

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

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THE CONSTITUTION PARTY OF  
PENNSYLVANIA, et al.,

*Plaintiffs,*

v.

PEDRO CORTES, et al.,

*Defendants.*

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Case No. 1:12-CV-02726

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65(a) and (b), Plaintiffs 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”) hereby move the Court for a temporary restraining order and preliminary injunction, to enjoin Defendants Secretary of State Pedro Cortes and Commissioner of Elections Jonathan M. Marks (together, “the Commonwealth”) and their agents from enforcing 25 P.S. § 2911(b) against the Minor Parties in the 2016 election cycle. The Minor Parties further request that the Court direct Secretary Cortes to place their candidates for public office on Pennsylvania’s November 8, 2016 general election ballot, by virtue of their demonstrated support among the electorate. In the alternative, the Minor Parties request that the Court direct Secretary Cortes to place their candidates on the November 8, 2016 general election ballot provided that they submit nomination papers on or before the August 1, 2016 deadline with valid signatures of qualified electors (including non-members) equal in number to the requirements imposed upon major party candidates pursuant to 25 P.S. § 2872.1.

In support of this motion, the Minor Parties state that on July 23, 2015, this Court entered a final judgment declaring Section 2911(b) and 25 P.S. § 2937 unconstitutional as applied (Dkt. No. 68). Secretary Cortes has nonetheless issued formal guidance stating that he intends to enforce Section 2911(b) against the Minor Parties in the 2016 election cycle. The relief requested herein is therefore necessary to ensure that the Minor Parties may participate in Pennsylvania's 2016 election cycle, free from the burdens imposed by a statutory scheme that this Court has declared unconstitutional.

In further support of this motion, the Minor Parties submit the attached Memorandum of Law, and state that all relevant factors weigh in favor of granting the relief requested. The Minor Parties also submit the Declaration of Oliver B. Hall, attached hereto as Exhibit A. Finally, the Minor Parties incorporate by reference the 15 Declarations attached to their Amended Complaint (Dkt. No. 46) and the seven Declarations submitted in support of their Motion for Summary Judgment (Dkt. No. 60).

Dated: April 26, 2016

Respectfully submitted,

/s/Oliver B. Hall  
Oliver B. Hall  
(Admitted Pro Hac Vice)  
CENTER FOR COMPETITIVE DEMOCRACY  
1835 16th Street NW #5  
Washington, D.C. 20009  
(202) 248-9294  
[oliverhall@competitivedemocracy.org](mailto:oliverhall@competitivedemocracy.org)

*Counsel for Plaintiffs*

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Case No. 1:12-CV-02726

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

On July 23, 2015 this Court entered a final judgment holding Section 2911(b) and Section 2937 unconstitutional as applied to the Minor Parties. (Dkt. No. 68). In direct violation of that judgment, Secretary Cortes has issued formal guidance stating that he will enforce Section 2911(b) against the Minor Parties in the 2016 election cycle. *See* Dec. of Oliver B. Hall (“Hall Dec.”) ¶ 4. The statutory scheme that the Minor Parties successfully challenged in this case, and which this Court struck down, thus remains in effect. It continues to burden the Minor Parties – and to threaten the voting rights of all Pennsylvanians – as if this litigation had never taken place.

The severity of the burdens that Section 2911(b) and Section 2937 impose on the Minor Parties can hardly be overstated. Both this Court and the Court of Appeals for the Third Circuit have found that the application of these provisions creates a “chilling effect” that prevents the Minor Parties from engaging in First Amendment protected activity. *See* Slip Op. (Dkt. No. 66) at 26-28; *see also* *Constitution Party of Pa. v. Aichele* (“CPPA”), 757 F.3d 347, 359-60 (3rd Cir. 2014). As the Third Circuit emphasized, this case involves “a fundamental First Amendment

right to political participation – not an inconvenience or burden, but wholesale disenfranchisement.” *CPPA*, 757 F.3d at 365 n.21. Similarly, this Court concluded that the Minor Parties’ ability “to organize and voice their views has been decimated by Section 2911(b) and Section 2937.” Slip Op. at 28.

To avoid sustaining these same injuries again in 2016, the Minor Parties are compelled to seek further relief from this Court, in aid of the final judgment it entered in their favor on July 23, 2015. They request injunctive relief only insofar as it is necessary to preserve the status quo following the Court’s entry of that judgment, and to provide them with a constitutional procedure for placing their candidates on Pennsylvania’s 2016 general election ballot, in view of the Legislature’s failure to enact remedial legislation that cures the constitutional defects of Section 2911(b) and Section 2937. The Federal Rules of Appellate Procedure expressly recognize that this Court retains jurisdiction to award such relief, despite the pendency of an appeal. *See* Fed. R. App. P. 8(a)(1)(C). Further, precedent of the Third Circuit and other federal courts of appeals confirms that the facts developed here – involving defendants who decline to recognize the validity of this Court’s final judgment – make the award of such relief warranted in this case.

