UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al.,	)	
Appellees,	)	
v.	)	Case No. 15-3046
PEDRO CORTES, et al.,	)	
Appellants.	)	

APPELLEES' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Fed. R. App. P. 8(a)(2) and 3rd Cir. L.A.R. 8.1, Plaintiff-Appellees 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 Defendant-Appellants 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, the District Court entered a final judgment declaring Section 2911(b) and 25 P.S. § 2937 unconstitutional as applied. 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. *See* Appellees' Letter Filed Pursuant to Rule 28(j) (submitted March 1, 2016). 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 the District Court has declared unconstitutional.

In further support of this motion, the Minor Parties state that they first moved for the relief requested herein before the District Court, and that the District Court denied their motion by its Memorandum and Order entered on May 19, 2016 (attached as Exhibit A). The Minor Parties also submit the attached Memorandum of Law, which demonstrates that all relevant factors weigh in favor of granting the requested relief, as well as the Declaration of Oliver B. Hall (attached as Exhibit B). 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).

INTRODUCTION

On July 23, 2015, the District 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 the District 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. Once again, therefore, the Minor Parties are presently engaged in petition drives to access Pennsylvania's general election ballot, laboring under the burdens imposed by Pennsylvania's unconstitutional statutory scheme, just as they were when they commenced this action in May 2012. Am. Comp. ¶¶ 41-47.

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 District Court 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 Constitution Party of Pa. v. Aichele ("CPPA")*, 757 F.3d 347, 359-60 (3rd Cir. 2014); Slip Op. (Dkt. No. 66) at 26-28. As this Court 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, the District 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 further injury to their First and Fourteenth Amendment rights in the 2016 election cycle, the Minor Parties are compelled to seek further relief, in aid of the declaratory judgment the District Court entered in their favor on July 23, 2015. The Minor Parties request injunctive relief only insofar as it is necessary to preserve the status quo following the District 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. This Court's precedent, and that of other federal courts of appeals, confirms that

the facts developed here – involving defendants who decline to recognize the validity of the District Court's final judgment – make the award of such relief warranted.

As set forth below, the undisputed facts and evidence in the record demonstrate that the test for awarding preliminary injunctive relief is satisfied in this case. Indeed, the specific relief requested will merely give effect to a final judgment the District Court has already entered. This Court should enjoin Secretary Cortes, Commissioner Marks and their agents from enforcing Section 2911(b), as necessary to enforce the District Court's 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. The District Court initially dismissed the case on standing grounds, but this Court 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, the District 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. *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 the District Court's analysis of the merits.

Instead, the only issues the Commonwealth raises on appeal are whether it was proper for the District Court to enter judgment against Secretary Cortes and Commissioner Marks (as opposed to some other party), and whether the District Court could fashion meaningful relief against these defendants. *See id.* at 2. This Court 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," this Court concluded. *See id.* at 367. This Court 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, the District Court relied directly on this Court's reasoning, and properly entered judgment against Secretary Cortes and Commissioner Marks. *See* Slip Op. at 32.

More than six months after the District 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 the District Court's judgment declaring it unconstitutional as applied to them, necessitates the instant motion for injunctive relief. The Minor Parties initially requested such relief in a motion filed before the District Court, which the District Court denied on May 19, 2016. (Dkt. Nos. 83, 88, 89).

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 Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514, 524 (3rd Cir. 2004).

ARGUMENT

I. All Factors Weigh Decisively in Favor of Granting Injunctive Relief.

Little discussion is needed to demonstrate that the test for granting injunctive relief is satisfied here. Because the District Court has entered final judgment in the Minor Parties' favor (Dkt. No. 68), there can be no doubt that they prevailed on the merits in the proceedings below. Ordinarily, that would mean the Commonwealth would no longer enforce the provisions of law that the District Court struck down. 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 the District Court's final judgment declaring it unconstitutional as applied.

A. The Minor Parties Are Likely to Prevail on the Merits.

On July 23, 2015, the District 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 District 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). It is therefore beyond dispute that the Minor Parties prevailed on the merits in the proceedings below.

The District 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). Thus, for purposes of this motion, the Minor Parties rely on the District Court's cogent analysis, which closely tracks this Court's reasoning in *CPPA*. Should this 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. The Minor Parties also rely on the Brief of Appellees that they submitted on January 4, 2016, which explains why they are entitled to prevail in this appeal.

