
UNITED STATES COURT OF APPEALS

for the

THIRD CIRCUIT

Case No. 16-3266

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

Appellants,

- v. -

PEDRO CORTES AND JONATHAN M. MARKS,

Appellees.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA AT NO. 5:12-CV-02726-LS

**BRIEF ON BEHALF OF APPELLANTS AND
JOINT APPENDIX VOLUME I OF II (JA 1-5)**

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
1835 16th Street NW, Suite 5
Washington, D.C. 20009
(202) 248-9294 (ph)
oliverhall@competitivedemocracy.org

Attorneys for Appellant

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STATEMENT OF JURISDICTION

This case was filed in the United States District Court for the Eastern District of Pennsylvania, pursuant to 42 U.S.C. § 1983. Plaintiff-Appellants are the Constitution Party of Pennsylvania (“CPPA”), the Green Party of Pennsylvania (“GPPA”), the Libertarian Party of Pennsylvania (“LPPA”), Joe Murphy, James Clymer, Carl Romanelli, Thomas Robert Stevens and Ken Krawchuk (collectively, the “Aspiring Parties”).¹ Defendant-Appellees are Pennsylvania Secretary of State Pedro Cortes and Pennsylvania Commissioner of Elections Jonathan M. Marks. (collectively, the “Commonwealth”). The Defendants are named in their official capacities only.

The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. It initially dismissed the case in a memorandum opinion and order entered on March 8, 2013, but this Court reversed. *See Constitution Party of Pa. v. Aichele (“CPPA I”),* 757 F.3d 347 (3rd Cir. 2014). On remand, the District Court granted summary judgment to the Aspiring Parties. *See Constitution Party of Pa. v. Cortes (“CPPA II”),* 116 F.Supp. 3d 486 (E.D. Pa. 2015). The Commonwealth appealed, and this Court affirmed. *See Constitution Party of Pa. v. Cortes (“CPPA III”),* No.

¹ Plaintiff-Appellants adopt the name “Aspiring Parties” in accordance with this Court’s prior opinion in this case. *See Constitution Party of Pa. v. Aichele (“CPPA I”),* 757 F.3d 347 (3rd Cir. 2014).

15-3046 (3rd Cir. June 2, 2016) (Slip Op.). Thereafter, the District Court entered a final order, on June 30, 2016, which granted the Aspiring Parties injunctive relief and disposed of all parties' remaining claims. JA 3. In addition, however, the District Court's June 30, 2016 order imposed new requirements on the Aspiring Parties, which were not contained in the statutory provisions held unconstitutional in this case. JA 4. The Aspiring Parties therefore appeal from that order, only insofar as it imposes such new requirements. They timely filed their Notice of Appeal on July 29, 2016. JA 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The questions presented for review are:

1. Whether the new county-based signature distribution requirements that the District Court imposed in its June 30, 2016 order are unconstitutional under *Moore v. Ogilvie*, 394 U.S. 814 (1969), and its progeny?
2. Whether the District Court lacked jurisdiction to impose such distribution requirements *sua sponte*, where the statutory provisions held unconstitutional in this case did not contain them, and the Legislature itself has never imposed them on the Aspiring Parties or those similarly situated?

The constitutionality of the county-based distribution requirements contained in the District Court's June 30, 2016 order, and the District Court's authority to impose them *sua sponte*, was first raised in telephonic hearings that the District Court held on multiple days immediately preceding entry of that order, JA 6-7 (Dkt. Nos. 91-94, 96), as memorialized in the Letter Brief that the Aspiring Parties submitted on June 24, 2016. JA 20.

STATEMENT OF RELATED CASES

This litigation has resulted in two reported decisions thus far. *See CPPA I*, 757 F.3d 347 (3rd Cir. 2014) (reversing dismissal and remanding for judgment on the merits); *CPPA II*, 116 F.Supp. 3d 486 (E.D. Pa. 2015) (granting summary judgment to the Aspiring Parties). It has also resulted in one precedential decision that is not yet reported. *See CPPA III*, No. 15-3046 (3rd Cir. June 2, 2016) (affirming summary judgment in the Aspiring Parties' favor).

Additionally, in April 2009, some of the Plaintiff-Appellants in this case were parties to an action in the federal District Court for the Eastern District of Pennsylvania, which challenged the constitutionality of one of the statutory provisions challenged herein. *See Constitution Party of Pennsylvania v. Cortes*, 712 F. Supp. 2d 387 (E.D. Pa. 2010). The District Court dismissed that case on standing and ripeness grounds, *see id.*, and this Court affirmed in an unreported opinion. *See Constitution Party of Pennsylvania v. Cortes*, No. 10-3205 (3rd Cir. May 19, 2011).