As set forth below, the undisputed facts and evidence in the record demonstrate that the test for awarding preliminary injunctive relief is satisfied here. Indeed, the specific relief requested will merely give effect to a final judgment the Court has already entered. The Court should enjoin Secretary Cortes, Commissioner Marks and their agents from enforcing Section 2911(b), as necessary to enforce its July 23, 2015 judgment declaring that provision unconstitutional. Further, the Court should direct Secretary Cortes to place the Minor Parties’ candidates on the November 8, 2016 general election ballot, by virtue of their demonstrated support among the electorate, or in the alternative, based on their compliance with the signature

requirements established by Section 2872.1 (but not the requirement that signatures be from “registered and enrolled members of the proper party”).

### **FACTUAL AND PROCEDURAL BACKGROUND**

The Minor Parties commenced this action on May 17, 2012, to challenge the constitutionality of Section 2911(b), the provision requiring them to submit nomination papers with a specified number of signatures, in conjunction with Section 2937, the provision authorizing private parties to challenge their nomination papers and collect costs. This Court initially dismissed the case on standing grounds, but the Third Circuit reversed, holding as a matter of law that the Minor Parties had established standing to pursue their claims. *See CPPA*, 757 F.3d 347. On remand, this Court granted the Minor Parties’ motion for summary judgment, and entered its final judgment declaring Section 2911(b) and Section 2937 unconstitutional as applied. (Dkt. Nos. 66-68).

The Commonwealth appealed to the Third Circuit. *See Constitution Party of Pa. v. Cortes (“CPPA II”)*, No. 15-3046. That appeal has been fully briefed and was argued on April 13, 2016. Significantly for purposes of this motion, the Commonwealth’s appeal is unusually narrow and limited in scope: the Commonwealth does not dispute that its statutory scheme is unconstitutional as applied; it does not dispute any of the material facts; and it does not dispute the sufficiency of the evidence submitted by the Minor Parties in support of their motion for summary judgment. *See* Brief of Appellant at 23-40, *CPPA II*, No. 15-3046 (filed December 2, 2015). In fact, the Commonwealth does not assert any error whatsoever with respect to this Court’s analysis of the merits.

Instead, the only issues the Commonwealth raises on appeal are whether it was proper for this Court to enter judgment against Secretary Cortes and Commissioner Marks (as opposed to

some other party), and whether this Court could fashion meaningful relief against these Defendants. *See id.* at 2. The Third Circuit has already squarely addressed these issues and decided them against the Commonwealth. *See CPPA*, 757 F.3d at 366-68. It is “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,” the Third Circuit concluded. *See id.* At 367. The Third Circuit further concluded that the Minor Parties have “established redressability,” because:

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.”

On remand, this Court relied directly on the Third Circuit’s reasoning, and properly entered judgment against Secretary Cortes and Commissioner Marks. *See Slip Op.* at 32.

More than six months after this Court entered its judgment declaring Section 2911(b) and Section 2937 unconstitutional as applied, Secretary Cortes issued formal guidance advising the Minor Parties that he will continue to enforce Section 2911(b) against them, and that he intends to do so in 2016. *See Hall Dec.* ¶ 4. Secretary Cortes’ continuing enforcement of Section 2911(b) against the Minor Parties, despite this Court’s judgment declaring it unconstitutional as applied to them, necessitates the instant motion for injunctive relief.

### **LEGAL STANDARD**

To obtain a preliminary injunction, the Minor Parties must demonstrate that: 1) they have a likelihood of success on the merits; 2) they will suffer irreparable harm if the injunction is denied; 3) granting the injunction will not result in even greater harm to the Commonwealth; and 4) the public interest favors such relief. *See NAACP of Pennsylvania v. Cortes*, 591 F. Supp. 2d

757, 763 (E.D. Pa. 2008) (citing *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514, 524 (3rd Cir. 2004)).