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 the District Court and this Court 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. at 26-28; *CPPA*, 757 F.3d at 359-60. This Court 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, the District 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 the District Court's judgment declaring it unconstitutional, will therefore cause the Minor Parties irreparable injury unless they are granted 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 the District Court's judgment on July 23, 2015. As the District 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 v. Fed. Election Comm'n.*, 558 U.S. 310, 331 (2010)). 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 II. 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," the District 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," this Court 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 has been 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.

II. 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 Secretary to establish a constitutional procedure for them to place their candidates on the general election ballot in 2016. Such relief is necessary because the Legislature has failed to enact remedial legislation following the District Court's judgment declaring Section 2911(b) and Section 2937 unconstitutional.[1] Under these circumstances, the proper remedy is an order directing Secretary Cortes to place the Minor Parties' nominees on the ballot, provided that the available evidence, including matters properly subject to judicial notice, shows that they have the requisite 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

[1]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.

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 the Supreme Court had recently granted McCarthy the same relief in Texas. *See id.* (citing *McCarthy v. Briscoe*, 429 U.S. 1317 (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 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). Having granted such relief, the Court concluded that it was compelled to grant further 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." *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 the District 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 the evidence 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 conclude – as directed by the Supreme Court in *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 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 District 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 District Court's judgment 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 (citing *Virginia Ry. Co. v. Sys. Fed'n. No. 40*, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved"). 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

All relevant factors weigh decisively in favor of granting the Minor Parties the injunctive relief requested herein. 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 and ongoing harm caused by the Commonwealth's enforcement of its unconstitutional statutory scheme, the foregoing Motion for a Temporary Restraining Order and Preliminary Injunction should be granted.

Dated: May 19, 2016

Respectfully submitted,

/s/Oliver B. Hall
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Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2016, I caused the foregoing Emergency Motion for Temporary Restraining Order and Preliminary Injunction, on behalf of all Appellees, by means of the Court's CM/ECF system, which will effect service upon all counsel of record, including the following:

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Counsel for Appellants Pedro Cortes and Jonathan M. Marks

/s/Oliver B. Hall
Oliver B. Hall

EXHIBIT A

District Court's Memorandum Opinion and Order Entered May 19, 2016

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

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al.,	:	
Plaintiffs,	:	**CIVIL ACTION**
v.	:	
	:	**NO. 12-2726**
PEDRO CORTES, et al.,	:	
Defendants.	:	

MEMORANDUM

STENGEL, J. **May 18, 2016**

Although this case is on appeal in the United States Court of Appeals for the Third Circuit, the plaintiffs have asked this court to enter an injunction. The plaintiffs are political bodies, or "minor parties," seeking to place their candidates on the November 2016 general election ballot in Pennsylvania. On April 26, 2016, they filed an emergency motion for a temporary restraining order and a preliminary injunction to direct the Secretary of the Commonwealth to accept their nominating petitions.

In a memorandum and order on July 23, 2015, I ruled that two sections of the Pennsylvania Election Code, when applied together, were unconstitutional as applied to these plaintiffs. Specifically, 25 P.S. § 2911(b) establishes a requirement for the number of signatures on a nominating petition. 25 P.S. § 2937 provides for a process to verify the signatures and allows for the imposition of significant costs if the petition is stricken for

invalid signatures. On May 16, 2016, I heard oral argument on the request for an injunction and for the reasons that follow, I am denying the plaintiffs' motion.

I. LEGAL STANDARD

A plaintiff seeking injunctive relief must show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." Kos Pharma., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004). The party moving for injunctive relief bears the burden of demonstrating that all four factors weigh in favor of granting the injunction. Ferring Pharma., Inc. v. Watson Pharma., Inc., 765 F.3d 205, 210 (3d Cir. 2014). "A preliminary injunction is not granted as a matter of right." Kerschner v. Mazurkewicz, 670 F.2d 440, 443 (3d Cir. 1982). Rather, such "'an exercise of a court's equitable authority' will only be granted after 'taking into account all of the circumstances that bear on the need for prospective relief.'" URL Pharma, Inc. v. Reckitt Benckiser Inc., Civ. A. No. 15-0505, 2016 WL 1592695, *3 (E.D. Pa. Apr. 20, 2016)(quoting Salazar v. Buono, 559 U.S. 700, 714 (2010)).