STATEMENT OF THE CASE

This appeal arises at the tail end of litigation the Aspiring Parties initiated more than four years ago, in May 2012, to challenge the constitutionality of Pennsylvania's statutory scheme for regulating non-major party candidates' access to the ballot. The Aspiring Parties specifically challenged the constitutionality of the provision requiring them to submit nomination papers with a specified number of signatures, *see* 25 P.S. § 2911(b), in conjunction with the provision authorizing private parties to challenge such nomination papers and collect litigation costs from the defending candidates. *See* 25 P.S. § 2937.² The Aspiring Parties have prevailed on the merits in that litigation. The District Court held that Sections 2911(b) and 2937 are unconstitutional as applied, and this Court affirmed. *See CPPA II*, 116 F.Supp. 3d 486 (E.D. Pa. 2015), *aff'd*, *CPPA III*, No. 15-3046 (3rd Cir. June 2, 2016). Further, following this Court's decision in *CPPA III*, on June 30, 2016, the District Court entered an order enjoining the Commonwealth from enforcing those provisions against the Aspiring Parties, and that injunction is to remain in effect until the Legislature enacts remedial legislation. JA 3.

Despite prevailing on the merits, the Aspiring Parties have filed this appeal because, in addition to enjoining enforcement of Sections 2911(b) and 2937, the

² Pennsylvania statutes are cited by reference to Purdon's Pennsylvania Statutes.

District Court’s June 30, 2016 order imposed new county-based signature distribution requirements upon parties that must submit nomination papers pursuant to Section 2911(b).³ JA 4. This aspect of the District Court’s order is in direct conflict with long-settled Supreme Court precedent holding such distribution requirements unconstitutional, because they violate the “one man, one vote” principle as applied to ballot access regulations. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (striking down, on equal protection grounds, Illinois statute that imposed a county-based signature distribution requirement on nomination petitions submitted by new political parties). Moreover, the distribution requirements are nowhere to be found in Section 2911(b) as enacted by the Legislature. *See* 25 P.S. § 2911(b). Ye they are now part of Pennsylvania law – not because a duly elected, deliberative body enacted them, but only because the District Court, acting *sua sponte*, imposed them as part of the “relief” it granted the Aspiring Parties when they prevailed in this case. JA 4.

Apart from the unconstitutional distribution requirements it imposed, the District Court’s disposition of the merits of this case was unassailable. Accordingly, the Aspiring Parties do not appeal from the District Court’s June 30,

3 The District Court’s order applied to the Aspiring Parties only, JA 3, but the Commonwealth construed it to apply to all parties who submit nomination papers pursuant to Section 2911(b).

2016 order insofar as it enjoins the Commonwealth from enforcing Sections 2911(b) and 2937, nor insofar as it grants the Aspiring Parties affirmative relief from the operation of those provisions. The Aspiring Parties appeal from that order only insofar as it imposes the new county-based distribution requirements, because they are unconstitutional under *Moore* and its progeny, and because the District Court lacked jurisdiction to enter them in the first instance.

STATEMENT OF FACTS

The facts of this case have been set forth at length in the reported decisions of this Court and the District Court, and they need not be repeated here. *See CPPA I*, 757 F.3d at 350-56; *CPPA II*, 116 F.Supp. 3d at 488-98. In brief, the Aspiring Parties initiated this action pursuant to 42 U.S.C. § 1983. They alleged that Pennsylvania’s ballot access scheme for non-major party candidates is unconstitutional, because it requires them both to submit nomination papers pursuant to Section 2911(b), and to bear the expense of validating those nomination papers when challenged by a private party pursuant to Section 2937 – including paying the challengers’ litigation costs, in cases where a court deems it “just”. *See CPPA I*, 757 F.3d at 349-50. In their Complaint (and their Amended Complaint), the Minor Parties asserted three Counts under the First and Fourteenth Amendments, and requested both declaratory and injunctive relief. *See id.* at 356.

The District Court initially dismissed the case, but this Court reversed. *See CPPA I*, 757 F.3d 347. On remand, the District Court granted summary judgment to the Aspiring Parties, and held Sections 2911(b) and 2937 unconstitutional as applied. *See CPPA II*, 116 F.Supp. 3D 486. The Commonwealth appealed, and this Court affirmed. *See CPPA III*, No. 15-3046 (3rd Cir. June 2, 2016).

