Commonwealth of Pennsylvania
Senate State Government Committee
Senator Mike Folmer, Chair
Hearing Room 1
North Office Building
Harrisburg, PA 17120

September 22, 2015

STATEMENT OF OLIVER B. HALL IN SUPPORT OF SENATE BILL 495, THE "VOTER CHOICE ACT"

I am an attorney with the Washington, DC-based non-profit Center for Competitive Democracy. I represented the Constitution Party of Pennsylvania ("CPPA"), Green Party of Pennsylvania ("GPPA") and Libertarian Party of Pennsylvania ("LPPA") in their recent successful challenge to the constitutionality of Pennsylvania's ballot access scheme for minor political parties. *See Constitution Party of Pa. v. Cortes*, No. 12-cv-2726 (E.D. Pa. July 23, 2015). In that case, the Court held that 25 P.S. § 2911(b), which establishes the signature requirements for non-major party candidates' nomination papers, and 25 P.S. § 2937, which authorizes private parties to challenge the validity of such nomination papers, are both unconstitutional as applied. *See id.* As a result, these provisions may not be enforced against CPPA, GPPA and LPPA, or their nominees.

Section 2911(b) and Section 2937 have done serious damage to Pennsylvania's democratic process in the last decade. When Section 2937 was first construed to authorize the imposition of litigation costs against candidates who defend their nomination papers, following the 2004 election, the consequences were both drastic and immediate. The order directing independent presidential candidate Ralph Nader and his running mate Peter Miguel Camejo to pay $81,102.19 in litigation costs to their challengers was completely unprecedented, and the message it sent was loud and clear: non-major party candidates for statewide office in Pennsylvania should be prepared to risk personal bankruptcy if they defend their nomination papers when challenged pursuant to Section 2937. Sure enough, the next candidate who did so, GPPA's Carl Romanelli, was forced off the ballot in the 2006 election, and ordered to pay more than $80,000 to his challengers. With few exceptions, these two orders effectively ended the participation of non-major party candidates in Pennsylvania's statewide elections, leaving voters with no choice but to vote for a Republican or Democrat.

Now that a federal court has held Section 2911(b) and Section 2937 unconstitutional, the Legislature has an obligation, but also an opportunity, to take action to remedy the harm these provisions have caused. All Pennsylvanians have an equal right to participate in the electoral process, regardless of their partisan affiliation, and that is what the Voter Choice Act provides. It replaces the discriminatory and unnecessarily restrictive signature requirements imposed by Section 2911(b), which apply only to non-major party candidates, with one reasonable signature requirement that applies to all candidates. Further, it is based on a statute that is already in place in Delaware, where it has been operating efficiently and effectively for decades. It can do the same in Pennsylvania. The Legislature should enact the Voter Choice Act without delay.

For the Committee's further review, the decisions of the Court of Appeals for the Third Circuit, and the District Court on remand, in *Constitution Party of Pa. v. Cortes* are attached hereto as Exhibit A. These decisions include a vivid and detailed account of the harm CPPA, GPPA and LPPA and their supporters sustained over the last decade as a result of Pennsylvania's unconstitutional statutory scheme. In the words of the District Court, "the ability of the minor parties to organize and voice their views has been decimated," and as a further consequence, "with few exceptions over the last decade, the electorate has been forced to choose between Democratic and Republican candidates, alone, for statewide office." *See Constitution Party of Pa. v. Cortes*, No. 12-cv-2726 (Slip Op. at 28-29). The court's decisions thus provide compelling evidence of the need for the Legislature to enact the Voter Choice Act, as well as a powerful rebuttal to those who might urge the Committee to maintain a discriminatory statutory scheme that imposes a separate and more onerous set of requirements on minor parties.

Finally, I commend Chairman Mike Fuller and his co-sponsors for reintroducing the Voter Choice Act, and ask each member of the Committee to support it. In this connection, I refer the Committee to editorials published by the largest newspapers in Philadelphia and Pittsburgh, both of which support the decision in *Constitution Party of Pa.*, and urge the Legislature to enact ballot access reform legislation. *See* Editorial, *Crashing the Party*, PHILADELPHIA INQUIRER (July 31, 2015) ("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, *Third Party Torture*, PITTSBURGH POST-GAZETTE (August 2, 2015) ("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"). The time has come for the Legislature to make the Voter Choice Act law.

- End -

EXHIBIT A

COURT OF APPEALS AND DISTRICT COURT DECISIONS IN *CONSTITUTION PARTY OF PA. V. CORTES*

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 13-1952

_____

THE CONSTITUTION PARTY OF PENNSYLVANIA; THE GREEN PARTY OF PENNSYLVANIA; THE LIBERTARIAN PARTY OF PENNSYLVANIA; JOE MURPHY; JAMES N. CLYMER; CARL J. ROMANELLI; THOMAS ROBERT STEVENS; KEN KRAWCHUK,
Appellants

v.