II. DISCUSSION

A. Jurisdiction to Grant an Injunction Pending Appeal

A district court can enter an injunction when an appeal is pending pursuant to Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure. Rule 8(a)(1)(C) provides as follows:

> **(1) Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:
>
> …..
>
> (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

Despite the defendants' contention that "[a]s a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal," the defendants overlook the fact that this general divesture rule is subject to limited exceptions including the granting of injunctions. Venen v. Sweet, 758 F.2d 117, 129 (3d Cir. 1985)(noting that a district court is not divested of jurisdiction during the pendency of an appeal to modify, restore, or grant injunctions in accordance with Rule 8 of the Federal Rules of Appellate Procedure). Accordingly, I have jurisdiction to enter an injunction in this matter notwithstanding the pending appeal before the Third Circuit.

B. Motion for a Temporary Restraining Order and Preliminary Injunction

The plaintiffs request injunctive relief seeking to have this court direct Secretary Cortes to place their candidates for public office on Pennsylvania's November 8, 2016 general election ballot. In the alternative, the plaintiffs request that this court direct Secretary Cortes to place their candidates on the November 8, 2016 general election ballot provided that they submit nomination papers before the August 1, 2016 deadline

with valid signatures of qualified electors equal in number to the requirements imposed upon major party candidates pursuant to 25 P.S. § 2872.1.

Following my July 23, 2015 decision on the parties' cross-motions for summary judgment, the defendants appealed the case to the Third Circuit. Last month, the Third Circuit held oral argument on the merits and the parties are awaiting a decision. It is very difficult for this court to say whether the plaintiffs are likely to succeed on the merits. That is up to the Court of Appeals at this point. My analysis led to my decision that the two sections of the Election Code in combination are unconstitutional as applied to the plaintiffs. That analysis is now under review on appeal and it appears the Court of Appeals is in a better position than I to assess the plaintiffs' likelihood of success on the merits. I find that the first element of injunctive relief has not been established in the motion pending before this Court.

Further, the public interest likely does not favor the District Court granting relief to the plaintiffs in this procedural posture. My decision to grant or deny this injunction on its merits could be consistent with the anticipated decision by the Court of Appeals. Or, it could not. Inconsistent rulings on similar issues would lead to, at best, confusion or delay. At worst, there could be further appeals and additional litigation seeking clarification. There is a process in place for the orderly, consistent and reliable resolution of the issues raised by the parties in this injunction context. This process is the appeal pending in the Third Circuit. I decline to enter an order on matters the Court of Appeals is considering in this very case. If the plaintiffs believe they need a decision on an emergency basis, they have the option of seeking interim, injunctive relief from the Court

of Appeals. The public interest in efficient litigation and consistent rulings suggests the Third Circuit is in a better position to consider such a request.

An appropriate Order follows.

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

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al.,	:	
Plaintiffs,	:	**CIVIL ACTION**
v.	:	
	:	**NO. 12-2726**
PEDRO CORTES, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of May, 2016, following oral argument held on May 16, 2016, and upon consideration of the plaintiffs' motion for a temporary restraining order and preliminary injunction (Doc. No. 83) and the defendants' response (Doc. No. 86), **IT IS HEREBY ORDERED** that the plaintiff's motion (Doc. No. 83) is **DENIED**.

BY THE COURT

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

EXHIBIT B

Declaration of Oliver B. Hall

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 5:12-CV-02726
PEDRO CORTES, et al.,	)	
Defendants.	)	

DECLARATION OF OLIVER B. HALL IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

(pursuant to 28 U.S.C. § 1746)

I, Oliver B. Hall, hereby declare under oath and subject to the penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am a licensed attorney in Massachusetts and the District of Columbia.

2. I represent the plaintiffs in the above-captioned matter.

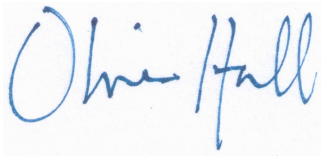
3. On November 5, 2015, I sent a letter to Secretary of the Commonwealth Pedro Cortes, who is a defendant in this case, a letter requesting that he notify the plaintiffs of the ballot access requirements that he intended to impose on them in 2016. A copy of that letter is attached hereto as Exhibit 1.