Meanwhile, on February 4, 2016, Secretary Cortes had issued formal guidance to the Aspiring Parties, which stated that, despite the District Court's judgment holding Section 2911(b) unconstitutional as applied, he intended to enforce that provision against them in the 2016 election cycle. *See CPPA III*, Slip Op. at 26-27. In its decision affirming that judgment, this Court expressly concluded that such guidance is "in clear violation" thereof. *Id.* at 27. Therefore, one day after this Court entered that decision, the Aspiring Parties requested that Secretary Cortes issue new guidance, consistent with the District Court's judgment, which would establish constitutional procedures for them to place their candidates on the ballot in Pennsylvania's 2016 general election. JA 15-16. Secretary Cortes failed to do so. Consequently, on June 17, 2016, the Aspiring Parties filed a motion for injunctive relief, which requested that the District Court enjoin the Commonwealth from enforcing Sections 2911(b) and 2937 against them. JA 8-10 (Dkt. No. 90).

In their motion, the Aspiring Parties also requested that the District Court grant them affirmative relief, in the form of an order directing Secretary Cortes to place their candidates on the 2016 general election ballot by virtue of the Aspiring Parties' demonstrated support among the electorate, or in the alternative, based on their compliance with the signature requirements imposed upon the major parties pursuant to 25 P.S. 2872.1. JA 8-9 (Dkt. No. 90). The District Court held multiple telephonic hearings on the motion, during the course of which it requested that the Aspiring Parties and the Commonwealth each submit a proposed order. (Dkt. Nos. 91-94, 96). Both parties did so on June 28, 2016. JA 25-26, 29-31.

The Commonwealth's proposed order included county-based signature distribution requirements that would apply to nomination papers submitted for any office except President and United States Senator. JA 29-30.⁴ The Aspiring Parties vigorously opposed the Commonwealth's request that the District Court establish such distribution requirements *sua sponte*, when the Legislature itself had never done so. On June 24, 2016, they submitted a letter brief citing ten federal court cases, including the Supreme Court's decision in *Moore v. Ogilvie*, which hold that

⁴ The apparent explanation for this exception is that such distribution requirements had already been held unconstitutional as applied to major party candidates for those offices. *See Elliott v. Shapp*, No. 76-cv-1277 (E.D. Pa. 1979) (Cahn, J.) (unreported) (striking down requirement that such candidates obtain signatures of 100 registered voters from each of 10 counties).

county-based distribution requirements are unconstitutional because they violate the “one man, one vote principle” as applied to ballot access regulations. JA 20-21.

The Commonwealth submitted a letter brief in response on June 25, 2016. JA 23-24. The Commonwealth’s brief completely failed to address the precedent the Aspiring Parties had cited, and it cited almost no law in support of its own position. JA 23-24. Instead, the Commonwealth contended that its request that the District Court establish new county-based distribution requirements had “no bearing on ... the subject of this lawsuit.” JA 23. The Commonwealth also contended, falsely, that its proposal “mirrors the [requirement] that has long applied to major party candidates seeking to appear on the primary election ballot.” JA 23. In fact, the distribution requirements that the Commonwealth asked the District Court to impose upon the Aspiring Parties are 2.5 times more burdensome than those that apply to major party candidates. *Compare* JA 29-30 (Commonwealth’s proposed order) *with* 25 P.S. 2872.1 (statute establishing signature requirements for major party candidates).

On June 30, 2016, the District Court entered its order granting the Aspiring Parties’ motion for injunctive relief. JA 3-5 (Dkt. No. 97). The order enjoins the Commonwealth from enforcing the signature requirement set forth in Section 2911(b) in conjunction with the challenge process set forth in Section 2937. JA 5.

With respect to the affirmative relief the Aspiring Parties requested, JA 8-9, however, the District Court adopted the Commonwealth's proposed order verbatim. *Compare* JA 3-4 *with* JA 29-31. Consequently, although the District Court's order establishes substantially lower signature requirements that apply under Section 2911(b), and further directed that costs may not be assessed against the Aspiring Parties pursuant to Section 2937, it also included county-based distribution requirements for all offices except President and United States Senator. JA 3-5. Specifically, the District Court's order requires that candidates for Governor submit 5,000 signatures, "including at least two hundred fifty from each of at least ten counties," and that candidates for other offices submit 2,500 signatures, "including at least two hundred fifty from each of at least five counties." JA 4.

