UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:12-CV-02726
PEDRO CORTES, et al.,	)	
Defendants.	)	

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PERMANENT 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 permanent injunction, which takes effect immediately, and enjoins 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) and 2937 against the Minor Parties, and lasts until such time as the Legislature enacts remedial legislation that cures the constitutional defects of those provisions. 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 Section 2937 unconstitutional as applied (Dkt. No. 68). Nevertheless, on February 4, 2016, Secretary Cortes issued formal guidance stating that he intends to enforce Section 2911(b) against the Minor Parties in the 2016 election cycle. The Court of Appeals for the Third Circuit has now affirmed this Court's judgment, in an opinion and order entered on June 2, 2016, which expressly concludes that the guidance issued by Secretary Cortes violates that judgment. *See Constitution Party of Pa. v. Cortes*, No. 15-3046 (3rd Cir. June 2, 2016). The Minor Parties have therefore requested that Secretary Cortes issue further guidance as to what they must do to qualify for Pennsylvania's November 8, 2016 general election ballot, but Secretary Cortes has failed to do so. As a result, the Minor Parties urgently need the relief requested herein, to ensure that they may participate in Pennsylvania's 2016 election cycle, free from the burdens imposed by a statutory scheme that this Court has declared unconstitutional, in a decision affirmed by the Third Circuit.

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 Second Declaration of Oliver B. Hall and Third Declaration of Carl Romanelli, attached hereto as Exhibit A, which satisfy the requirements for entering a temporary restraining order without notice pursuant to Rule 65(b)(1). Finally, the Minor Parties incorporate by reference the Declarations attached to their Amended Complaint (Dkt. No. 46), their Motion for Summary Judgment (Dkt. No. 60), and their Motion for Temporary Restraining Order and Preliminary Injunction (Dkt. No. 83), which set forth additional specific facts demonstrating that

the Minor Parties will incur immediate and irreparable harm in the absence of the relief requested herein.

Dated: June 17, 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

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:12-CV-02726
PEDRO CORTES, et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PERMANENT 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 (Dkt. No. 83-1). The Third Circuit has now affirmed this Court's judgment, in an opinion that expressly concludes that the guidance issued by Secretary Cortes is "in clear violation" of that judgment. *See Constitution Party of Pa. v. Cortes ("CPPA III")*, No. 15-3046, 27 (3rd Cir. June 2, 2016) (Slip Op.). Accordingly, on June 3, 2016, one day after the Third Circuit entered its opinion, the Minor Parties requested that Secretary Cortes issue guidance that conforms with the judgment in this case, and provides them with notice as to what they must do to place their candidates on Pennsylvania's November 8, 2016 general election ballot. *See* Second Hall Dec. ¶ 3. Two weeks have now passed, and Secretary Cortes has still failed to issue such guidance. The Legislature has also failed to enact remedial legislation that cures the constitutional defects of Section 2911(b) and Section 2937.

Meanwhile, the 2016 election cycle is in full swing. The August 1, 2016 deadline for submitting nomination papers is rapidly approaching, just six weeks away. Yet Secretary Cortes continues to operate as if the statutory scheme that the Minor Parties successfully challenged in this case, and which this Court struck down in July 2015, remains in effect. As a result, that unconstitutional statutory scheme continues to burden the Minor Parties, and to threaten the voting rights of all Pennsylvanians, as if this litigation had never taken place. And with each day that passes, the Minor Parties sustain further irreparable harm to their First Amendment rights. This situation is intolerable. The Court should not permit it to continue for another day.

The harm that Section 2911(b) and Section 2937 are causing the Minor Parties can hardly be overstated. Both this Court and 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 Constitution Party of Pa. v. Aichele ("CPPA I")*, 757 F.3d 347, 359-60 (3rd Cir. 2014); *Constitution Party of Pa. v. Cortes ("CPPA II")*, 116 F.Supp. 3d 486, 504 (E.D. Pa. 2015). 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 I*, 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." *CPPA II*, 116 F.Supp. 3d at 504.