## ARGUMENT

### **I. This Court Has Jurisdiction to Enter an Injunction to Supervise and Enforce Its Final Judgment Declaring Section 2911(b) and Section 2937 Unconstitutional As Applied.**

The Federal Rules of Appellate Procedure expressly recognize that a district court retains jurisdiction over a case for certain purposes after an appeal has been filed. *See* Fed. R. App. P. 8(a)(1)(C). One such purpose is the granting of injunctive relief. *See id.* In fact, Appellate Rule 8(a)(1)(C) provides that a party “must” first seek such relief from the District Court while an appeal is pending. *See id.* Accordingly, the Third Circuit has repeatedly found it proper for a district court to exercise jurisdiction, despite the pendency of appeal, for purposes of staying, modifying or granting an injunction. *See, e.g., In re Merck & Co. Inc. Securities Litigation*, 432 F.3d 261, 267-68 (3rd Cir. 2005); *Sheet Metal Workers’ Intern. Ass’n v. Herre Bros.*, 198 F.3d 391, 394 (3rd Cir. 1999); *Bensalem Tp. v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1314 & n.9 (3rd Cir. 1994); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3rd Cir. 1988); *Venen v. Sweet*, 758 F.2d 117, 120-21 & n.2 (3rd Cir. 1985).

The “general rule,” of course, is that the filing of an appeal divests the district court of jurisdiction. *See Venen*, 758 F.2d at 120. But that rule, being “judge-made,” *see id.*, is not “absolute in character.” *See Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 439 (6th Cir. 1985) (citation omitted). As the Sixth Circuit has explained:

Where the district court ... has a continuing duty to maintain a status quo, and where, as the days pass, new facts are created by the parties and the maintenance of the status quo requires new action, ... an appeal from the supervisory order does not divest the court of jurisdiction....

*Id.* at 439-40. The “supervisory order” referenced above required the city of Gainesville to continue performance of its contract by accepting shipments of coal from Island Creek. *See id.* at 440. When the city began refusing shipments, the district court exercised jurisdiction over the matter for purposes of holding Gainesville in contempt, even though an appeal was pending. *See id.* The court of appeals concluded this was proper. “Where, as here, the district court is attempting to supervise its judgment and enforce its order,” the Sixth Circuit explained, “pendency of appeal does not deprive it of jurisdiction for these purposes.” *Id.* (citations omitted).

The situation presented by this case is analogous to *Island Creek Coal*. The Court has entered a final judgment declaring Section 2911(b) and Section 2937 unconstitutional as applied. (Dkt. No. 68). In its accompanying opinion, the Court explained that its judgment “blocks the enforcement” of the challenged provisions against the Minor Parties. Slip Op. at 18 (citing *Citizens United v. Federal Election Comm’n.*, 558 U.S. 310, 331 (2010)). More than six months later, Secretary Cortes notified the Minor Parties that, in spite of the Court’s judgment, he will nevertheless continue to enforce Section 2911(b) against them. *See* Hall Dec. ¶ 4. These circumstances constitute “new facts,” which demonstrate that “maintenance of the status quo requires new action” by the Court. *See Island Creek Coal Sales Co.*, 764 F.2d at 440. Specifically, an injunction is necessary to block Secretary Cortes from enforcing Section 2911(b) against the Minor Parties in the 2016 election cycle, thereby restoring the status quo following entry of this Court’s final judgment declaring Section 2911(b) unconstitutional as applied. *See* Slip Op. at 18 (citation omitted).

Appellate Rule 8(a)(1)(C) and the precedent of the Third Circuit and other federal courts of appeals construing that rule make clear that this Court retains jurisdiction to grant the



injunctive relief requested herein, despite the pendency of the Commonwealth's appeal. Further, the Court's exercise of jurisdiction for such purpose is proper here, because the Commonwealth has declined to recognize the legal effect of the declaratory judgment that the Court entered on July 23, 2015 (Dkt. No. 68). The requested temporary restraining order and preliminary injunction are therefore necessary to supervise and enforce that judgment. *See Island Creek Coal Sales Co.*, 764 F.2d at 440.

## **II. Each Element of the Test for Granting a Preliminary Injunction Is Satisfied.**

Little discussion is needed to demonstrate that the test for granting injunctive relief is satisfied here. Because the Court has entered final judgment in the Minor Parties' favor (Dkt. No. 68), there can be no doubt that they have prevailed on the merits. Ordinarily, that would mean the Commonwealth would no longer enforce the provisions of law that the Court struck down. *See Slip Op.* at 18 (citing *Citizens United*, 558 U.S. At 331). In this case, however, Secretary Cortes has issued formal guidance stating that he will continue to enforce Section 2911(b) against the Minor Parties, including in the 2016 election cycle. The Minor Parties are therefore entitled to an injunction, as necessary to enjoin enforcement of that provision, and to give legal effect to this Court's judgment declaring it unconstitutional as applied.