STANDARD OF REVIEW

This Court exercises plenary review over the purely legal questions raised in this appeal, including the constitutionality of the county-based distribution requirements imposed by the District Court, and whether the District Court had jurisdiction to impose such requirements. *See Mirza v. Insurance Adm'r of America, Inc.*, 800 F. 3d 129, 133 n.4 (3rd Cir. 2015) (where an appeal raises "purely legal questions ... an appellate court exercises plenary review"); *US v. Voigt*, 89 F. 3d 1050, 1064 (3rd Cir. 1996) ("When the district court decides a

constitutional claim based on a developed factual record, we exercise plenary review of the district court’s legal conclusion”); *see also CPPA I*, 757 F.3d at 356 n.12 (“We exercise plenary review over all jurisdictional questions...” (citing *Belitskus v. Pizzingrilli*, 343 F. 3d 632, 639 (3rd Cir. 2003))).

SUMMARY OF ARGUMENT

It is a matter of settled law that county-based signature distribution requirements are unconstitutional, because they violate the “one man, one vote” principle, and thus run afoul of the Equal Protection Clause. The Supreme Court’s decision in *Moore v. Ogilvie*, and more than a dozen federal court cases following it, make that abundantly clear. The District Court’s June 30, 2016 order imposing such requirements is in direct conflict with this line of precedent, and therefore it cannot be sustained. That order also should be vacated, insofar as it imposes unconstitutional distribution requirements, on the additional ground that the District Court lacked jurisdiction to establish such requirements in the first instance.

ARGUMENT

I. The County-Based Distribution Requirements Imposed By the District Court Are Unconstitutional Under *Moore v. Ogilvie* and Its Progeny.

More than 45 years ago, the Supreme Court struck down the state of Illinois’

county-based signature distribution requirements on the ground that they violate the “one man, one vote” principle as applied to ballot access regulations, and thus deny voters in more populous counties the equal protection of law guaranteed by the Fourteenth Amendment. *See Moore*, 394 U.S. at 818-19. Since then, no fewer than 13 federal courts have relied on *Moore* to invalidate other states’ county-based distribution requirements. Based on this line of precedent, it is a matter of settled law that such distribution requirements – including those imposed by the District Court in this case – are unconstitutional.

In *Moore*, independent candidates for President and Vice President challenged an Illinois law requiring that they submit a nomination petition containing the signatures of 25,000 qualified voters, including “the signatures of 200 qualified voters from each of at least 50 counties.” *Id.* at 815. At the time, 93.4 percent of the state’s voters resided in its 49 most populous counties, whereas only 6.6 percent resided in the remaining 53 counties. *See id.* at 816. The county-based distribution requirement thus diluted the power of voters in more populous counties to nominate candidates, relative to the power of voters in less populous counties. *See id.*

Before addressing the merits of the Illinois law, the Court rejected the state’s preliminary objection that the case was non-justiciable. “When a State makes

classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy is presented,” it reasoned. *Id.* at 817 (citing *Baker v. Carr*, 369 U.S. 186, 198-204 (1962)). The Court then found the controversy to fall squarely in line with its recent decisions in legislative apportionment cases. Relying on that precedent, it had no trouble concluding that Illinois’ county-based distribution requirement violated the Equal Protection Clause:

How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Id. at 817 (quoting *Gray v. Sanders*, 372 U. S. 368, 379 (1963) (striking down Georgia’s county-unit system in statewide primary elections)). As the Court explained, “the right of suffrage can be denied by a debasement or a dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.* at 818 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

Applying these principles to the Illinois statute, the Court found the county-

based distribution requirement it imposed suffered the same defect as the statutory schemes struck down in the Court's apportionment cases. The law made it impossible for the electorate in 49 counties containing 93.4 percent of the state's registered voters to form a new political party and place their candidates on the ballot, while enabling only 25,000 of the remaining 6.6 percent of registered voters to do so. *See id.* at 819. It "thus discriminates against the residents of the populous counties of the State in favor of rural sections." *Id.* In view of such discrimination, the Court expressly rejected the state's asserted justification for the law, that it was intended to ensure "statewide support" for new political parties. *See id.* at 818-19. "This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike," the Court observed, "contrary to the constitutional theme of equality among citizens in the exercise of their political rights." *Id.* Because the law granted greater voting strength to certain groups over others, the Court concluded, it "is hostile to the one man, one vote basis of our representative government." *Id.* at 819.