The Minor Parties first sought injunctive relief from this harm in August 2012, when they filed an emergency motion for temporary restraining order and preliminary injunction on the same day that their 2012 nomination papers were challenged pursuant to Section 2937. (Dkt. No. 12). The Court denied that motion as moot eight months later, in March 2013, after the 2012 election had concluded. (Dkt. No. 35). The Minor Parties again requested such relief on April 26,

2016, when they filed their second emergency motion for temporary restraining order and preliminary injunction, in an effort to avoid sustaining further injury in the 2016 election cycle. (Dkt. No. 83). The Court denied that motion on May 19, 2016, due to the pendency of the Commonwealth's appeal. (Dkt. No. 89). The Minor Parties thus filed another motion for injunctive relief on the same day, with the Third Circuit, pursuant to Fed. R. App. P. 8(a)(2)(A)(ii). But the Third Circuit denied that motion as moot, after entering its opinion and order affirming this Court's judgment on June 2, 2016. *See CPPA III*, No. 15-3046 (order entered June 7, 2016). Consequently, the Minor Parties are compelled to return to this Court, and once again to request injunctive relief, as necessary to enjoin Secretary Cortes from enforcing the statutory scheme struck down in this case, and to provide them with a constitutional procedure for placing their candidates on Pennsylvania's 2016 general election ballot. This request is urgent. Based on the foregoing facts, and those set forth in the Declarations attached hereto, and the Declarations already submitted into the record, the Court should grant such relief immediately, pursuant to Rule 65(b)(1).

The Minor Parties specifically request that the Court direct Secretary Cortes to place their 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"). As set forth below, the test for awarding such relief is plainly satisfied here: the Minor Parties have prevailed on the merits of their challenge to Section 2911(b) and Section 2937, and yet, Secretary Cortes has expressly advised that he will continue to enforce this unconstitutional statutory scheme against them. Further relief is therefore necessary, to give legal effect to the judgment this Court has entered, and which the

Third Circuit affirmed. Furthermore, the precedent of the Supreme Court of the United States and lower federal courts uniformly demonstrates that the remedy requested here is proper. Such precedent establishes that, where a state fails to provide candidates with a constitutional procedure for obtaining ballot access, the federal courts must intervene, and order their placement on the ballot provided they make some showing of community support. The Minor Parties have made that showing, and they are entitled to ballot access in 2016.

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 I*, 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. *See CPPA II*, 116 F.Supp. 3d 486.

The Commonwealth appealed to the Third Circuit. *See CPPA III*, No. 15-3046. On June 2, 2016, the Third Circuit affirmed this Court's judgment. *See id.* A complete discussion of the Third Circuit's opinion is not necessary for purposes of the instant motion. In sum, the Third Circuit concluded that this Court's opinion, which explained the basis for holding Section 2911(b) and Section 2937 unconstitutional as applied, was "well-reasoned". *See id.* at 14. It also rejected the Commonwealth's arguments in their entirety, and concluded that they had no merit. *See id.* at 16-30. In the course of its discussion, the Court repeatedly observed that the

Commonwealth was in error regarding the effect of this Court's judgment. Even though Section 2911(b) and Section 2937 may be facially valid, the Third Circuit explained, these provisions "cannot both be enforced against the [Minor] Parties as a result of the District Court's ruling." *Id.* at 19-20. Further, the Third Circuit continued, "the Commonwealth is therefore wrong that the signature requirement can be enforced against the [Minor] Parties in the form of a private suit brought *pursuant to* an unconstitutional provision of Pennsylvania's election code." *Id.* at 20. In other words, the Third Circuit reasoned, the "practical benefit" of this Court's judgment is that "the Commonwealth may not enforce both § 2911(b) and § 2937 together against the [Minor] Parties." *Id.* at 21.

The Third Circuit also rejected the Commonwealth's contention that "Secretary Cortes and Commissioner Marks cannot protect the [Minor] Parties from the operation of 25 Pa. Stat. Ann. § 2937." *Id.* at 25. Because Section 2911(b) and Section 2937 are facially valid, the Third Circuit observed, "the Commonwealth seems to believe that … the [Minor] Parties still have to gather signatures and submit them for review by the Commonwealth." *Id.* at 26. But that argument "falls apart" because it "misunderstands the fundamental difference between facial and as-applied challenges." *Id.* at 26. The effect of this Court's judgment, the Third Circuit reiterated, is that "the [Minor] Parties cannot be forced to both collect the number of signatures required by § 2911(b) and defend those signatures in the § 2937 challenge process." *Id.*

