closely followed the guidance this Court provided in its prior decision. The District Court began by recognizing a key aspect of this case that the Commonwealth disregards throughout its brief on appeal: the Minor Parties challenge Section 2911(b) as it applies "in combination" with Section 2937. App. 4. The District Court then provided a detailed account of the undisputed facts and evidence on which it relied. App. 5-18. Of particular relevance to this appeal, the District Court observed that "the Secretary and his staff" are the officials with enforcement authority over the challenged statutory scheme. App. 8 (citing 25 P.S. § 2936). It also observed that the Commonwealth's efforts to create disputed issues of material fact had largely failed, *e.g.*, App. 17 n.29, 18 n.30, 29 n.33, and it carefully delineated the few facts it found to be in dispute and specified that it would not rely on them. App. 16 n.26, n.27.

Turning to the legal issues, the District Court set forth the proper analytic framework the Supreme Court has established for constitutional review of ballot access statutes. App. 22-25 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). Under *Anderson*, the District Court observed, the first step is "to determine the severity of the burden" a challenged statute imposes on a plaintiff's

constitutional rights. App. at 24 (citing *Belitskus*, 343 F.3d 632, 644 (3rd Cir. 2003)). Next, a court must "identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule." App. 23 (quoting *Anderson*, 460 U.S. at 789). And finally, a court "must...determine the legitimacy and strength of [the state] interests, [and] the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

The District Court next proceeded to analyze the burden imposed on the Minor Parties' rights in this case. Acknowledging that the Supreme Court has not provided a "clear test for what constitutes a severe burden," App. 25 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997)), the District Court nonetheless found the precedent on which the Minor Parties rely applicable. For instance, the District Court found that statutes that impose "financial burdens on candidates are severe if they work to exclude legitimate candidates from the ballot." App. 25 (citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Further, the District Court found, "in the absence of a reasonable alternative means of ballot access, any mandatory fee, **no matter how small**, will inevitably remain 'exclusionary as to some aspirants.'" App. 27 (quoting *Belitskus*, 343 F.3d at 645) (emphasis added by District Court) (citing *Lubin v. Panish*, 415 U.S. 709, 718 (1974)). The District Court also relied on a case closely analogous to this one,

wherein the court struck down a Florida statute that required minor party candidates to pay a per signature fee to validate their nomination papers. App. 27 (citing *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992)).

Applying the foregoing precedent to the undisputed facts in the record, the District Court had no trouble concluding that Pennsylvania's statutory scheme imposes both a severe and unequal burden. App. 29-32. "The potential costs which a minor party must absorb are astonishing," the District Court found:

> A minor party's defense of nomination papers, if taken to its conclusion, can cost up to $50,000. If that defense is unsuccessful, the party may then be liable for the challenger's costs which, in the last eleven years, have twice been levied in excess of $80,000. Thus, a minor party candidate who seriously wants to place his or her name on the general election ballot must be prepared to assume a $130,000 financial liability. This figure is staggering and would deter a reasonable candidate from running for office.

App. 28 (citing *Storer v. Brown*, 415 U.S. 724, 742 (1974)). Further, the District Court observed, "if a minor party candidate wishes to run in the general election, he has no alternative but to bear the cost of signature validation and the risk that he will have to pay his opponent's costs as well." App. 29 (citing *Susan B. Anthony List v.* Driehaus, 134 S.Ct. 2334, 2346 (2014)). Like this Court before it, the District Court recognized that this risk "chills the [Minor Parties'] electioneering activities." App. 29 (quoting *CPPA*, 757 F.3d at 364). While the excessive costs imposed render Pennsylvania's statutory scheme constitutionally suspect under

Bullock, the District Court reasoned, the lack of any non-monetary alternative makes it constitutionally suspect under *Lubin* and *Belitskus*. App. 29.