A few months after the Supreme Court decided *Moore*, a federal court in Michigan struck down that state's county-based distribution requirement. *See Socialist Workers Party v. Hare*, 304 F.Supp. 534 (E.D. Mich. 1969). Michigan's law required that a new political party submit nomination petitions with signatures

equal to at least 1 percent of the votes cast for the last successful candidate for secretary of state, and that “the petitions shall be signed by at least 100 residents in each of at least 10 counties of the state and not more than 35% of the minimum required number of the signatures may be by resident electors of any one county.” *Id.* at 535. In holding the provision unconstitutional, the Court rejected the state’s attempts to distinguish it from the distribution requirement struck down in *Moore*. That the Michigan statute required signatures from only 10 counties, whereas the Illinois statute in *Moore* required signatures from 50 counties, was “of no constitutional significance,” the Court found. *See id.* at 536. The law still applied “a rigid, arbitrary formula,” in violation of the “one man, one vote” principle. *Id.* (quoting *Moore*, 394 U.S. at 818). Similarly, it was not relevant that the Michigan statute imposed a lesser burden on new political parties than the Illinois statute, because the rights protected in *Moore* were those of “*voters to equality in the exercise of their political rights.*” *Id.* (emphasis original). *Moore* establishes “a clear mandate,” the Court concluded, and thus enjoined the Michigan statute. *See id.*

The constitutionality of county-based distribution requirements next arose in New York, which required independent candidates for statewide office to submit a nomination petition signed by at least 12,000 voters, “of whom at least fifty shall

reside in each county of the state, and counties of Fulton and Hamilton to be considered as one county.” See *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984, 986 (S.D. N.Y. 1970). In this case, too, the Court invalidated the statute, finding it “constitutionally indistinguishable from the Illinois statute” struck down in *Moore*. *Id.* at 991. Once again, the problem was the statute’s use of a “rigid, arbitrary formula,” which applied to “sparsely settled counties and populous counties alike.” See *id.* at 990 (citing *Moore*, 394 U.S. at 818-19). “By overweighting and overvaluing the votes of those living in less populous counties,” the Court found, “the votes of the majority of the electorate have been diluted and undervalued.” *Id.* at 990-91 (citing *Reynolds*, 377 U.S. at 563). Such discrimination, the Court held, “is constitutionally impermissible.” *Id.* at 991.

That same year, a federal court struck down Ohio’s requirement that independent candidates for statewide office submit nomination petitions with “the signatures of at least two hundred electors from each of at least thirty counties,” and further provided that “no more than one fourth of [the signatures] needed” could come from any one county. See *Sweetenham v. Rhodes*, 318 F.Supp. 1262, 1271 (S.D. Oh. 1970). Such a distribution requirement, the Court found, “results in a marked dilution of the voting strength of urban voters as opposed to rural voters, violating the principle of one man, one vote.” *Id.* (citing *Gray*, 372 U.S. 368;

Reynolds, 377 U.S. 533). The Court thus relied on the same reasoning in *Moore* as the Courts had in *Hare* and *Rockefeller*, and held Ohio's distribution requirement unconstitutional. *See id.* at 1272 (citing *Moore*, 394 U.S. at 818-19).

The county-based distribution requirement in Massachusetts was next to fall. *See Baird v. Davoren*, 346 F.Supp. 515 (D. Mass. 1972). The Massachusetts law required that a new political party submit a nomination petition containing signatures equal in number to the entire vote cast for governor in the previous election, and that "no more than one third of the signatures shall be from any one county." *Id.* at 517-18. Once again, the Court found that such a distribution requirement "has the effect of discriminating between voters in the populous and sparsely settled counties of the state, and limits the rights of voters from the most populous counties." *Id.* at 522. Accordingly, the Court held the Massachusetts law to be contrary to the "one man, one vote" principle, and thus in violation of the Equal Protection Clause. *See id.* (citing *Moore*, 394 U.S. at 819; *Gray*, 372 U.S. at 381; *Hare*, 304 F.Supp. 534).

The issue next arose again in Illinois, which had enacted a successor statute to the one struck down in *Moore*. This statute required that political parties seeking statewide ballot access submit a nomination petition with signatures from at least 25,000 qualified voters, "not more than 13,000 of which may be counted from any

one county.” *Communist Party of Illinois v. State Bd. of Elections*, 518 F.2d 517, 518 (7th Cir. 1975). “This two-county requirement,” the Seventh Circuit concluded, “like the fifty county requirement in *Moore*, ‘discriminates against the residents of the populous counties of the state in favor of rural sections.’” *Id.* at 521 (quoting *Moore*, 394 U.S. at 819). The Court therefore held the law unconstitutional on equal protection grounds. *See id.* at 521-22.

