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Voter's Choice Act, SB 495
Hearing Room 1, North Office Building
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Chairman Folmer and Members of the Committee:

Thank you for giving me the opportunity to testify this morning. It is both a pleasure and an honor to be asked to participate in this process, and I hope that my remarks may prove worthy of the honor. I would also like to thank the Committee staff and Senator Folmer's staff, particularly Ms. Totino, for being so helpful in preparing this hearing.

I have spent several years studying the Constitution and election law. I have taught Constitutional Law, Election Law, and related subjects since 2004, and, in addition to writing several articles and essays on constitutional topics, I have co-written a casebook on Voting Rights and Election Law. Although I am a Professor of Law at the Widener Commonwealth Law School, I come before you today not on behalf of my law school or my university. Rather, the opinions I shall offer this morning are mine alone.

The purposes of my testimony are threefold. First, I will provide background to the Committee concerning *Constitution Party of Pennsylvania v. Cortes*, which struck down a portion of Pennsylvania's law relating to minor parties' ballot access. Second, I will discuss SB 495 and address the ways in which it relates to *Constitution Party v. Cortes*. Third, I will offer some comments about the challenges faced by minor parties and the appropriate ways to promote the benefits of a multi-party system without the disadvantage of the spoiler effect, which can be a substantial problem when more than two candidates run in an election.

I.

In *Constitution Party v. Cortes*, the United States District Court for the Eastern District of Pennsylvania struck down part of Pennsylvania's ballot-access law, as that law was applied to minor parties. Such parties must collect signatures to enable their candidates to appear on the general-election ballot. The court did not call into question the validity of the signature requirement itself, but it did hold that it was unconstitutional for Pennsylvania to require minor parties to pay the costs of defending against challenges to those signatures and to bear the risk of having to pay the challengers' litigation fees. Those fees had been quite high—in excess of $80,000—in two recent cases.

The court based its decision on the Federal Constitution's Due Process and Equal Protection Clauses, particularly as interpreted in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *Anderson* held that the more a law burdens the constitutional rights to vote and to run for office, the more substantial the state's justification for the law must be. While "reasonable, nondiscriminatory" laws are usually justified by the state's important regulatory interests, more burdensome laws require weightier justifications.

In *Constitution Party*, the court held that the Pennsylvania laws, in combination, produced a severe burden on the constitutional rights of the minor parties and their supporters. Accordingly, the court demanded that the Commonwealth show both that its interest in enforcing the laws was compelling and that the laws were a necessary or narrowly tailored way of advancing that interest. The Commonwealth could not meet this standard, and the court therefore held the laws unconstitutional.

Anderson's test for evaluating the constitutionality of ballot-access laws is notoriously vacuous. It directs courts to weigh a state's justifications for its laws against the burdens created by those laws—in effect inviting courts to act as a second legislature. On top of that, *Anderson* established no criteria for assessing the extent of the burdens imposed by a state's election laws. As we saw with the recent controversy concerning voter-ID requirements, it is not clear at all when a law's obligations will be considered "severe."

In *Constitution Party*, for example, the court held that the burden faced by minor parties was severe because the possibility of being ordered to pay $80,000 was enough to dissuade some candidates from running. But in the cases where courts imposed such orders, the courts found widespread fraud and bad faith. It is by no means certain that awards of costs in such instances would severely burden the rights of candidates to run for office legally.[1] In fact, the Pennsylvania Supreme Court considered the argument laughable. *See In re Nomination Paper of Nader*, 905 A.2d 450, 459 (Pa. 2006) ("Given the magnitude of the fraud and deception implicated in Appellants' signature-gathering efforts, their claim that the Commonwealth Court acted in an unjust and unconstitutional fashion by assessing transcription and stenography costs does not pass the straight-face test.").

Accordingly, the Commonwealth's pending appeal in *Constitution Party* may well be successful, but it is difficult to make a prediction with any confidence because the *Anderson* standard is so elastic.

If the district court's decision is affirmed, a simple way for the General Assembly to amend the law and correct the constitutional violation would be to provide for a

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[1] The district court remarked that "no amount of good faith will fend off a nomination paper challenge, and motions for costs are now a routine part of the process," but that remark skirts the main issue. Costs may be requested, but motions for costs will not be *granted* absent fraud or bad faith.

portion of the executive branch (presumably the Secretary of the Commonwealth) to verify petition signatures at public expense. As Judge Stengel noted, Pennsylvania is the only state that gives its courts the duty of verifying petition signatures. It may be distasteful for taxpayers to have to fund the costs of verifying signatures, especially when many such signatures are fraudulent, but such an amendment would be a relatively simple way of addressing the district court's constitutional concerns.