4. Secretary Cortes responded, through counsel, three months later, by letter dated February 4, 2016, which advised that he intended to enforce 25 P.S. § 2911(b) against plaintiffs in the 2016 election cycle. A copy of that letter is attached hereto as Exhibit 2.

5. On April 26, 2016, I interviewed ballot access law expert Richard Winger, *see* Richard Winger's First Declaration in Support of Plaintiffs (Dkt. No. 60-1), who confirmed that the party enrollment figures published in his March 2016 edition of *Ballot Access News* are based

on data he obtained directly from the Pennsylvania Secretary of State's office. *See* Richard Winger, *February 2016 Registration Totals*, BALLOT ACCESS NEWS, available at http://ballot-access.org/2016/03/27/march-2016-ballot-access-news-print-edition/ (last visited April 26, 2016).

6. According to Mr. Winger's data, as of February 2016, the Libertarian Party of Pennsylvania has 48,075 registered members, the Green Party of Pennsylvania has 13,830 registered members, and the Constitution Party of Pennsylvania has 1,497 registered members.



Executed: April 26, 2016

Oliver B. Hall

November 5, 2015

BY FIRST CLASS MAIL

Secretary of the Commonwealth Pedro A. Cortes
Office of the Secretary
302 North Office Building
Harrisburg, PA 17120

Re: Ballot Access Requirements for Non-Major Party Candidates in 2016

Dear Secretary Cortes,

My clients, the Constitution Party of Pennsylvania, the Green Party of Pennsylvania, the Libertarian Party of Pennsylvania and several individuals affiliated with them, are the plaintiffs in *Constitution Party of Pa. v. Cortes*, No. 5:12-cv-02726-LS (E.D. Pa. July 23, 2015). That case held Pennsylvania's statutory scheme governing ballot access for non-major party candidates unconstitutional as applied. Specifically, the Court's judgment holds, in relevant part, that "25 P.S. § 2911(b) and 25 P.S. § 2937 are hereby **DECLARED UNCONSTITUTIONAL AS APPLIED** to plaintiffs." Because these provisions have been held unconstitutional, and may not be enforced against my clients, we are writing to request notice of the ballot access requirements that you intend to impose on them in 2016.

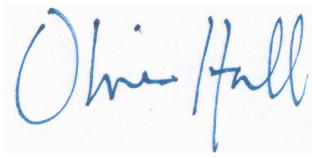
In cases where ballot access schemes are held unconstitutional, and the legislature fails to enact remedial legislation, Secretaries of State typically exercise their discretion to grant ballot access to candidates who demonstrate a small amount of community support. This practice reflects the Supreme Court's recognition that, while states have a legitimate interest in requiring a showing of support before placing a candidate on the ballot, they may not impose unnecessarily burdensome requirements. *See Williams v. Rhodes*, 393 U.S. 23, 33-34 & n. 9 (1968); *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1980) (constitutionality of ballot access statutes must be determined by extent to which a state's interests "make it necessary to burden a plaintiff's rights"). Thus, for example, when Ohio's ballot access scheme was recently declared unconstitutional, the court ordered the Secretary of State to place the Libertarian Party and Socialist Party candidates on the ballot, and thereafter, the Secretary of State voluntarily granted ballot access to the other minor party candidates, including the Constitution Party and Green Party nominees. *See Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Oh. 2008).

Based on the foregoing precedent, and other applicable law, we request that you issue a written rule, regulation or formal letter, advising that you will grant ballot access to non-major party candidates who demonstrate a small amount of community support, and that you will

exercise your authority, pursuant to 25 P.S. 2936, to determine whether a candidate has made the requisite showing. This procedure would ensure that Pennsylvania provides non-major party candidates with a means of gaining ballot access in 2016, which does not suffer from the constitutional defects of Section 2911(b) and Section 2937. Even if you adopt a different procedure, however, we request that you issue formal guidance as soon as possible, which provides my clients with notice as to the ballot access requirements that will apply to them in 2016, in the absence of remedial legislation.

My clients are currently setting budgets and making other preparations for the 2016 election cycle. Therefore, we ask that you reply to this letter, with the guidance requested, within two weeks, or by November 19, 2015. If you would like to discuss this request, or if I may provide further information, please don't hesitate to contact me. Thank you for your attention to this matter.