The Third Circuit next turned to the guidance issued by Secretary Cortes on February 4, 2016, which states that "no court has issued any decision altering the duty of candidates to comply with 25 P.S. § 2911(b)," and therefore, Secretary Cortes and Commissioner Marks "are obligated to follow 25 P.S. § 2911(b) as usual and intend to do so in 2016." *Id.* at 27. The "clear import" of this guidance, the Third Circuit found, "is that the two named officials plan to enforce

§§ 2911(b) and 2937 against the [Minor] Parties in 2016." *Id*. The Third Circuit expressly concluded that such guidance is "in clear violation" of this Court's judgment. *Id.*

LEGAL STANDARD

A district court should grant an *ex parte* temporary restraining order where "specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. App. P. 65(b)(1)(A). The standard for granting a temporary restraining order is the same as that for granting a preliminary injunction. *See Bieros v. Nicola*, 857 F.Supp. 445, 446 (E.D. Pa. 1994). The standard for granting a permanent injunction is also the same as that for granting a preliminary injunction, except the moving party must show "actual success" rather than a "likelihood of success" on the merits. *Compare Shields v. Zuccarini*, 254 F. 3d 476, 482 (3rd Cir. 2001) *with 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)). Accordingly, to obtain a permanent injunction, the Minor Parties must demonstrate that: 1) they have achieved actual 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 Shields*, 254 F. 3d at 482 (citing *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 n.2-3 (3rd Cir.1996)).

ARGUMENT

I. The Court Should Grant the Minor Parties Immediate Injunctive Relief Pursuant to Rule 65(b)(1), Because the Undisputed Facts and Evidence Clearly Show That They Will Suffer Immediate and Irreparable Harm Each Day That Secretary Cortes Continues to Enforce Pennsylvania's Unconstitutional Statutory Scheme Against Them.

Nearly four years after filing their first motion for injunctive relief, after prevailing on the merits in this Court, and winning two separate appeals before the Third Circuit, the Minor Parties remain subject to the unconstitutional statutory scheme that this Court struck down in July 2015. Secretary Cortes has advised the Minor Parties that he intends to enforce that statutory scheme "as usual" in 2016, and despite the Third Circuit's admonishment that doing so "would be in clear violation" of the judgment entered in this case, *see CPPA III*, No. 15-3046 at 27, Secretary Cortes has taken no further action to comply with that judgment. *See* Second Hall Dec. ¶¶ 5-6. The Minor Parties therefore urgently need further relief to enable their participation in Pennsylvania's 2016 general election free from the burdens imposed by Pennsylvania's unconstitutional statutory scheme.

The instant motion is the Minor Parties' fourth request for injunctive relief in this proceeding, and it is supported by the requisite "specific facts" that "clearly show" they will suffer "immediate and irreparable injury" if the motion for relief is denied. Fed. R. Civ. P. 65(b)(1)(A). Indeed, upon reviewing the undisputed facts and evidence contained in the sworn Declarations the Minor Parties submitted with their Amended Complaint (Dkt. No. 46), and in support of their Motion for Summary Judgment (Dkt. No. 60), this Court concluded that enforcement of Section 2911(b) and Section 2937 has "decimated" the Minor Parties' ability "to organize and voice their views." *CPPA II*, 116 F.Supp. 3d at 504. Yet Secretary Cortes continues to enforce those provisions, nearly a year after the Court declared them unconstitutional as applied. The relief that the Third Circuit contemplated in July 2014 – "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" – thus continues to elude the Minor Parties. *See CPPA I*, 757 F.3d at 368. The continued decimation of the Minor Parties' First Amendment rights due to the enforcement of an unconstitutional statutory scheme surely warrants the granting of the immediate injunctive relief authorized by Rule 65(b)(1). *See* Third Romanelli Dec. ¶¶ 6-9 (attesting to the injuries Section 2911(b) and Section 2937 continue to cause the Minor Parties in 2016, "beyond the volume of signatures required").