A federal court in Rhode Island struck down that state’s county-based distribution requirement, even though the law only required an independent candidate for president to submit a nomination petition with 1,000 signatures, including “25 from each of the five counties in the state.” *See McCarthy v. Garrahy*, 460 F.Supp. 1042, 1043 (D. R.I. 1978). The relatively minor burden imposed by the statute was “irrelevant,” the Court concluded. *Id.* at 1050. What mattered was that the statute, like those in all the other cases following *Moore*, “dilutes the value of the votes of those living in more populous counties in favor of those living in less populous counties.” *Id.* at 1046. Therefore, the Court reasoned, “the principle of *Moore* is implicated and the statute can be upheld only by a showing that it promotes a compelling state interest.” *Id.* at 1050. Finding no such interest, the Court permanently enjoined the state from enforcing it. *See id.*

Although it was not formally reported, *Elliott v. Shapp, supra*, has particular

relevance here, because it was decided by the same District Court as the one from which this appeal arises. *See Elliott v. Shapp*, No. 76-cv-1277 (E.D. Pa. 1979) (Cahn, J.) (unreported). In *Elliott*, the Court struck down a statutory provision that imposed county-based distribution requirements on major party candidates for federal office who sought access to the primary election ballot. The same statutory scheme also imposed county-based distribution requirements on candidates for state office, *see* 25 P.S. § 2872.1, but the Legislature responded to *Elliott* by repealing only the specific provision that applied to candidates for federal office. *See id.* This explains why, contrary to the weight of the foregoing authority, Pennsylvania continues to impose county-based distribution requirements upon major party candidates for state office, even though the same requirements have been invalidated as applied to federal candidates. *See Trinsey v. Mitchell*, 851 F.Supp. 167, 170 n.6 (E.D. Pa. 1994) (Cahn, J.) (discussing *Elliott* and suggesting that such requirements are also unconstitutional as applied to candidates for state office, due to “the dilutive impact such a scheme has on the signatures of voters who reside in more heavily populated counties”).

Notwithstanding Pennsylvania’s persistence in imposing county-based distribution requirements on major party candidates for state office, *Moore* and the line of cases following it make clear that such requirements run afoul of the Equal

Protection Clause. In each of the foregoing cases, federal courts either explicitly or implicitly applied strict scrutiny to invalidate the challenged requirements. Without belaboring the point, however, it is worth noting that more recent decisions have also invalidated county-based distribution requirements under the more flexible analysis the Supreme Court prescribed for review of ballot access laws in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). *See, e.g., Blomquist v. Thomson*, 739 F.2d 525, 526 (10th Cir. 1984) (applying *Anderson* analysis to strike down Wyoming's county-based distribution requirement); *Libertarian Party of Nebraska v. Beerman*, 598 F.Supp. 57, 61 (D. Neb. 1984) (applying *Anderson* analysis to strike down Nebraska's county-based distribution requirement). Even more recently, several courts have relied on this same line of precedent to invalidate county-based distribution requirements for ballot initiatives. *See, e.g., ACLU of Nevada v. Lomax*, 471 F.3d 1010 (9th Cir. 2006); *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073 (9th Cir. 2003); *Montana Public Interest Research Group v. Johnson*, 361 F.Supp 2d 1222 (D. Mont. 2005); *Gallivan v. Walker*, 54 P.3d 1069 (Utah Supreme Ct. 2002).

Against the weight of this authority, which the Aspiring Parties cited in their letter brief to the District Court, JA 20-21, the Commonwealth cited only one decision from a lower court in an effort to support its contention that county-based

distribution requirements are constitutionally permissible. JA 23 (citing *Berg v. Kane*, 999 F.Supp 633 (E.D. Pa. 1998), *appeal dismissed*, 156 F.3d 1224 (3rd. Cir. 1998)). The precedential value of *Berg* is limited, however, because it involved the denial of a motion for preliminary injunctive relief, not a final decision on the merits of the case. *See id.* at 634. Moreover, the Court declined to grant such relief because it found “the vagueness of [the] record” regarding the burden imposed on the plaintiff did not justify issuance of “what would be ... an unduly intrusive preliminary injunction.” *Id.* at 636. As the Court observed, the plaintiff had come very close to complying with the distribution requirement he challenged, and the Court found it unclear whether he fell short due to his own “carelessness ... rather than to any burden of constitutional proportions.” *Id.* As several courts have explained, however, “the rights protected in *Moore v. Ogilvie* are not those of political party candidates, but rather *the rights of the voters to equality in the exercise of their political rights.*” *Hare*, 304 F.Supp. at 536 (emphasis original). Consequently, “the degree of burden imposed by a statute which dilutes voting power is irrelevant” to the constitutional analysis under *Moore*. *McCarthy*, 460 F.Supp. at 1050. *Berg* thus represents a distinctly minority view, which other courts have not followed, and it cannot sustain the District Court’s error in imposing unconstitutional distribution requirements in this case.