### **A. The Minor Parties Have Prevailed on the Merits.**

On July 23, 2015, this Court entered an order granting summary judgment to the Minor Parties as to Count I and Count II of their Amended Complaint. (Dkt. No. 67). The Court also entered its final judgment declaring Section 2911(b) and Section 2937 unconstitutional as applied. (Dkt. No. 68). That is the primary relief requested in the Minor Parties' Amended Complaint. Am. Comp. ¶ 88 (Dkt. No. 46). The Minor Parties have therefore prevailed on the merits in this case.

The Court itself has explained the reasons why the Minor Parties are entitled to prevail on the merits, in the opinion it entered in support of its judgment. (Dkt. No. 66). The Minor Parties thus rely on the Court's own cogent analysis for purposes of this motion. Should the Court find further briefing on the merits necessary or helpful, the Minor Parties respectfully refer it to their Motion for Summary Judgment and the materials on which that motion relies (Dkt. No. 60), which are incorporated herein by reference.

**B. The Minor Parties Will Suffer Irreparable Harm If the Court Does Not Grant Them Injunctive Relief.**

It is well-settled that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *KA ex rel. Ayers v. Pocono Mountain School Dist.*, 710 F.3d 99, 113 (3rd Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam))). In this case, both this Court and the Third Circuit have concluded that Section 2911(b) and Section 2937 create a “chilling effect” that deters the Minor Parties from engaging in First Amendment protected conduct. *See* Slip Op. 26-28; *CPPA*, 757 F.3d at 359-60. The Third Circuit characterized this injury as “intolerable,” and emphasized that this case involves “a fundamental First Amendment right to political participation – not an inconvenience or burden, but wholesale disenfranchisement.” *CPPA*, 757 F.3d at 364, 365 n.21. Similarly, this Court concluded that the Minor Parties’ ability “to organize and voice their views has been decimated by Section 2911(b) and Section 2937.” Slip Op. at 28. The Commonwealth’s continued enforcement of Section 2911(b), in spite of this Court’s judgment declaring it unconstitutional, will therefore cause the Minor Parties irreparable injury unless the Court grants them injunctive relief.

**C. The Commonwealth Will Not Suffer Any Harm If the Court Grants the Minor Parties Injunctive Relief.**

Granting the injunctive relief requested herein will not cause the Commonwealth any harm, because it will merely restore the status quo following entry of this Court's judgment on July 23, 2015. As the Court explained, the effect of that judgment was to block the Commonwealth from enforcing Section 2911(b) against the Minor Parties. Slip Op. at 18 (citing *Citizens United*, 558 U.S. at 331). The requested injunction will accomplish precisely the same result.

The Minor Parties also seek to be provided with a constitutional procedure for placing their candidates on Pennsylvania's November 8, 2016 general election ballot, as specified *infra* at Part III. But the only consequence of granting that relief is that the nominees of CPPA, GPPA and LPPA may appear on Pennsylvania's general election ballot again in 2016 – as they regularly did before the Commonwealth began its unconstitutional enforcement of Section 2911(b) and Section 2937 following the 2004 election cycle. *See* Slip Op. at 8 (observing that the Minor Parties' candidates all appeared on the general election ballot in 2000, 2002 and 2004). There is no evidence in the record to suggest that the presence of the Minor Parties' candidates on the ballot in previous election cycles caused the Commonwealth any harm. On the contrary, the evidence demonstrates that the Commonwealth can accommodate these candidates on the 2016 general election ballot without incurring any harm whatsoever.

**D. The Public Interest Weighs in Favor of Granting the Minor Parties Injunctive Relief.**

Finally, granting the Minor Parties injunctive relief is in the public interest because, as the Supreme Court has observed, "all political ideas cannot and should not be channeled into the programs of our two major parties." *Williams v. Rhodes*, 393 U.S. 23, 39 (1968) (citation

omitted). Yet that is precisely what has happened in Pennsylvania, due to the Commonwealth's unconstitutional application of Section 2911(b) and Section 2937. "With few exceptions over the last decade," this Court found, "the electorate has been forced to choose between Democratic and Republican candidates, alone, for statewide office." *See* Slip Op. at 29. The challenged statutory scheme thus harms the voting rights not only of the Minor Parties, but of all Pennsylvanians. *See id.* ("By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences") (quoting *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). And "in the absence of legitimate, countervailing concerns," the Third Circuit has concluded, "the public interest clearly favors the protection of constitutional rights, including the voting and associational rights of alternative political parties, their candidates and their potential supporters." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883-84 (3rd Cir. 1997).