Furthermore, the Minor Parties have provided Secretary Cortes with notice that they would seek injunctive relief from the Court unless he issued guidance that conforms with the judgment entered in this case. *See* Fed. R. Civ. P. 65(b)(1)(B). They requested such guidance on June 3, 2016, and asked that Secretary Cortes provide it by June 10, 2016. *See* Second Hall Dec. ¶ 3. On June 10, 2016, Secretary Cortes contacted the Minor Parties, through counsel, to advise that he was not prepared to provide the guidance requested. *See* Second Hall Dec. ¶ 4. The Minor Parties thus advised Secretary Cortes, through counsel, that they intended to file a new motion for injunctive relief. *See* Second Hall Dec. ¶ 5. One week later, as of the date of this filing, Secretary Cortes has taken no further action to provide the Minor Parties with the requested guidance. *See* Second Hall Dec. ¶ 6.

The Supreme Court has concluded that "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 466 (1974). Thus, "even though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Id.* at 471. The Minor Parties have prevailed in this case, and have attempted to resolve it by obtaining the "milder form of relief" available under the Declaratory Judgment Act.

See id. Such relief has proven insufficient. They have no alternative, therefore, but to request the "strong medicine of the injunction." *Id.* at 466. The Court should grant such relief immediately, pursuant to Rule 65(b)(1).

II. The Court Should Grant the Minor Parties a Permanent Injunction, Because Each Element of the Test for Granting Such Relief Is Satisfied.

Little discussion is needed to demonstrate that the test for granting permanent injunctive relief is satisfied here. Because the Court has entered final judgment in the Minor Parties' favor, *see CPPA II*, 116 F.Supp. 3d 486, and the Third Circuit has affirmed, *see CPPA III*, No. 15-3046 (June 2, 2016), there can be no doubt that the Minor Parties 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 CPPA II*, 116 F.Supp. 3d at 499 (citing *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 331 (2010)). 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 Actually Succeeded 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 Third Circuit has now affirmed this Court's

judgment. *See CPPA III*, No. 15-3046 (June 2, 2016). The Minor Parties have therefore actually succeeded on the merits in this case.

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 CPPA I*, 757 F.3d at 359-60; *CPPA II*, 116 F.Supp. 3d at 504. 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 I*, 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." *CPPA II*, 116 F.Supp. 3d at 504. The Commonwealth's continued enforcement of Section 2911(b) – in "clear violation" of this Court's judgment declaring it unconstitutional, *CPPA III*, No. 15-3046 at 27 – 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. *See CPPA II*, 116 F.Supp. 3d at 499 (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 this Court found the "regularly" did before the Commonwealth began its unconstitutional enforcement of Section 2911(b) and Section 2937 following the 2004 election cycle. *See CPPA II*, 116 F.Supp. 3d at 492, 504 (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." *CPPA II*, 116 F.Supp. 3d at 504. 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)).

"In the absence of legitimate, countervailing concerns," the Third Circuit has concluded that "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 statutory scheme that this Court has declared unconstitutional in a decision affirmed by the Third Circuit. 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.[1] 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 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

[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.

> (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 three months ago, 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 such as this, 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. *See CPPA II*, 116 F.Supp. 3d at 504. That fact alone is much 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." *CPPA II*, 116 F.Supp. 3d at 504 (citing *CPPA I*, 757 F.3d at 364). It is therefore reasonable to conclude – 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 unconstitutional burdens imposed by Section 2911(b) and Section 2937.

The number of registered voters that belong to CPPA, GPPA and LPPA is additional and independently sufficient evidence demonstrating 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 CPPA II*, 116 F.Supp. 3d at 504. 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 underscored by 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

All relevant factors weigh decisively in favor of granting the Minor Parties injunctive relief immediately. Further, precedent of the Supreme Court and lower federal courts demonstrates that the specific relief requested herein 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 and Permanent Injunction should be granted.

Dated: June 17, 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

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CONSTITUTION PARTY OF PENNSYLVANIA, et al.,	)	
Plaintiffs,	)	Case No. 1:12-CV-02726
v.	)	
PEDRO CORTES, et al.,	)	
Defendants.	)	

ORDER

AND NOW, this _____ day of June, 2016, upon consideration of Plaintiffs' Motion for Temporary Restraining Order and Permanent 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 17th day of June, 2016, I filed the foregoing Motion for Temporary Restraining Order and Permanent 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