Alternatively, and even more simply, the General Assembly could continue to direct that the judiciary adjudicate petition challenges, but amend 25 Pa. C.S. § 2937 to delete the provision permitting costs to be awarded. As another alternative, § 2937 could be amended to clarify that costs can be awarded against challengers of nominating petitions, but not against candidates.[2] Finally, the General Assembly could specify the instances in which an award of costs would be appropriate, thereby lessening the potential chilling effect that candidates may now face, given that the statute places no limit on the judicial discretion to award costs.

Of course, if candidates, parties, and petition-gatherers suffer no penalty for filing a fraudulent petition, we can expect there to be more fraud and we can expect petition-gatherers to be less careful about ensuring that the signatures they submit are genuine. Accordingly, if the Commonwealth's appeal in *Constitution Party* is successful, there would be substantial reason to leave the cost-shifting provision of § 2937 in place.

II.

Senate Bill 495 appears to be an attempt to make it easier for third parties' nominees to appear on the general-election ballot, and so in that most general sense it responds to the concerns of the third parties who complained in *Constitution Party* about difficulties they faced in accessing the ballot. Really, however, SB 495 is directed toward concerns that are much different from those that were central to *Constitution Party v. Cortes*. Therefore, the merits of SB 495 should properly be considered apart from the coincidence that both it and *Constitution Party* happen to involve third-party ballot access.

As noted, a relatively simple fix to the constitutional problem identified in *Constitution Party* would be to amend 25 Pa. C.S. § 2937 to eliminate the risk that candidates might be ordered to pay the costs of defending their nominating petitions from challenge. Rather than adopt that solution, SB 495 appears to reduce

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[2] Amending the statute to say that costs may be imposed only against challengers would correct the Pennsylvania Supreme Court's apparent misinterpretation of the law in *In re: Nomination Paper of Nader*. As Justice Saylor argued in dissent, the plain meaning of the text of § 2937 permits an award of costs only upon the dismissal *of the petition challenging nominating papers*—not the dismissal of the nominating papers themselves.

the number of signatures required for nominees of minor parties and for independent candidates, so as to match the number of signatures required for nominees of major parties.[3] Under SB 495, minor parties would be permitted to choose their nominees and then notify the Secretary of the Commonwealth of those nominees at least eight weeks before the general election. All nominees, however—whether of major parties, minor parties, or "political bodies"—must submit a nominating petition with signatures, the validity of which will presumably still be subject to challenge.

In fact, in at least one respect SB 495 makes the signature requirement more onerous than it is under current law. Currently, nominating petitions for minor parties and for "political bodies" may be signed by any "qualified elector of the state." 25 Pa. C.S. § 2911. Under SB 495, however, political parties nominating candidates must submit nominating petitions signed by registered members of the party. A minor party might have a much easier time finding voters who are willing to sign a petition to add a candidate's name to the ballot, but finding people who are willing to join the party may be substantially more difficult.

And the apparent equality of requiring major and minor parties to submit the same number of signatures may be criticized as unfair in practice. Requiring the signatures of party members is likely to be a more significant burden on minor parties than on major ones, if only because of the obvious reason that major parties have more members than minor parties do. This disproportionate burden on minor parties could conceivably be considered unconstitutional under the *Anderson* standard, although I doubt that the burden would be considered severe given the relatively low number of signatures that are required in § 912.1 of the Election Code, which is incorporated by reference in SB 495.

For all that SB 495 does to reduce the number of required signatures, however, those changes have nothing to do with *Constitution Party v. Cortes*. As noted, the *Constitution Party* court acknowledged that the number of signatures required by current law was constitutional. In the court's view, it was the risk of being assessed costs for a challenge to the signatures that rendered Pennsylvania law unconstitutional. Senate Bill 495 changes the number of signatures, but retains the law relating to petition challenges, including 25 Pa. C.S. § 2937, which allows for candidates to be ordered to pay challengers' costs. Presumably those costs will be less if fewer signatures need to be verified, so if SB 495 passes we should not expect awards of $80,000 in costs. Perhaps a potential award of a much lower figure would not severely burden third-parties' rights, and so perhaps SB 495 would permit a court to uphold Pennsylvania's law against a challenge such as that in *Constitution*

[3] For a political body to qualify as a "political party" under SB 495, at least 0.05% of the Commonwealth's registered voters must be registered with that party or the party must have received at least 2% of the votes cast for a successful candidate at the last election. Minor parties are those political parties with fewer than 15% of the Commonwealth's registered voters.

Party. Nevertheless, overall SB 495 seems not to be directed toward solving the constitutional defects identified by the court in *Constitution Party v. Cortes*.

III.

Even if SB 495 does nothing to address the holding in *Constitution Party v. Cortes*, of course one might support the bill for other reasons. The law's chief objective appears to be to make it easier for third-party candidates to appear on the general-election ballot. In my opinion, if the General Assembly wishes to include the voices of third parties in the government, there are better ways of doing so.