Here, there are no legitimate countervailing concerns. The Minor Parties' request for injunctive relief arises entirely because Secretary Cortes is continuing to enforce a provision of law – Section 2911(b) – that this Court has declared unconstitutional. But "the enforcement of an unconstitutional law vindicates no public interest." *KA ex rel Ayers*, 710 F.3d at 114 (citing *ACLU v. Ashcroft*, 322 F.3d 240, 251 n. 11 (3rd Cir. 2003) ("Neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law")). Consequently, the public interest weighs in favor of granting the Minor Parties injunctive relief.

### **III. The Injunctive Relief Requested Is the Proper Remedy for the Harm Caused By the Commonwealth's Enforcement of Its Unconstitutional Statutory Scheme.**

In addition to enjoining Secretary Cortes, Commissioner Marks and their agents from enforcing Section 2911(b), the Minor Parties request that the Court order the Commonwealth to

establish a constitutional procedure for them to place their candidates on the general election ballot in 2016. Such relief is warranted because the Legislature has failed to enact remedial legislation following this Court's judgment declaring Section 2911(b) and Section 2937 unconstitutional.<sup>1</sup> Under these circumstances, the proper remedy is an order directing Secretary Cortes to place the Minor Parties' nominees on the ballot, provided it finds some basis for concluding that they have a level of community support.

Federal courts have routinely granted such relief at least since 1976, when the United States Supreme Court and several lower federal courts ordered officials in multiple states to place independent presidential candidate Eugene McCarthy on their general election ballots. These states had failed to provide any means for independent candidates to appear on the ballot. The proper remedy for this constitutional defect, the Fifth Circuit concluded, was to order McCarthy's inclusion on the ballot. *See McCarthy v. Askew*, 540 F.2d 1254, 1255 (5th Cir. 1976) (*per curiam*) (affirming order placing McCarthy on Florida's ballot). To explain its rationale, the Fifth Circuit relied on the fact that Justice Powell, sitting in chambers, had recently granted McCarthy the same relief in Texas. *See id.* (quoting *McCarthy v. Briscoe*, 429 U.S. 1317, 97 S. Ct. 10 (1976)). Finding "no material difference" between the two cases, the Fifth Circuit quoted at length from Justice Powell's order in *Briscoe*:

The Texas Legislature provided no means by which an independent presidential candidate might demonstrate substantial voter support. Given this legislative default, the courts were free to determine on the existing record whether it would be appropriate to order Senator McCarthy's name added to the general election ballot as

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<sup>1</sup>The Legislature certainly could have done so. On February 18, 2015 – more than five months before the Court entered judgment in this case – Senator Mike Folmer (R-Lebanon) reintroduced the Voters' Choice Act (SB 495), which would improve ballot access for non-major party candidates by, *inter alia*, establishing the same signature requirements for them as Pennsylvania currently imposes on major party candidates pursuant to Section 2872.1. *See* Pennsylvania General Assembly, Bill Information, Regular Session 2015-2016, Senate Bill 495, *available at* <http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2015&sInd=0&body=S&type=B&bn=0495> (last visited April 26, 2016). As in previous sessions, however, the Legislature has failed to take action on the bill.

a remedy for what the District Court properly characterized as an “incomprehensible policy” violative of constitutional rights. This is a course that has been followed before both in this Court, see *Williams v. Rhodes*, 89 S.Ct. 1, 21 L.Ed.2d 69. (Opinion of Stewart, J., in-Chambers, 1968), and, more recently, in three District Court decisions involving Senator McCarthy, *McCarthy v. Noel*, 420 F.Supp. 799 (D.C. R.I. 1976); *McCarthy v. Tribbitt*, 421 F.Supp. 1193 (D.C. Del. 1976); *McCarthy v. Askew*, 420 F.Supp. 775 (D.C. Fla. 1976).

In determining whether to order a candidate’s name added to the ballot as a remedy for a State’s denial of access, a court should be sensitive to the State’s legitimate interest in preventing “laundry list” ballots that “discourage voter participation and confuse and frustrate those who do participate.” *Lubin v. Panish*, 415 U.S. 709, 715 (1974). But where a state forecloses independent candidacy in presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support. See *McCarthy v. Askew*, *supra*, Memorandum Opinion, at 779.

It is not seriously contested that Senator McCarthy is a nationally known figure; that he served two terms in the United States Senate and five in the United States House of Representatives; that he was an active candidate for the Democratic nomination for President in 1968, winning a substantial percentage of the votes cast in the primary elections; and that he has succeeded this year in qualifying for position on the general election ballot in many States. The defendants have made no showing that support for Senator McCarthy is less substantial in Texas than elsewhere.