Regards,



Oliver B. Hall
Counsel to the Constitution Party of Pennsylvania, the Green Party of Pennsylvania and the Libertarian Party of Pennsylvania.

cc: Claudia Tesoro (via email to ctesoro@attorneygeneral.gov)

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

February 4, 2016

Oliver B. Hall, Esquire
Center for Competitive Democracy
1835 16th Street, NW, Apartment 5
Washington, DC 20009-3333

Re: Ballot Access Requirements for Political Bodies in 2016

Dear Mr. Hall:

Enclosed are the form political body nomination papers for 2016 and the instructions that accompany the nomination papers. Also enclosed are the political body numerical signature requirements for statewide offices as well as the numerical signature requirements for other district-based offices.

Please be advised that for a statewide office in 2016, the minimum number of signatures required by a political body candidate is 21,775, which is two percent of the largest entire vote cast for Justice Kevin Dougherty in the 2015 municipal election. As we have discussed, the district court in Constitution Party of Pa. v. Cortés, No. 12-2726, 2015 WL 4506167 (E.D. Pa., July 23, 2015), held, as a matter of law, that 25 P.S. § 2937 is facially valid. Slip op. at 35-40. The court concluded, however, that 25 P.S. §§ 2911(b) and 2937, in combination, are "unconstitutional as applied to plaintiffs." Slip op. at 35. But the court made a point of adding that its "conclusion is not to be construed as invalidating Section 2911(b)'s signature requirements which the Third Circuit has upheld." Slip op. at 35 n. 38 (citing Rogers v. Corbett, 468 F.3d 188, 197-198 (3rd. Cir. 2006)). As such, 25 P.S. § 2911(b) remains a part of the Pennsylvania Election Code. No court has issued any decision altering the duty of candidates to comply with 25 P.S. § 2911(b). Our clients, Pedro Cortés, the Secretary of the Commonwealth, and Jonathan Marks, the Commissioner of the Bureau of Commissions, Elections, and Legislation, are obligated to follow 25 P.S. § 2911(b) as usual and intend to do so in 2016.

In addition to the signature requirement, please be aware that the Secretary of the Commonwealth has decided to afford the relief granted to the Green Party plaintiffs to all nomination papers submitted by political bodies. The Green Party litigation centered on whether the Secretary and the Commissioner could enforce certain requirements of the Election Code relating to minor parties. Green Party v. Aichele, 89 F. Supp. 3d 723 (E.D. Pa. 2015). The

DEPARTMENT OF STATE | OFFICE OF CHIEF COUNSEL
306 NORTH OFFICE BUILDING | HARRISBURG, PA 17120
Phone: 717-783-0736 | Fax: 717-214-9899| www.dos.state.pa.us

Green and Libertarian Parties, as well as several individuals affiliated with those parties, asserted that various requirements of the Election Code were unconstitutional, both on their face and as applied to them.

While the Commonwealth defendants prevailed on some counts, the plaintiffs obtained an injunction as to following Election Code provisions:

- The requirement at 25 P.S. § 2911(d) that nomination paper circulators be in-state residents;
- The requirement at 25 P.S. § 2911(d) that nomination paper circulators have their signatures notarized on the nomination paper; and
- The requirement at 25 P.S. § 2911(c) that qualified electors sign no more than one nomination paper.

The district court found these Election Code requirements were unconstitutional as applied to the plaintiffs, but declined to find those provisions unconstitutional on their face. The Department of State believes, however, that future political body candidates not explicitly covered by the Green Party injunction would nevertheless be in a very similar position to the Green Party plaintiffs, and would be able to invoke the logic of that decision in future litigation. Moreover, having different nomination requirements for different political bodies raises equal protection concerns under both the Federal and State Constitutions. The logic of the Green Party case does apply to other political bodies, and the Department believes that those other entities would very likely be able to obtain relief similar to that already obtained by the Green Party plaintiffs if the Department were to maintain two separate sets of nomination papers (one for the Green Party plaintiffs, and one for all other entities).

I look forward to discussing this letter during our next conference call, scheduled for February 8, 2016, at 2:00 p.m. If you need any additional information ahead of the call, please do not hesitate to contact me.

Sincerely,

Timothy E. Gates
Chief Counsel
Department of State

Enclosures

cc: Claudia M. Tesoro, Senior Deputy Attorney General, Office of Attorney General
John K. Lavelle, Deputy General Counsel, Governor's Office of General Counsel