The District Court also found that the burden imposed by the challenged provisions "are not only financial in nature." App. 30. A challenge filed pursuant to Section 2937 forces the Minor Parties to divert their general election resources to defending their candidates' ballot access, the District Court found. App. 30. "By essentially silencing minor parties during the heat of a campaign, Section 2911(b) and Section 2937 render the plaintiffs' associational rights meaningless," it concluded. App. 30 (citing *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). As a result, the Minor Parties' "ability to organize and voice their views has been decimated," App. 31 (citing *CPPA*, 757 F.3d at 364), and their "right to develop their political parties has been severely burdened." App. 31 (citing *Norman v. Reed*, 502 U.S. 279, 288 (1992)).

In further support of its finding that the challenged provisions impose a severe burden, the District Court noted the Minor Parties' "disappearance" from Pennsylvania's general election ballot following the 2004 election cycle, when Section 2937 was first construed to authorize the imposition of costs against candidates. App. 31. "With few exceptions over the last decade, the electorate has been forced to choose between Democratic and Republican candidates, alone, for

statewide office," the District Court found. App. 32. Thus, it concluded, "Section 2911(b) in combination with Section 2937 severely burdens the right to vote." App. 32.

The District Court next addressed – and correctly rejected – the Commonwealth's attempts to minimize the severity of the burdens its statutory scheme imposes on the Minor Parties. It acknowledged, for instance, that challenges may be filed against major party nomination petitions pursuant to Section 2937, but observed that "the burden of these challenges is not equal," because a major party candidate must submit, at most, 2,000 signatures to run in the primary election, whereas the Minor Parties "on average, must file ten times as many signatures." App. 32-33. Consequently, the burden of cost shifting pursuant to Section 2937 is not nearly as great. App. 33; *see also CPPA*, 757 F.3d 362 n.18 (finding it "uncontested" that "§ 2937 in practice has been applied only to non-major parties). Moreover, as the District Court previously noted, major party members (and any other voter) are permitted to challenge the Minor Parties pursuant to Section 2937, but the Minor Parties are not permitted to challenge the major parties under the statute. App. 9 (citations omitted). This unequal treatment is what enables the major parties to wield Section 2937 "as a cudgel against non-major parties and their candidates." App. 29 (quoting *CPPA*, 757 F.3d at 363).

The District Court also acknowledged that the signature requirement imposed by Section 2911(b), standing alone, has been upheld. App. 33 (citing *Rogers v. Corbett*, 468 F.3d 188, 197 (3rd Cir. 2006)). Nonetheless, the District Court emphasized,

> No one is disputing the validity of Section 2911(b). Rather, plaintiffs contend that it is the combined effect of Section 2911(b) and Section 2937 which violate their constitutional rights. It is well established that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights."

App. 33 (quoting *Storer*, 415 U.S. at 737). The financial burden that Pennsylvania imposes on the Minor Parties is "proportionate" to the greater signature requirement it imposes on them pursuant to Section 2911(b), the District Court explained, and that is what denies them the equal protection of the law. App. 33-34 (citing *Fulani*, 973 F.2d 1539).

Finally, relying directly on this Court's prior opinion, the District Court rejected the Commonwealth's assertion that "it is private individuals, not state actors," who cause the Minor Parties' injuries. As the District Court correctly observed, it is the challenged statutory scheme that authorizes private parties to challenge the Minor Parties' nomination papers in the first instance. App. 35. Consequently, "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." App. 35 (quoting *CPPA*, 757 F.3d at 367).

Having determined that Section 2911(b) and Section 2937 severely burden the Minor Parties, the District Court correctly concluded, under *Anderson*, that the interests asserted by the Commonwealth are insufficient to justify its statutory scheme. App. 36-37. Although the imposition of costs pursuant to Section 2937 "discourage[s] the submission of fraudulent nomination papers and petitions," the District Court reasoned, the provision "is extraordinarily ill-fitted to that goal," because it "exclude[s] legitimate candidates as well." App. 36 (citing *Bullock*, 405 U.S. at 146). "Section 2937 imposes severe financial burdens on minor party candidates no matter how strong their support," the District Court reasoned, and "since no candidate can be expected to shoulder these extraordinary costs, Section 2937 undoubtedly excludes non-frivolous minor party candidates." App. 37. As to the Commonwealth's assertion that the provision "deters meritless objections," the District Court rejected it out of hand. "There is absolutely no evidence supporting this conclusion," it determined. App. 37.

