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

REPLY BRIEF ON BEHALF OF APPELLANTS

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Appellants Constitution Party of Pennsylvania ("CPPA"), Green Party of Pennsylvania ("GPPA"), Libertarian Party of Pennsylvania ("LPPA"), Joe Murphy, James Clymer, Carl Romanelli, Thomas Robert Stevens and Ken Krawchuk (collectively, the "Aspiring Parties") respectfully submit this Reply to the brief filed by Appellees Pedro Cortes and Jonathan M. Marks (together, "the Commonwealth") on November 30, 2016 ("Comm. Br.").

ARGUMENT

I. The District Court Lacked Jurisdiction to Impose County-Based Distribution Requirements Upon the Aspiring Parties, Because That Issue Was Neither Raised Nor Litigated in This Case.

The Commonwealth does not dispute the fact that this case did not concern county-based distribution requirements in any way, nor can it. As the record confirms, such requirements were never even mentioned in the entire four-plus years between May 2012, when the Aspiring Parties initiated this action, and June 2, 2016, when this Court affirmed the District Court's judgment in their favor. *See Constitution Party of Pa. v. Cortes*, No. 15-3046 (3rd Cir. June 2, 2016). That is because this case involved a challenge to the constitutionality of 25 P.S. §§ 2911(b) and 2937, and neither those provisions nor any other provision of the Pennsylvania Election Code impose county-based distribution requirements upon the Aspiring Parties. Consequently, no issue relating to such requirements was ever raised, much less litigated, in this action.

The Commonwealth nonetheless insists that the District Court had jurisdiction to impose county-based distribution requirements upon the Aspiring Parties by means of its post-judgment order granting their motion for injunctive relief. Comm. Br. at 16-17. According to the Commonwealth, such action presents "no jurisdictional problem," because the District Court had federal question jurisdiction over this case. Comm. Br. at 16. It is too plain for argument, however, that federal question jurisdiction is limited to the questions actually raised in a case. *See generally ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 516 (3rd Cir. 1998) (citing the "fundamental precept that federal courts are courts of limited jurisdiction") (citation omitted). As this Court has explained, "It is one of the settled principles of federal jurisdiction jurisprudence that the federal question must appear on the face of the complaint...." *United Jersey Banks v. Parell*, 783 F.2d 360, 365 (3rd Cir. 1986). Here, neither the Aspiring Parties' Complaint, nor any subsequent filing in this case, up to and including the District Court's final judgment and the accompanying opinion and order, make any reference whatsoever to county-based distribution requirements. *See Constitution Party of Pa. v. Cortes*, 116 F.Supp.3d 486 (E.D. Pa. 2015). It follows that the District Court lacked jurisdiction to decide any issue relating to such requirements.

This Court has recognized that "the limits upon federal jurisdiction, whether

imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *ErieNet, Inc.*, 156 F.3d at 516 (citation omitted). The wisdom of that admonition is amply demonstrated here. The District Court, without the benefit of briefing or argument, acceded to the Commonwealth's request that it impose a county-based distribution requirement upon the Aspiring Parties, apparently in reliance upon the Commonwealth's false claim that such a requirement "mirrors the one 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). The Aspiring Parties were denied the opportunity to raise this objection, however, because the District Court adopted the substance of the Commonwealth's proposed order verbatim on June 30, 2016, only two days after the Commonwealth submitted it. *Compare* JA 3-4 *with* JA 29-31.

In the brief interval between the time when the Commonwealth first asked the District Court to impose county-based distribution requirements upon the Aspiring Parties, and the District Court's entry of its order granting that request,

the Aspiring Parties did submit a letter brief citing ten federal court cases holding such requirements unconstitutional. JA 20-21. But because the District Court adopted the Commonwealth's proposed order verbatim, without entering an opinion to explain its rationale, there is no indication in the record as to why the District Court disregarded such precedent. This underscores, yet again, the impropriety of the District Court's action: there is nothing in the record, apart from the Aspiring Parties' letter brief, JA 20-21, that would enable this Court to review the constitutionality of the county-based signature distribution requirements that the District Court imposed. No evidence was introduced on this issue and no facts were developed. And that is because such requirements are distinct from and unrelated to the specific claims and issues the parties actually litigated in this case.

Perhaps the best demonstration of the District Court's error in exceeding its jurisdiction comes from the Commonwealth itself. The Commonwealth states that the District Court "borrowed" the county-based distribution requirements it imposed "from H.B. 342 and incorporated [them] into its order." Comm. Br. At 18. But the Legislature, once notified that such requirements are constitutionally suspect, determined that H.B. 342 should not be enacted in its present form. The District Court, despite receiving the same notice, JA 20-21, proceeded to impose those requirements itself, by means of an order ostensibly granting the Aspiring

Parties injunctive relief from Sections 2911(b) and 2937. JA 3-5. The District Court thus abandoned its role as arbiter over the case and controversy before it, and improperly assumed the role of legislator. In so doing, the District Court exceeded its jurisdiction.

II. The County-Based Distribution Requirements That the District Court Imposed Upon the Aspiring Parties Are Unconstitutional Under *Moore v. Ogilvie* and Its Progeny.