For the reasons stated, I have ordered that the application be granted and that the Secretary of State place the name of Eugene J. McCarthy on the November 1976 general election ballot in Texas as an independent candidate for the office of President of the United States.

*Id.* Citing *Briscoe*, other courts soon ordered McCarthy’s inclusion on additional state ballots, in time for the 1976 general election. See, e.g., *McCarthy v. Exon*, 424 F.Supp. 1143 (D. Neb.) *summ. aff’d.*, 429 U.S. 972 (1976); *McCarthy v. Austin*, 423 F.Supp. 990 (W.D. Mich. 1976); see also *MacBride v. Exon*, 558 F.2d 443 (8th Cir. 1977); *MacBride v. Askew*, 541 F.2d 465 (5th Cir. 1976).

The issue arose again in 1980. Even though Michigan’s statutory scheme had been declared unconstitutional in *McCarthy v. Austin*, *supra*, the legislature failed to enact remedial

legislation. As a result, Gus Hall and Angela Davis, running as independent candidates in Michigan for president and vice-president, respectively, were forced to resort to the federal court to obtain ballot access – relief which the district court granted them. *See Hall v. Austin*, 495 F.Supp. 782 (E.D. Mich. 1980).

In 1984, the Michigan legislature had still failed to remedy its constitutionally defective statutory scheme. A candidate for the State Board of Education thus challenged the lack of provision for an independent to gain ballot access. Once again, the district court declared Michigan's ballot access scheme unconstitutional and ordered the Secretary of State to place the candidate on the ballot, and the Sixth Circuit affirmed. *See Goldman-Frankie v. Austin*, 727 F.2d 603, 607-08 (6th Cir. 1984). "Although Goldman-Frankie's demonstration of the requisite community support is not compelling," the Sixth Circuit concluded, "the Court finds it sufficient to warrant the relief granted by the district court." *Id.* The only evidence the Sixth Circuit cited in support of this finding is that the candidate had run for the same statewide office ten years before on the Communist Party ticket, receiving 5,936 votes, and two years prior to that, she ran for the Wayne State University Board of Governors, again as a Communist, and received 14,903 votes. *See id.* at 607 n.4. Acknowledging that courts should take care not to burden ballots with an excessive number of candidates, the Sixth Circuit nonetheless reasoned that "it would be understandable if the courts looked with increasing disfavor on the State's arguments regarding requisite support for a candidate when the State possesses the power to establish a uniform method of assuring such support and continuously refuses to do so." *Id.*

More recently, a federal district court relied on the *McCarthy* line of cases as authority for ordering Ohio's Secretary of State to place the candidates of both the Libertarian Party of Ohio and the Socialist Party of Ohio on the 2008 general election ballot. *See Libertarian Party*

of *Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008). The Court relied on Justice Powell's above-quoted order in *Briscoe*, as applied by the Sixth Circuit in *Goldman-Frankie*. *See id.* at 1015. Thus, it concluded:

The Constitution gives the Ohio legislature significant discretion to establish election procedures. After the state statute was held to fall outside "the boundaries established by the Constitution," the legislature failed to act. ... The Court will not prescribe Constitutional election procedures for the state, but in the absence of constitutional, ballot access standards, when the "available evidence" establishes that the party has "the requisite community support," this Court is required to order that the candidates be placed on the ballot. *McCarthy v. Briscoe*, 429 U.S. at 1323, 97 S.Ct. 10. As set out above, the Court finds that the Libertarian Party has the requisite community support to be placed on the ballot in the state of Ohio.

*Id.* (emphasis added).

Finally, in a decision entered just last month, a federal district court in Georgia struck down that state's 1 percent signature requirement for minor party or independent presidential candidates, and permanently enjoined the Secretary of State from enforcing it. *See Green Party of Ga. v. Kemp*, No. 1:12-CV-01822-RWS, Slip Op. at 74 (March 17, 2016). But the Court also found it proper to grant injunctive relief, as necessary to enable the minor party plaintiffs to place their candidates on Georgia's 2016 general election ballot:

Because this is a presidential election year, the Court feels compelled to assure that a procedure is in place to protect the very rights that this Order seeks to secure: specifically, the rights of Georgia voters to fully participate in presidential elections by having a meaningful opportunity to vote for candidates other than those nominated by the two major political parties. The rights of the voters are significant and accordingly a remedy must be imposed immediately.