Accordingly, the District Court concluded that the Commonwealth had failed to justify the burdens Section 2911(b) and Section 2937 impose on the Minor Parties, and that "the statutes are unconstitutional as applied to plaintiffs."

App. 37-38. It therefore granted the Minor Parties summary judgment as to Count I and Count II of the Amended Complaint. App. 38. The Commonwealth appeals from that judgment.

STANDARD OF REVIEW

This Court exercises plenary review over the District Court's grant or denial of summary judgment. *See Belitskus*, 343 F.3d at 639. This Court thus applies "the same test" the District Court applied below. *Id.* Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

SUMMARY OF ARGUMENT

In the instant appeal, the Commonwealth concedes that the challenged statutory scheme is unconstitutional as applied to the Minor Parties. Accordingly, it does not assert any error with respect to the District Court's application of well-settled principles of constitutional law to the facts of this case. Nor does the Commonwealth dispute those facts, or contest the sufficiency of the Minor Parties' evidence. Instead, the only issue the Commonwealth raises is whether the District Court could properly enter judgment and fashion relief against Secretary Cortes and Commissioner Marks – an issue this Court squarely addressed in the prior

appeal, and decided in the affirmative. *See CPPA*, 757 F.3d at 366-68. The District Court's decision should be affirmed.

ARGUMENT

I. The District Court's Decision Should Be Affirmed, Because the Commonwealth Concedes That the Challenged Statutory Scheme Is Unconstitutional, and It Fails to Dispute the Material Facts or Contest the Sufficiency of the Evidence in the Record.

This is an unusual appeal in that it presents very little for the Court to decide. Most important, there is no dispute that the challenged statutory scheme is unconstitutional, because the Commonwealth expressly concedes that it is. Specifically, the Commonwealth prefaces its discussion by "assuming" that Section 2911(b) and Section 2937 cause the Minor Parties "some constitutional injury," but states that it will not address that issue. Brief for Appellants ("Commw. Br.") 3. The unconstitutionality of the challenged provisions, according to the Commonwealth, "is almost incidental" to the resolution of this appeal. Commw. Br. 3. That is incorrect.

When this Court previously reversed dismissal of this case on procedural grounds, it concluded that the Minor Parties are entitled "to pursue their claims and have them heard" on the merits. *See CPPA*, 757 F.3d at 368. Although the Commonwealth filed another motion to dismiss on remand (this one for failure to state a claim under Rule 12(b)(6)), it withdrew that motion after the Minor Parties

filed their opposition. App. 57-58 (Dkt. Nos. 48, 52, 53). Thus, when the parties proceeded to file cross-motions for summary judgment, the merits of the Minor Parties' claims were squarely before the District Court. App. 58-59 (Dkt. Nos. 59-60). The District Court correctly held that Section 2911(b) and Section 2937 cannot withstand constitutional scrutiny under *Anderson*, and it properly entered summary judgment for the Minor Parties as to Count I and Count II of the Amended Complaint. App. 28-38.