In their opening brief, as in their letter brief to the District Court, JA 20-21, the Aspiring Parties cited no fewer than 10 cases striking down county-based distribution requirements. This long line of precedent, the Aspiring Parties contend, demonstrates that the county-based distribution requirements imposed by the District Court in this case are unconstitutional. Remarkably, the Commonwealth does not dispute that contention. Nowhere in its brief does the Commonwealth attempt to argue that these requirements can withstand constitutional scrutiny. That omission is telling. It shows that the Commonwealth is unable to mount a direct defense with respect to the primary issue in this appeal. As a result, it resorts instead to obfuscation.

A. The Commonwealth's Reliance on Cases Upholding Distribution Requirements Based on Congressional Districts Is Misplaced.

The Commonwealth first attempts to demonstrate that county distribution requirements are not "*per se* unconstitutional" or "absolutely forbidden" under

Moore v. Ogilvie, 394 U.S. 814 (1969), and that "*Moore* did not establish a categorical prohibition on distribution requirements." Comm. Br. at 18-19. Contrary to the Commonwealth's assertion, however, the Aspiring Parties did not make such claims. They argue only that the distribution requirements imposed by the District Court are unconstitutional for the same reasons as those struck down in *Moore* and its progeny – because they violate the "one man, one vote" principle. Although the Commonwealth complains that the record in this case lacks the "relevant statistical information about the various counties" that was available to the Court in *Moore*, Comm. Br. at 19, that is entirely due to the fact that this issue was not properly raised in the District Court proceedings, and never should have been decided. Moreover, this Court may take judicial notice of the fact that Pennsylvania's counties, like the Illinois counties in *Moore*, do in fact vary widely with respect to population.[1] As a result, the more than 1.5 million voters in Philadelphia cannot join together to place a candidate on the ballot under the distribution requirements imposed by the District Court, whereas a fraction of that population living in Pennsylvania's more rural counties can.[2]

1 *See In re NAHC, Inc. Securities Litigation*, 306 F. 3d 1314, 1331 (3rd Cir. 2002) (Rule 201(b), Federal Rules of Evidence permits a district court to take judicial notice of facts that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.")

2 *See* Pennsylvania Total Population By County, available at http://www.us-

In an effort to avoid the obvious conclusion that the distribution requirements imposed by the District Court are unconstitutional under *Moore* and its progeny, the Commonwealth asserts that these cases "are not dispositive now." Comm. Br. at 20. According to the Commonwealth, the "legal landscape is neither as uniform nor as one-sided as the Aspiring Parties would have this Court believe." But it is the Commonwealth, not the Aspiring Parties, that is being disingenuous on this point. It claims that, "when it comes to geographical distribution requirements, different courts in different jurisdictions have reached different conclusions based on different records." Comm. Br. at 20. This appeal does not merely concern "geographical distribution requirements," however, but county-based distribution requirements. Thus the cases cited by the Commonwealth, which uphold distribution requirements based on congressional districts, are clearly distinguishable from those involving county-based distribution requirements. Comm. Br. at 20 (citing *Udall v. Bowen*, 419 F. Supp. 746 (S.D. Ind. 1976); *Moritt v. Governor of the State of New York*, 366 N.E.2d 1285 (N.Y. 1977)). Because congressional districts – unlike counties – are nearly uniform in population, distribution requirements based on them do not raise the same constitutional concerns. They do not implicate the "one man one vote" principle.

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places.com/Pennsylvania/population-by-County.htm (last visited December 19, 2016).

The Commonwealth's reliance on certain state court decisions is similarly misplaced. Comm. Br. at 22 (citing *Cavanaugh v. Schaeffer*, 444 A.2d 1308 (Pa. Cmwlth.), *aff'd*, 444 A.2d 1165 (Pa. 1982). As the Commonwealth concedes, such precedent is not binding on this Court. Comm. Br. at 22. Additionally, the very provisions struck down in this case, Sections 2911(b) and 2937, were previously upheld by the Pennsylvania Supreme Court. *See Constitution Party of Pa.*, 116 F.Supp.3d at 505 (citing *In Re: Nader*, 905 A.2d 450, 459 (Pa. 2006)). This underscores the need for this Court to conduct its own constitutional analysis of the issues.

B. The Analytical Framework Established By *Anderson v. Celebrezze* Does Not Alter the Analysis of County-Based Distribution Requirements Under *Moore*.

The Commonwealth next suggests that "subsequent legal developments" since *Moore* was decided, and particularly the Supreme Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), mean that "distribution requirements have to be judged accordingly." Comm. Br. at 24. The significance of this claim is unclear. The Commonwealth does not contend, for example, that *Moore* is no longer good law, nor could it. Instead, the Commonwealth returns to its refrain that "different courts may come to different conclusions" with respect to the constitutionality of county-based distribution requirements. Comm. Br. at 25. That

is incorrect. Once again, the cases the Commonwealth cites to support that contention involve distribution requirements based on congressional districts – not counties – and thus they do not implicate the "one man, one vote" principle. Comm. Br. at 25 (citing *Libertarian Party of Nebraska v. Bond*, 764 F.2d 538, 541-44 (10th Cir. 1984); *Erard v. Johnson*, 905 F.Supp.2d 782, 800 (E.D. Mich. 2012). Moreover, as the Commonwealth concedes, Comm. Br. at 26 n.18, the Aspiring Parties cite several cases decided post-*Anderson*, which also hold county-based distribution requirements unconstitutional.