*Id.* (citing *Hall v. Holder*, 117 F.3d 1222, 1231 n.18 (11th Cir. 1997) ("The right to vote is ... a right of paramount constitutional significance, the violation of which permits federal court intercession"). Finding it "well within this Court's equitable powers to fashion a remedy in this case," the Court concluded that the best way to do so was "by a reduction in the number of



signatures required” of minor party presidential candidates to 7,500. *Id.* at 75 (citation omitted). The Court arrived at this figure based on expert evidence demonstrating that no state that has required as few as 5,000 signatures for statewide office has ever had more than eight candidates on the ballot. *See id.* at 77 (citing Affidavit of Richard Winger). The Court further ordered that its judicially-established “interim requirement will expire when the Georgia General Assembly enacts a permanent provision.” *See id.* at 75.

To return to the instant case, the foregoing precedent establishes that the Minor Parties should be placed on Pennsylvania’s 2016 general election ballot provided that the available evidence demonstrates they have the “requisite community support.” *See Libertarian Party of Ohio*, 567 F. Supp.2d at 1015 (quoting *McCarthy v. Briscoe*, 429 U.S. at 1323). This is a permissive standard, and it should be construed in favor of parties seeking ballot access, particularly in cases where the legislature has failed to enact remedial legislation as necessary to cure a statutory scheme that has been declared unconstitutional. *See Goldman-Frankie*, 727 F.2d at 607-08 & n.4. Further, the Supreme Court has directed lower courts to rely not only on “available evidence,” but also on “matters subject to judicial notice to determine whether there is reason to assume the requisite community support.” *McCarthy v. Briscoe*, 429 U.S. at 1323.

The available evidence demonstrates that CPPA, GPPA and LPPA each have the requisite community support to entitle them to placement on Pennsylvania’s 2016 general election ballot. As this Court has observed, each of these parties’ candidates “regularly appeared on the general election ballot” in the election cycles immediately preceding the Commonwealth’s unconstitutional application of the statutory scheme struck down in this case. Slip Op. at 28. That fact alone is stronger evidence than that which the Sixth Circuit found sufficient to justify the candidate’s placement on Michigan’s ballot in *Goldman-Frankie*, 727 F.2d at 607-08 & n.4.

Moreover, the Minor Parties' general absence from the ballot since 2004 is a direct consequence of the fact that their ability "to organize and voice their views has been decimated by Section 2911(b) and Section 2937." Slip Op. at 28 (citing *CPPA*, 757 F.3d at 364). It is therefore reasonable to assume – as directed by the Supreme Court in *McCarthy v. Briscoe*, *supra* – that the Minor Parties would have continued to appear on the ballot regularly in more recent election cycles, but for the burdens imposed by Section 2911(b) and Section 2937.

The number of registered voters that belong to CPPA, GPPA and LPPA is additional evidence that the Minor Parties have the requisite community support to justify their inclusion on the ballot – particularly given that they have been laboring under an unconstitutional statutory scheme for the better part of a decade, which has "decimated" their ability to organize and voice their views. *See* Slip Op. at 28. According to the Commonwealth's own data, LPPA had 48,075 enrolled members as of February 2016, while GPPA had 13,830 and CPPA had 1,497. *See* Hall Dec. ¶¶ 5-6. Any party that has more than 1,000 registered members – let alone many times that many – manifestly has sufficient support among the electorate to justify inclusion of its candidates on the ballot. *See McCarthy v. Briscoe*, 429 U.S. At 1323; *Goldman-Frankie*, 727 F.2d at 607-08 & n.4.

The community support enjoyed by the Minor Parties is reflected in the editorials published by Pennsylvania's two largest newspapers, both of which applauded the Court's decision in this case and urged the Commonwealth not to appeal. Here, for example, is the *Philadelphia Inquirer*:

Rather than challenging the result, the Wolf administration should work with the legislature to change the law. The goal must be to give all candidates an equal opportunity to run for office by eliminating unreasonable requirements and financial penalties.

Editorial, *Crashing the Party*, PHILADELPHIA INQUIRER (July 31, 2015). Similarly, the *Pittsburgh Post-Gazette* wrote:

The judge's decision is an indictment of how Pennsylvania has been treating third-party candidates, and an order to fix a process that has been unconstitutionally hostile to anyone other than Democrats and Republicans. Gov. Tom Wolf's administration should let this ruling stand without appeal so that the Legislature can change the law.

Editorial, *Third Party Torture*, PITTSBURGH POST-GAZETTE (August 2, 2015). Such strong endorsements of the Court's judgment in this case provide still more evidence that the Minor Parties have the requisite community support to justify their inclusion on the ballot in 2016.