Because the Commonwealth declines to address the merits of the Minor Parties' claims, little discussion is needed to demonstrate that the District Court's decision is well founded. The Minor Parties set forth the legal theory underlying their claims on page 1 of the Amended Complaint, where they assert that Pennsylvania's ballot access scheme violates their First and Fourteenth Amendment rights "by forcing them to incur substantial financial burdens if they defend nomination papers they are required by law to submit." App. 62. This legal theory is supported by a long line of well settled precedent, which establishes that states may not require voters, candidates or political parties to bear the expense of the state's own legislative choices with respect to regulating elections. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding poll tax of $1.50 unconstitutional); *Bullock*, 405 U.S. 134 (holding filing fees ranging as high as

$8,900 unconstitutional); *Lubin*, 415 U.S. 709 (holding filing fees of any amount unconstitutional in the absence of non-monetary alternatives); *Belitskus*, 343 F.3d 632 (holding Pennsylvania's filing fees unconstitutional as applied to candidates unable to pay them); *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); *Fulani*, 973 F.2d 1539 (holding unduly burdensome nomination petition signature verification fees unconstitutional); *Dixon v. Maryland State Bd. of Elections*, 878 F.2d 776 (4th Cir. 1989) (holding mandatory filing fee of $150 for non-indigent write-in candidates unconstitutional); *McLaughlin v. North Carolina Board of Elections*, 850 F. Supp. 373 (M.D. N.C. 1994) (holding five-cent per signature verification fee unconstitutional); *Clean-Up '84 v. Heinrich*, 590 F. Supp. 928 (M.D. Fl. 1984) (holding ten-cent per signature verification fee unconstitutional). Far from being "incidental" to this appeal; this line of precedent controls the outcome.

As the District Court recognized, the foregoing precedent compels the conclusion that Pennsylvania's statutory scheme is unconstitutional as applied to the Minor Parties because, taken together, the challenged provisions require non-major party candidates both to submit nomination papers with a specified number of signatures, and also to bear the expense of validating them. *See* 25 P.S. §§

2911(b), 2937. Pennsylvania thus makes the Minor Parties' ability to pay a condition of their participation in its electoral process. It is well settled that the Constitution does not permit such discrimination on the basis of financial status in the electoral context, where fundamental First Amendment rights are implicated. *See Lubin*, 415 U.S at 718; *Belitskus*, 343 F.3d at 647. That is especially true in light of the District Court's finding, based on undisputed evidence in the record, that the Minor Parties "must be prepared to assume a $130,000 financial liability" to place their candidates on the general election ballot. App. 28. Thus, in addition to its failure to provide any non-monetary alternative, Pennsylvania's statutory scheme is also unconstitutional due to the "patently exclusionary" character of the financial burdens it imposes. *Bullock*, 405 U.S. at 143.

Applying *Anderson*, the District Court correctly identified the burdens imposed by Pennsylvania's statutory scheme, balanced them against the state interests asserted by the Commonwealth, and determined that the burdens outweigh those interests. App. 28-38; *see Anderson*, 460 U.S. at 789. It therefore concluded that Section 2911(b) and Section 2937 are unconstitutional as applied. App. 38. The Commonwealth makes no attempt to address the District Court's *Anderson* analysis – much less does it assert that the District Court committed any error of law.

The Commonwealth also fails to dispute the material facts on which the District Court relied, or contest the sufficiency of the evidence in the record. Indeed, throughout this proceeding, the Commonwealth has largely conceded the relevant facts. *See CPPA*, 757 F.3d at 364-65 (observing that the Minor Parties "have produced sworn and uncontested declarations that their plans for seeking public office are directly impeded by the relevant provisions of the election code"). On remand, the Commonwealth did attempt to raise a limited number of factual issues, but the District Court properly determined that the Commonwealth's "pure conjecture" was insufficient "to create a disputed issue of fact" that would preclude entry of summary judgment under Rule 56. App. 17 n.29; *see* 18 n.30, 29 n.33. The Commonwealth does not assert any error with respect to that determination, either.

It necessarily follows that the Minor Parties are entitled to judgment as a matter of law. The Commonwealth concedes that its statutory scheme is unconstitutional, and asserts no legal error with respect to the District Court's analysis of the merits. The Commonwealth also fails to dispute the material facts or contest the sufficiency of the evidence in the record. Therefore, the District Court properly concluded that the Minor Parties are entitled to summary judgment as to Count I and Count II of the Amended Complaint. *See* Fed. R. Civ. P. 56(c). Its decision should be affirmed.