II. The District Court Lacked Jurisdiction to Impose County-Based Signature Distribution Requirements Upon the Aspiring Parties.

In cases where state ballot access laws are held unconstitutional, and the legislature fails to enact remedial legislation, the proper remedy is for the court to place candidates on the ballot provided that they can show some evidence of support among the electorate. *See, e.g., McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J., in Chambers) (placing candidate on Texas ballot); *Williams v. Rhodes*, 393 U.S. 17, 89 S.Ct. 1, (1968) (Stewart, J., in Chambers) (placing candidate on Ohio ballot); *Goldman-Frankie v. Austin*, 727 F.2d 603 (6th Cir. 1984) (affirming order placing candidate on Michigan ballot); *McCarthy v. Askew*, 540 F.2d 1254, 1255 (5th Cir. 1976) (*per curiam*) (affirming order placing candidate on Florida's ballot); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008) (placing political parties' entire slates of candidates on ballot); *Hall v. Austin*, 495 F.Supp. 782 (E.D. Mich. 1980) (placing candidate on Michigan ballot); *McCarthy v. Noel*, 420 F.Supp. 799 (D.C. R.I. 1976) (placing candidate on Rhode Island ballot); *McCarthy v. Tribbitt*, 421 F.Supp. 1193 (D.C. Del. 1976) (placing candidate on Delaware ballot); *McCarthy v. Exon*, 424 F.Supp. 1143 (D. Neb.) (placing candidate on Nebraska ballot), *summ. aff'd.*, 429 U.S. 972 (1976); *McCarthy v. Austin*, 423 F.Supp. 990 (W.D. Mich. 1976) (placing candidate on Michigan

ballot). As these cases amply demonstrate, it is well within the federal courts' equitable powers to fashion such relief. But not one of them holds that a federal court has the power to enact entirely new substantive requirements. The District Court therefore exceeded its authority, by imposing new county-based distribution requirements on the Aspiring Parties, which are wholly absent from the provisions it struck down. Because the District Court lacked jurisdiction to impose such requirements, that part of its June 30, 2016 order should be vacated.

CONCLUSION

For the foregoing reasons, the District Court's June 30, 2016 order should be vacated in part, insofar as it imposes county-based signature distribution requirements, but otherwise should remain undisturbed.

Dated: September 26, 2016

Respectfully submitted,

s/Oliver B. Hall

Oliver B. Hall

CENTER FOR COMPETITIVE DEMOCRACY

1835 16th Street NW, Suite 5

Washington, D.C. 20009

(202) 248-9294 (ph)

oliverhall@competitivedemocracy.org

CERTIFICATE OF BAR MEMBERSHIP

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

/s/ Oliver B. Hall

Oliver B. Hall

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a) AND L.A.R. 31.1

This brief complies with the word limit requirements of F.R.A.P. 32(a) because:

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

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

- a. The text of this electronic brief is identical to the text of the paper copies;
- b. AVG Anti-Virus version 2015 has been run on the file containing the electronic version of this brief and no viruses have been detected.

/s/ Oliver B. Hall

Oliver B. Hall

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September 2016, I served a copy of the foregoing Brief of Appellant, including the attached Joint Appendix Volume I of II, on behalf of all Plaintiff-Appellants, by the Court's CM/ECF system, upon the following:

Claudia M. Tesoro
Office of the Attorney General of Pennsylvania
21 South 12th Street, Third Floor
Philadelphia, PA 19107

*Counsel for Appellees Pedro Cortes
and Jonathan M. Marks*

s/Oliver B. Hall
Oliver B. Hall

UNITED STATES COURT OF APPEALS

for the

THIRD CIRCUIT

Case No. 16-3266

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

Appellants,

- v. -

PEDRO CORTES AND JONATHAN M. MARKS,

Appellees.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA AT NO 5:12-CV-02726-LS

JOINT APPENDIX VOLUME I OF II (JA 1-5)

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
Attorneys for Appellant
1835 16th Street NW, Suite 5
Washington, D.C. 20009
(202) 248-9294 (ph)
oliverhall@competitivedemocracy.org

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

THE CONSTITUTION PARTY OF
PENNSYLVANIA, et al.,

Plaintiffs,

Case No. 5:12-CV-02726

V.

