

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-3778

ROQUE DE LA FUENTE

Plaintiff-Appellant,

v.

PEDRO CORTES, et al.,

Defendants-Appellees.

**Appeal from the Final Orders of the
United States District Court for the Middle District of Pennsylvania
Dated August 21, 2017, Civil Action No. 1:16-cv-01696-JEJ**

**APPELLANT'S SUPPLEMENTAL BRIEF
ON THE IMPACT OF APPELLEES' REPRESENTATION
THAT THY WILL NOT ENFORCE RESIDENCY REQUIREMENTS**

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I. Summary

Enforcement of the voter registration requirement for Pennsylvania resident petition circulators is bifurcated between Appellees (who have authority to draft the text of the circulator affidavit and effectuate orders of Pennsylvania Commonwealth Court) and, pursuant to 25 P.S. §2937, private individuals who routinely sue in Commonwealth Court to challenge the validity signatures recorded on candidate nomination petitions and papers. Only a final disposition with preclusive effect on state courts, such as a binding consent decree or injunction as part of a final order, is sufficient to prevent the continued enforcement of the challenged voter registration requirements in state courts. Accordingly, Appellees' eleventh hour litigation tactic is insufficient to render this case moot and depriving this Court of Article III jurisdiction to adjudicate Appellant's appeal of his challenge to 25 P.S. §§2869(a), 2911(d). In fact, Appellees' representation seems designed to permit the continued enforcement of the challenged provisions through state court litigation of the validity of signatures gathered by unregistered Pennsylvania residents.

II. Residency Not An Issue

As a threshold issue, Appellant only challenges the voter registration requirements imposed on Pennsylvania residents wanting to circulate election petitions under 25 P.S. §2869(a) and §2911(d). Residency requirements are

different and not challenged in this litigation. In 2016, the professional petition firm hired by Appellant employed some Pennsylvania residents who are not registered voters. These circulators gathered a significant number of signatures for Appellant in other states for the 2016 elections, but could not do so in Pennsylvania. Appellant has hired the same firm in planning his 2020 petition drives and needs certainty that the firm's unregistered Pennsylvania circulators can lawfully, and without fear of subsequent protracted state court challenges, circulate Appellant's election petitions in Pennsylvania. Accordingly, the residency requirement has nothing to do with this litigation.

III. Appellees Lack Full Enforcement Power and Cannot Act to Moot Challenge to Registration Requirement

This Court rejected a similar mootness argument raised by these Appellees in a previous case. In *Constitution Party of Pennsylvania v. Cortes*, 824 F.3d 386 (3rd Cir. 2016), Appellees appealed the district court's grant of summary judgment holding that, in tandem with other ballot access restrictions, the significant financial impact of the state court challenge process of 25 P.S. §2937 violated First Amendment rights. *Id.* at 390-93. On appeal, Appellees argued they were not proper parties arguing: "the District Court erred because the two state officials sued in this case had no connection to the enforcement" of the challenged provisions and that "it is the Commonwealth Court that adjudicates the disputes 'without the involvement of executive branch officials'" and that "neither

Commonwealth Court nor private parties are *obliged* to follow the district court's orders"" and they had ""no ability' to prevent private suit under the statute or to prevent how the Commonwealth Court will rule on the challenge." *Id.* at 395-97, This Court properly held that Appellees were nevertheless proper Defendants because the Supreme Court held in *American Party of Texas v. White*, 415 U.S. 767, 779 (1974), that ballot access challenges are properly brought against state election officials. *Constitution Party of Pennsylvania*, 824 F.3d at 396. The law has not changed since 2016 and Appellees are bound by these admissions in this appeal.

Furthermore, the Supreme Court of Pennsylvania has made clear that, while state courts are not generally bound by federal court decisions rendered by courts inferior to the Supreme Court, state courts will enforce final orders issued by lower federal courts which rise to the level of having preclusive effect such as orders resulting from a final decision on the merits (and presumably binding consent decrees). *In re Stevenson*, 40 A.3d 1212, 1221-26 (Pa. 2012). Accordingly, the only way to provide complete relief from the challenged unconstitutional voter registration requirement for Pennsylvania resident petition circulators is a final order enjoining Appellees' enforcement of the voter registration requirement. Only such a final order enjoining enforcement will prevent private litigants from challenging signatures gathered by unregistered Pennsylvania residents and bind

Commonwealth Court to the outcome in this litigation – because only such an order will place Appellees in a position of either complying with a federal court order or a contrary order of Commonwealth Court to strike a candidate’s name from the ballot based on signatures collected by unregistered Pennsylvania residents. Clearly, Appellees’ mere representations in briefing to this Court that they will not exercise their limited enforcement role is insufficient to prevent continued enforcement of the challenged restrictions by Commonwealth Court under 25 P.S. §2937, because such representations in briefs do not rise to the level of having preclusive effect on state court litigation – especially since the lower court’s dismissal of these claims will remain in effect. Absent a final order on the merits or a binding consent decree, Appellant will need to continue to avoid using unregistered Pennsylvania residents out of fear that Commonwealth Court will rule any signatures gathered by them invalid and out of fear of the significant financial impact of litigation triggered by using unregistered Pennsylvania resident as petition circulators in 2020 and the need to fully litigate this issue to uncertain conclusion in Commonwealth Court.

As a result of *Constitution Party of Pennsylvania*, the Commonwealth was forced to choose between keeping a higher signature requirement for political bodies to secure access to the ballot or abandon the private challenge process of 25 P.S. §2937. **THESE APPELLEES** expressly opted to keep the private challenge

process in Commonwealth Court under §2937 and lowering the signature requirement for statewide candidates. Knowing full well they lack full enforcement power, Appellees cannot moot out this issue by voluntary cessation because they cannot provide Appellant with complete relief. No case cited by Appellees applies to situations where defendant(s) lack full enforcement power over the challenged statute.

IV. Conclusion

Accordingly, absent a binding a consent decree (which Appellant will readily agree to sign) or final order enjoining Appellees with preclusive effect on state courts, the voter registration requirements under 25 P.S. §§2869(a), 2911(d) cannot be rendered moot by Appellees' representations.

Dated: June 21, 2018

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CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the Bar of this Court.

Dated: June 21, 2018

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief was prepared in proportionately spaced, 14-point type and the body of this brief, including internal headings, contains 999 words.

Dated: June 21, 2018

/s/ *Paul Rossi*
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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I caused a true and correct copy of the foregoing document to be served upon the following via the Court's CM/ECF system.

Dated: June 21, 2018

/s/ *Paul Rossi*
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CERTIFICATION OF VIRUS CHECK

I hereby certify that a virus check was performed on the text of the foregoing brief on June 21, 2018. Norton Anti-Virus 2017, fully updated, was used to scan the text of the foregoing brief. No viruses are present.

Dated: June 21, 2018

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