II. The Commonwealth Fails to Assert Any Valid Basis for This Court to Reverse the District Court.

Having conceded that its statutory scheme is unconstitutional, the Commonwealth focuses its appeal exclusively on what it characterizes as "more technical issues." Commw. Br. 3. Specifically, the Commonwealth reasserts the reasons it believes the District Court could not properly enter judgment or fashion meaningful relief against Secretary Cortes and Commissioner Marks. Commw. Br. 24-39. As a threshold matter, this Court has already rejected these assertions, when it concluded that the Minor Parties satisfy the "causation" and "redressability" elements of standing. *See CPPA*, 757 F.3d at 366-68. To the extent that the Commonwealth seeks to relitigate those issues, therefore, this Court's prior decision in *CPPA* forecloses this appeal. The Minor Parties nonetheless address each of the Commonwealth's assertions in turn.

A. The District Court Properly Entered Judgment Against Secretary Cortes and Commissioner Marks.

The Commonwealth first asserts that the Minor Parties "had no right to a declaratory judgment against the officials they sued." Commw. Br. 27. This assertion is based on an error of law. According to the Commonwealth, "liability under § 1983 may be imposed on a government official only if that official has some personal involvement in the challenged wrongdoing." Commw. Br. 24. To

the extent that this is an accurate statement of law, however, it is plainly inapplicable to the instant case. The Minor Parties do not seek to impose personal liability on Secretary Cortes or Commissioner Marks for any "wrongdoing" by them. On the contrary, the Amended Complaint expressly asserts that these defendants are sued in their "official capacity only," as the state officials who administer the challenged statutory scheme. App. 67 (Am. Comp. ¶¶ 9, 10). Because it is the statutory scheme itself that the Minor Parties challenge, they do not – and need not – allege any wrongdoing by the defendants personally. *See CPPA*, 757 F.3d at 367 ("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") (citing *Belitskus*, 343 F.3d at 638).

The only authority the Commonwealth cites for the supposed "bedrock requirement" that plaintiffs in a Section 1983 action must allege the "personal involvement" of each government official defendant is *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Iqbal* was a *Bivens* action for damages, however, which a detainee filed against individual government officials who were allegedly responsible for his harsh treatment, including beatings, daily strip and body-cavity searches, extreme heat and cold, and withholding adequate food. *See id.*; *see also Bivens v.*

Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). Thus, the issue in that case was whether the allegations of such official misconduct were sufficient to state a claim for damages against each named defendant – including the Attorney General of the United States and the Director of the Federal Bureau of Investigation. *See Iqbal*, 556 U.S. 662. Although the Court did conclude that a plaintiff in such actions "must plead that each Government official defendant, through the official's own individual actions, has violated the Constitution," this is not such an action, and the Commonwealth is simply wrong to suggest that it is. Commw. Br. 25 (quoting *Iqbal*, 556 U.S. at 676). The Minor Parties do not assert a *Bivens* claim for damages against the defendants personally, but rather seek invalidation of an unconstitutional statutory scheme that the defendants administer in their official capacities. The Commonwealth's reliance on *Iqbal* is misplaced.

The Commonwealth devotes the remainder of its discussion on this point to its contention that Secretary Cortes and Commissioner Marks do not in fact "enforce" the challenged statutory scheme. Commw. Br. 26. Elsewhere, however, the Commonwealth concedes – as it must – that the Secretary has a statutory duty to "receive and determine, as hereinafter provided, the sufficiency" of nomination papers the Minor Parties are required to submit pursuant to Section 2911(b). Commw. Br. 30 (quoting 25 P.S. § 2621(d)); *see also* 25 P.S. § 2936 (requiring the

Secretary to review nomination papers and determine whether they comply with Section 2911(b)). The Commonwealth's assertions to the contrary therefore have no merit.