The presence of a third candidate in an election for a single office creates the potential for that third candidate to act as a "spoiler," resulting in the election of the candidate least preferred by a majority of the electorate. Consider the 2000 presidential election in Florida, for example. If forced to choose between then-Governor George W. Bush and then-Vice President Albert Gore, a majority of Floridians would have chosen Gore. Because Ralph Nader (as well as some other candidates) appeared on the ballot, however, some voters who otherwise would have supported Gore actually voted for Nader. The result was that Nader took enough votes from Gore that Bush's total exceeded Gore's, and Bush won the election.

Pennsylvania has an important interest in avoiding a similar result, and in ensuring that elections validate the choice of a majority of voters. As long as a candidate can win an election with a plurality of votes, however, the presence of a third candidate risks creating the spoiler effect.

There are a few ways of avoiding the spoiler effect while allowing third parties to have increased access to politics, but merely lowering ballot-access barriers will only make the spoiler effect more likely. Certainly lowering those barriers is unlikely to result in the *election* of more third-party candidates.[4] I will briefly note two superior alternatives.

First, in elections for multiple offices (for example, the members of the Pennsylvania House of Representatives or a city council), voters in a single district could elect multiple representatives. If voters were to vote for their preferred party, rather than for individual candidates, the legislative seats could be allocated proportionally by party. Thus, if a third party received 15% of the votes, it would be allocated 15% of the seats in the legislature. This system of "proportional representation" is quite common throughout the world and forthrightly recognizes (and promotes) the importance of parties in the political system.

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[4] Voters, intuitively understanding the spoiler effect, will often vote for the major-party candidate whom they view as the "lesser of two evils." Thus, increased access to the ballot does not even mean that voters have any more of a "choice," because only two candidates stand a realistic chance of election.

Second, third-party ballot access could be made easier, as with SB 495, but instead of declaring the winner to be whichever candidate receives a plurality of votes, we could require the winning candidate to have majority support. Such a system could be applied in single-member districts and would allow third parties to have an increased voice in elections, although it would probably do little to increase the likelihood of a third-party candidate actually being elected.

Such a system could function as follows: In the initial election, any number of candidates could run. If any candidate received a majority of votes, he or she would be declared the winner. If no candidate received a majority, the top two candidates would advance to a run-off election, with the winner of that election winning the office. The run-off election could be a traditional election, held after the first election, or it could be an "instant run-off" election. In the second, "instant" version, each voter would rank the candidates, rather than just selecting his or her top choice. If the voter's first choice was not one of the two candidates receiving the most first-place votes, then the voter's vote would be counted for the voter's next-preferred candidate.

Imagine a race between Bush, Gore, and Nader. A voter who most likes Nader, then Gore, and then Bush would indicate on his ballot that Nader is his first choice, Gore his second choice, and Bush his third. After the ballots are tallied, imagine that no candidate has a majority of first-place votes: Bush has 48%, Gore has 46%, and Nader has 6%. Nader would then drop out of contention, and the race would be between Bush and Gore. If all of the Nader voters indicated that Gore was their second choice, their votes—rather than being wasted—would be counted for Gore, and Gore would be elected.

Several states use a variation of this system, although it is most identified with Louisiana. It permits third parties to appear on the ballot and to bring their perspectives to campaigns. Because a majority is required for election, however, voters do not need to fear that a vote for the third-party candidate is "wasted" or would "spoil" the election for the major-party candidate preferred by that voter.

Conclusion

In summary, the decision in *Constitution Party v. Cortes* is neither clearly wrong nor clearly correct under existing Supreme Court precedent. The court found that the threat of being ordered to pay for the costs of challenging a nominating petition—even if such costs were likely to be assessed only upon a finding of fraud or bad faith—placed a severe burden on the right to vote and the right to run for office. It is possible that the Third Circuit will agree that the cost-shifting provision will create a "chilling effect" that will dissuade even legitimate candidacies, but it is also possible that the Third Circuit will conclude that the cost-shifting provision

will deter only the kind of fraudulent activity that the government has a clear interest in eradicating.

If the district court's holding is affirmed on appeal, there are easy ways to amend the statute to cure the constitutional violation—such as by repealing the cost-shifting provision. Senate Bill 495 may also correct the constitutional problem with the existing law by lowering the required number of signatures on nominating petitions, but SB 495 is focused on issues different from the ones the court identified as constitutionally problematic. SB 495 is therefore a poor vehicle for addressing the court's constitutional concerns.

Reasonable political theorists can disagree on the wisdom of Senate Bill 495's attempt to make it easier for third-party candidates to appear on the general-election ballot. Certainly our current political structure protects the dominance of the two major parties, and critics have suggested that the result has been an apathetic citizenry and a political discourse that is devoid of new ideas. In my view, however, the major cause of that political stagnation is not ballot-access restrictions but the plurality-winner electoral system. An alternative system, such as one based on proportional representation or one that allows for run-off elections where necessary to achieve a majority, would be a much better means of invigorating politics with the third parties' ideas.

Again, thank you for the opportunity to testify.