CAROL AICHELE, et al.,

Defendants.

PLAINTIFFS' NOTICE OF APPEAL

PLEASE TAKE NOTICE THAT Plaintiffs Constitution Party of Pennsylvania, Green Party of Pennsylvania, Libertarian Party of Pennsylvania, Joe Murphy, James N. Clymer, Carl J. Romanelli, Thomas Robert Stevens and Ken Krawchuk hereby appeal to the United States Court of Appeals for the Third Circuit, from that portion of this Court’s June 30, 2016 Order found at paragraphs 1(c) – 1(k), inclusive, which requires that candidates submit nomination papers containing a certain number of valid signatures “including at least two hundred fifty from each of at least ten counties,” or “including at least two hundred fifty from each of at least five counties.” Plaintiffs only appeal from the county-based distribution requirements imposed by the foregoing quoted language. Plaintiffs do not appeal from any other aspect of this Court’s order, including the total number of signatures that candidates must submit pursuant to paragraphs 1(c) – 1(k).

Dated: July 29, 2016

Respectfully submitted,

Mark R. Brown
Newton D. Baker/Baker &
Hostetler Professor of Law
Capital University*
614-236-6590 (ph)
MBrown@law.capital.edu

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

*For identification purposes only

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2016, I filed the foregoing Plaintiffs' Notice of Appeal via the Court's CM/ECF system, which will effect service upon all counsel of record in this matter.

/s/ Oliver B. Hall
Oliver B. Hall

Counsel for Plaintiffs

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

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

ORDER

AND NOW, this 30th day of June, 2016, upon consideration of plaintiffs' Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (Doc. No. 90) and after four court conferences with the parties, **IT IS HEREBY ORDERED** that plaintiffs' motion (Doc. No. 90) is **GRANTED** as follows: until such time as the Pennsylvania Legislature enacts a permanent measure amending or modifying the process to place the plaintiff political bodies on the general election ballot, the following rules shall apply to the plaintiff political bodies, the Constitution Party of Pennsylvania, the Libertarian Party of Pennsylvania, and the Green Party of Pennsylvania, with respect to securing placement of their candidates on the general election ballot in Pennsylvania:

1. Candidates for the offices listed below shall present to the Secretary of the Commonwealth by August 1, 2016, and every August 1st thereafter until the Legislature enacts a permanent change in the law and this permanent change is signed by the Governor of Pennsylvania, nomination papers containing at least as many valid signatures of qualified electors of the state or the electoral district, as the case may be, as listed below:

- a. President of the United States: Five thousand.
- b. United States Senate: Five thousand.

- c. Governor: Five thousand including at least two hundred fifty from each of at least ten counties.
- d. Lieutenant Governor: Two thousand five hundred including at least two hundred fifty from each of at least five counties.
- e. Treasurer: Two thousand five hundred including at least two hundred fifty from each of at least five counties.
- f. Auditor General: Two thousand five hundred including at least two hundred fifty from each of at least five counties.
- g. Attorney General: Two thousand five hundred including at least two hundred fifty from each of at least five counties.
- h. Justice of the Supreme Court: Two thousand five hundred including at least two hundred fifty from each of at least five counties.
- i. Judge of the Superior Court: Two thousand five hundred including at least two hundred fifty from each of at least five counties.
- j. Judge of the Commonwealth Court: Two thousand five hundred including at least two hundred fifty from each of at least five counties.
- k. For any other office to be filled by the vote of the electors of the state at large: Two thousand five hundred including at least two hundred fifty from each of at least five counties.

2. Candidates for non-statewide offices shall present to the Secretary of the Commonwealth by August 1, 2016 and every August 1st thereafter, nomination papers containing at least as many valid signatures of qualified electors of the state or the electoral district, as the case may be, as set forth by 25 P.S. § 2911(b).

3. No candidate of the plaintiff political bodies shall be assessed costs under 25 P.S. § 2937.

4. This Order is intended to replace the signature requirement imposed by 25 P.S. § 2911(b). The defendants are enjoined from enforcing this signature requirement in conjunction with the objection procedure set forth in 25 P.S. § 2937 as applied to nomination papers submitted by the plaintiffs Constitution Party of Pennsylvania, Green Party of Pennsylvania and Libertarian Party of Pennsylvania and by their candidates for office.

5. All other provisions of the Pennsylvania Election Code that do not conflict with this Order continue to apply to the candidates of the plaintiff political bodies.

BY THE COURT:

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