C. The County-Based Distribution Requirements That Pennsylvania Applied to Major Party Candidates Were Held Unconstitutional in the Only Federal Court Case Challenging Them.

The Commonwealth's assertion that Pennsylvania's county-based distribution requirements "have been found constitutional" again relies on a non-binding state court decision, Comm. Br. at 27 (citing *Petition of Berg*, 713 A.2d 1106 (Pa. 1998)), while disregarding the only federal court case to address the issue, *Elliott v. Shapp*, No. 76-1277 (E.D. Pa. Mar. 9, 1979) (Cahn, J.) (unreported), which held those requirements unconstitutional. In *Elliott*, the Court struck down the distribution requirements that applied to candidates for President and United States Senate, because those were the only two provisions specifically at issue in the case. But Judge Cahn later opined, in dicta, that the distribution

requirements also would be unconstitutional as applied to other offices. *See Trinsey v. Mitchell*, No. 94-0976, 1994 WL 70103 (E.D. Pa. Feb. 28, 1994). The Commonwealth's suggestion that such requirements have been "upheld" is therefore incomplete at best. Comm. Br. at 26. In fact, the most persuasive authority to address the question is in accord with the long line of cases that rely on *Moore* to strike down county-based distribution requirements. And while the Commonwealth attempts to diminish the significance of that settled line of precedent, it cannot dispute the fact that virtually every federal court to consider the question has held that county-based distribution requirements are unconstitutional.

D. The District Court's Imposition of County-Based Distribution Requirements Upon the Aspiring Parties Was Neither Reasonable Nor Fair.

Finally, it bears repeating that the Commonwealth itself does not defend the constitutionality of the county-based distribution requirements that the District Court imposed. Nowhere in its brief does the Commonwealth attempt to establish that these requirements can withstand constitutional scrutiny. Given that this is the primary issue the Aspiring Parties raise on appeal, the Commonwealth's failure to address it can only be construed as a tacit admission. The Commonwealth does not defend the constitutionality of the distribution requirements imposed by the

District Court because it cannot.

The Commonwealth's position ultimately appears to be that the Aspiring Parties should be content to labor under these requirements despite the fact that they are unconstitutional. After all, the Commonwealth asserts, the District Court gave the Aspiring Parties "almost exactly what they asked for". Comm. Br. at 29. But that simply is not true. The District Court gave the Commonwealth exactly what it asked for – it adopted the substance of the Commonwealth's proposed order verbatim, *compare* JA 3-4 *with* JA 29-31 – and did so over the Aspiring Parties' strenuous objections. JA 20-21. Moreover, the price for obtaining relief from the unconstitutional operation of Sections 2911(b) and 2937 cannot be that the Aspiring Parties must accept a new set of unconstitutional requirements.

It makes no difference that major party candidates continue to be subject to county distribution requirements. As the discussion *supra* at Part II.C demonstrates, those requirements are a relic of the Legislature's failure to take appropriate remedial action following the decision in *Elliott*. But they do not justify imposing the same unconstitutional requirements on the Aspiring Parties – particularly under the circumstances here, where the Aspiring Parties were denied a full and fair opportunity to litigate the issue and demonstrate that such requirements are in fact unconstitutional.

As a final point, the Commonwealth notes that the Aspiring Parties were able to place several candidates on the general election ballot in 2016. Therefore, it contends, "evidently the Aspiring Parties were not held back by the county-distribution requirements." Comm. Br. at 30. But this contention misapprehends the rationale behind *Moore* and the cases following it. As one such case explained, the rights protected in *Moore* were not those of political parties, but those of "*voters to equality in the exercise of their political rights.*" *See Socialist Workers Party v. Hare*, 304 F.Supp. 534, 536 (E.D. Mich. 1969) (emphasis original). Consequently, the relevant issue is not the burden imposed upon the political parties that must comply with the distribution requirements, but the dilution of voters' rights in populous counties like Philadelphia, Allegheny and Montgomery, as compared to voters in rural counties like Cameron, Sullivan and Forest. Because that dilution violates the "one man, one vote" principle, the county-based distribution requirements imposed by the District Court are unconstitutional.

CONCLUSION

For the foregoing reasons, and those set forth in the Aspiring Parties' opening brief, the order of the District Court should be vacated insofar as it imposes county-based distribution requirements, and should be affirmed in all other respects.

Dated: December 20, 2016 Respectfully submitted,

/s/ Oliver B. Hall

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CERTIFICATE OF BAR MEMBERSHIP

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

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

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

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/s/ Oliver B. Hall
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December 2016, I served the foregoing Reply Brief of Appellant, on behalf of all Appellants, by the Court's CM/ECF system upon the following:

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