B. The Eleventh Amendment Does Not Bar This Action.

The Commonwealth next asserts that the Eleventh Amendment bars the Minor Parties from pursuing this action, because Secretary Cortes and Commissioner Marks "have no responsibility whatever for objection proceedings under the *specific* provision at the heart of this action, 25 P.S. § 2937." Commw. Br. 27-28 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). Here, as throughout much of its discussion, the Commonwealth misrepresents the basis of the Minor Parties' claims. Count I and Count II of the Amended Complaint do not challenge Section 2937 standing alone, but rather as it is applied in conjunction with Section 2911(b). App. 82-85 (Am. Comp. ¶¶ 59-78). The Commonwealth's suggestion that the named defendants lack a sufficiently "close official connection" to the challenged statutory scheme is therefore specious. Commw. Br. 28 (quoting *Ex Parte Young*, 209 U.S. at 156). As demonstrated *supra* at Part II.A, Secretary Cortes and Commissioner Marks are the specific officials who administer the challenged statutory scheme.

The District Court observed this critical point throughout its analysis, when

it repeatedly acknowledged that the Minor Parties challenge Section 2937 "in combination" with Section 2911(b). App. 28-38. It even admonished the Commonwealth for disregarding this point. App. 33 ("No one is disputing the validity of Section 2911(b). Rather, plaintiffs contend that it is the combined effect of Section 2911(b) and Section 2937 which violates their constitutional rights"). As the District Court explained, "it is well established that 'a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights.'" App. 33 (quoting *Storer*, 415 U.S. at 737). As the District Court correctly concluded, "that is what has happened here." App. 33. The Commonwealth's insistence that Section 2937, by itself, is "the specific provision at the heart of this action" therefore has no merit. Commw. Br. 28.

It bears mentioning, in this regard, that some of the plaintiffs in this action previously filed a case in which they challenged the constitutionality of Section 2937 standing alone (and naming state judicial officials as defendants in their official capacity only). *See Constitution Party of Pennsylvania v. Cortes*, 712 F. Supp. 2d 387 (E.D. Pa. 2010), *aff'd*., No. 10-3205 (3rd Cir. May 19, 2011) (unreported). That case was dismissed on the ground that it failed to present a justiciable case or controversy. *See id*. It thus appears that Section 2937 must be challenged in conjunction with Section 2911(b), or not at all. *See CPPA*, 757 F.3d

at 361 (concluding that dismissal of this case on standing grounds "is tantamount to holding Section 2911(b) and Section 2937 immune from judicial review").

C. The Election Code Establishes That Secretary Cortes and Commissioner Marks Are Properly Named as Defendants in This Action.

For the reasons previously stated, the Commonwealth's assertion that the Election Code "does not justify" entry of judgment against Secretary Cortes and Commissioner Marks also lacks merit. Commw. Br. 29. Once again, the Commonwealth attempts to support its assertion by misrepresenting the legal basis for the Minor Parties' Count I and Count II claims. The Commonwealth contends, for instance, that the named defendants "have no role to play in the process" challenged herein, and that they are not "directly responsible, under state law, for the discrete policy or practice being challenged." Commw. Br. 31, 32. But the Commonwealth simply disregards the fact that the Minor Parties challenge the combined effect of Section 2911(b) and Section 2937. App. 82-85 (Am. Comp. ¶¶ 59-78); *see Storer*. 415 U.S. at 737. Contrary to the Commonwealth's contentions, there is not just one "challenged provision of Pennsylvania law" at issue in this case. Commw. Br. 32. Consequently, Secretary Cortes is not "some hapless state official who is at best a bystander," Commw. Br. 33, but rather, he is the official who administers that challenged statutory scheme – as the Commonwealth itself

acknowledges just three pages earlier in its brief. Commw. Br. 30 (citing 25 P.S. § 2621(d)); *see also* 25 P.S. § 2936.