Finally, in the event that the Court finds insufficient evidence to support an order directing Secretary Cortes to place the Minor Parties' candidates on the ballot in 2016, it should exercise its equitable power to fashion an alternative remedy. *See Green Party of Ga.*, No. 1:12-CV-01822-RWS, Slip Op. at 75. Specifically, the Court should order Secretary Cortes to place the Minor Parties' candidates on the ballot provided that they comply with the signature requirements established for major party candidates pursuant to Section 2872.1 (not including the requirement that signers of their nomination papers be members of their parties). *See* 25 P.S. § 2872.1. The Court should further order Secretary Cortes to exercise his power, pursuant to 25 P.S. § 2936, to determine whether the Minor Parties' nomination papers include the requisite number of valid signatures. Such relief would enable the Minor Parties to participate once again in Pennsylvania's electoral process, free from the unconstitutional burdens imposed by Section 2911(b) and Section 2937.

### CONCLUSION

This Court retains jurisdiction to enter the injunctive relief requested herein, and all relevant factors weigh decisively in favor of granting such relief. Further, precedent of the Supreme Court and lower federal courts demonstrates that the specific relief requested is the proper remedy in cases such as this, where a state fails to enact remedial legislation following a judgment declaring its statutory scheme unconstitutional. To protect the Minor Parties' constitutional rights, and those of all Pennsylvania voters, from further harm caused by the Commonwealth's enforcement of its unconstitutional statutory scheme, the foregoing Motion for a Temporary Restraining Order or Preliminary Injunction should be granted.

Dated: April 26, 2016

Respectfully submitted,

/s/Oliver B. Hall  
Oliver B. Hall  
(Admitted Pro Hac Vice)  
CENTER FOR COMPETITIVE DEMOCRACY  
1835 16th Street NW, #5  
Washington, D.C. 20009  
(202) 248-9294  
[oliverhall@competitivedemocracy.org](mailto:oliverhall@competitivedemocracy.org)

*Counsel for Plaintiffs*

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

\_\_\_\_\_  
THE CONSTITUTION PARTY OF  
PENNSYLVANIA, et al.,

*Plaintiffs,*

v.

PEDRO CORTES, et al.,

*Defendants.*

Case No. 1:12-CV-02726

**ORDER**

AND NOW, this \_\_\_\_\_ day of April, 2016, upon consideration of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, and any Opposition filed thereto, IT IS HEREBY ORDERED that the motion is GRANTED.

IT IS FURTHER ORDERED that Defendants Pedro Cortes, Jonathan M. Marks and their agents are hereby ENJOINED from enforcing the signature requirement imposed by 25 P.S. § 2911(b), as applied to the nomination papers submitted by Plaintiffs Constitution Party of Pennsylvania, Green Party of Pennsylvania and Libertarian Party of Pennsylvania for inclusion on Pennsylvania's November 8, 2016 general election ballot.

IT IS FURTHER ORDERED that Defendant Pedro Cortes shall place the nominees of Plaintiffs Constitution Party of Pennsylvania, Green Party of Pennsylvania and Libertarian Party of Pennsylvania on Pennsylvania's November 8, 2016 general election ballot, because they have demonstrated the requisite community support by virtue of their regular presence on Pennsylvania's general election ballot in recent election cycles, the number of registered voters belonging to each party and other evidence in the record.

IN THE ALTERNATIVE, IT IS ORDERED that Secretary Cortes shall place the nominees of Plaintiffs Constitution Party of Pennsylvania, Green Party of Pennsylvania and Libertarian Party of Pennsylvania on Pennsylvania's November 8, 2016 general election ballot, provided that they submit nomination papers on or before the August 1, 2016 deadline with valid signatures equal in number to the requirements imposed upon major party candidates pursuant to 25 P.S. § 2872.1, except that such nomination papers may be signed by any elector qualified to vote in Pennsylvania's November 8, 2016 general election, without regard to partisan affiliation; and

IT IS FURTHER ORDERED that Secretary Cortes shall assume responsibility, pursuant to 25 P.S. § 2936, to determine whether any nomination papers submitted by Plaintiffs Constitution Party of Pennsylvania, Green Party of Pennsylvania and Libertarian Party of Pennsylvania contain the number of valid signatures required by 25 P.S. § 2872.1.

BY THE COURT:

/s/Lawrence F. Stengel  
LAWRENCE F. STENGEL, J.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of April, 2016, I caused the foregoing Motion for Temporary Restraining Order or Preliminary Injunction, on behalf of all Plaintiffs, by means of the Court's CM/ECF system, which will effect service upon all counsel of record.

/s/Oliver B. Hall  
Oliver B. Hall