It follows that the District Court did not "simply brush[] aside as insignificant" the supposed "absence of any involvement by Secretary Cortes and Commissioner Marks" in the challenged statutory scheme, as the Commonwealth erroneously insists. Commw. Br. 34. Instead, unlike the Commonwealth, the District Court properly recognized and addressed the actual basis of the Minor Parties' claims. The Minor Parties do not challenge Section 2937 alone, but the "combined effect" of that provision as it applies in conjunction with Section 2911(b). App. 28-38.

The Commonwealth concludes by suggesting that it has "come full circle analytically," to the question "of whether *these defendants* bear any responsibility" for the action taken under the challenged provisions. Commw. Br. 34. But the Commonwealth is correct only insofar as it has returned to the error with which it began. The question is not whether the record demonstrates that Secretary Cortes and Commissioner Marks personally have done anything wrong, but only whether they are the officials who administer the challenged statutory scheme. They are. *See* 25 P.S. §§ 2621(d), 2936. This Court made that clear when it determined that the Minor Parties had satisfied the causation element of standing. *See CPPA*, 757

F.3d at 368 (concluding that the Minor Parties "have established that their injury-in-fact can fairly be traced to the actions of the Commonwealth officials").

D. The Declaratory Judgment Entered By the District Court Redresses the Minor Parties' Injury.

As a final salvo, the Commonwealth predicts that the District Court's judgment declaring Section 2911(b) and Section 2937 unconstitutional as applied "will not be of any practical help to the Minor Parties." Commw. Br. 35. According to the Commonwealth, "the declaratory judgment in this case resolves nothing." Commw. Br. 36. That is incorrect.

The District Court itself explained that the judgment entered in this case "blocks the enforcement" of the challenged provisions against the Minor Parties. App. 21 (citing *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 331 (2010)). Consequently, Secretary Cortes and Commissioner Marks do not "remain obliged to follow [Section 2911(b)] as usual," as the Commonwealth contends. Commw. Br. 37. On the contrary, they are prohibited from enforcing this provision against the Minor Parties. Such a result, this Court previously concluded, will redress the Minor Parties' injury:

> 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 [their] candidates to run for office and build functioning political parties.

CPPA, 757 F.3d at 368. That is precisely the result the Minor Parties request in the Amended Complaint. App. 87 (Am. Comp. ¶ 88).

In spite of the guidance provided by the District Court and this Court's own prior opinion, the Commonwealth expresses considerable confusion over the effect of the judgment in this case. Commw. Br. 37. The Commonwealth explicitly asks what the judgment means, and what Secretary Cortes and Commissioner Marks should do in response to it. Comm. Br. 37. This plainly constitutes an improper request for an advisory opinion. *See Flast v. Cohen*, 392 US 83, 96 (1968). It does not provide grounds for reversal.

In a similar vein, the Commonwealth expresses doubt that Pennsylvania state courts will follow the District Court's decision. Commw. Br. 38. It contends that the judgment is "not binding on Pennsylvania courts." Commw. Br. 38 (citing *Chiropractic Nutritional Assoc., Inc. v. Empire Blue Cross & Blue Shield*, 669 A.2d 975, 979-80 (Pa. Super. 1995)). Again, however, even if that were an accurate statement of the law, it would not provide grounds for reversal. But the Commonwealth is also in error as to the binding effect of the District Court's judgment on the Pennsylvania state courts. *See In Re Stevenson*, 40 A. 3d 1212, 1226 (Pa. 2012) (concluding that any provision of Pennsylvania law held unconstitutional by a federal district court "is unenforceable by the Secretary and

the courts of this Commonwealth").

CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

Dated: January 4, 2016

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

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

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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 contains no more than 14,000 words, and is prepared in Times New Roman, 14 Point Font.

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

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/s/ Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January 2016, I served the foregoing Brief of Appellee, on behalf of all Plaintiff-Appellees, by the Court's CM/ECF system, upon the following:

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