CAROL AICHELE; JONATHAN M. MARKS; ATTORNEY GENERAL PENNSYLVANIA

CAROL SIDES; RICHARD J. TEMS; LOUIS NUDI; DAMON KEGERISE; ANNE LAYNG; JUDITH GUISE,

(Intervenor-Defendants)

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-12-cv-02726)
District Judge: Hon. Lawrence F. Stengel

_____

Argued
March 6, 2014

Before: AMBRO, JORDAN and ROTH, *Circuit Judges*.

(Filed: July 9, 2014)

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Jonathan M. Marks, Attorney General Pennsylvania

OPINION OF THE COURT

JORDAN, *Circuit Judge*.

The Appellants, political groups in Pennsylvania and several of their supporters, have invoked 42 U.S.C. § 1983 to challenge the constitutionality of two provisions of Pennsylvania's election code that regulate ballot access, namely title 25, sections 2911(b) and 2937 of Pennsylvania's Consolidated Statutes. Section 2911(b) and a similar section, § 2872.2(a), require that candidates seeking to be included on the general election ballot – other than Republicans and Democrats – must submit nomination papers with a specified number of signatures. Section 2937 allows private actors to object to such nomination papers and have them nullified, and it further permits a Pennsylvania court, as that court deems "just," to impose administrative and litigation costs on a candidate if that candidate's papers are so rejected. The Appellants contest an order of the United States District Court for the Eastern District of Pennsylvania dismissing their Complaint for lack of standing. We conclude that they do have standing to pursue their constitutional claims, and we will therefore reverse.

I. Factual Background and Procedural History[1]

The Appellants are the Constitution Party of Pennsylvania ("Constitution Party"), the Green Party of Pennsylvania ("Green Party"), and the Libertarian Party of Pennsylvania ("Libertarian Party") (collectively, the "C.G.L. Parties"); their respective chairmen – Joe Murphy, Carl Romanelli, and Thomas Robert Stevens; James Clymer, a

[1] In accordance with our standard of review, see *infra* note 12, we set forth the facts in the light most favorable to the Appellants.

member of the Constitution Party; and Ken Krawchuk, a former candidate of the Libertarian Party. For ease of reference we will refer to the Appellants collectively as the"Aspiring Parties."[2] They filed the instant suit against the Secretary of the Commonwealth of Pennsylvania, Carol Aichele; the Commissioner of the Pennsylvania Bureau of Commissions, Elections, and Legislation, Jonathan M. Marks; and the Pennsylvania Attorney General (collectively, the "Commonwealth") in their official capacities only.[3]

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[2] Finding a shorthand term for the Appellants has been a challenge. "Minor political parties" is a statutorily defined term in Pennsylvania. 25 Pa. Cons. Stat. § 2872.2(a). Despite referring to themselves as the "Minor Parties," the organizational Appellants are in fact not minor parties but are "political bodies" for purposes of the election code because, as more fully explained herein, they did not attain a statutory threshold of votes in the 2010 election. The term "party" also has an equivocal character, indicating both a political party and a litigant in a lawsuit. Thus, we have created our own term. We use it only to capture the idea that both the individual Appellants and the organizational Appellants aspire to full political participation.

[3] When the Complaint was filed, the Attorney General was Linda L. Kelly. The current Attorney General is Kathleen G. Kane. The Commonwealth argues that the Attorney General should not have been named as a defendant because she "does not have a discrete role in administering the Pennsylvania Election Code." (Appellees' Br. at 33.) We agree. The Aspiring Parties' Complaint only asserts that the Attorney General is the "chief legal and law enforcement officer" of Pennsylvania, and it makes no allegations regarding her role in the electoral process. (J.A. at 35.)

To understand the parties' dispute, a brief sketch of the statutory background is necessary.

A. Pennsylvania's Electoral Scheme

Pennsylvania's election code distinguishes between "political parties" and "political bodies." 25 Pa. Cons. Stat. § 2831. An organization qualifies as a "political party" if one of its candidates polled at least two percent of the largest entire vote cast in each of at least ten counties and "polled a total vote in the State equal to at least two per centum of the largest entire vote cast in the State for any elected candidate." *Id*. § 2831(a). Political parties may in turn be categorized as either major or minor parties, depending on their statewide voter registration. *Id*. §2872.2(a); *Rogers v. Corbett*, 468 F.3d 188, 190-91 (3d Cir. 2006). Major parties are defined by exclusion as those that are not minor political parties under the election code, and minor parties are defined as those whose statewide registration is less than fifteen percent of the total statewide registration for all political parties. 25 Pa. Cons. Stat. § 2872.2(a). At present, there are only two major parties in Pennsylvania, the Democratic Party and the Republican Party, as has been the case since the election code was enacted more than three-quarters of a century ago. "Political bodies" are organizations that did not have a candidate who crossed the two-percent threshold in the last election, and so they do not qualify for the benefits of being a minor party, let alone a major one. *Id*. § 2831(a).

Accordingly, we will direct that, on remand, all claims against the Attorney General be dismissed.

One of the most basic goals of a political organization, and the one for which the Aspiring Parties are contending in this case, is to have its candidates listed on the general election ballot. Major parties get to place their candidates on the general election ballot through a publicly-funded primary process.[4] *See id*. § 2862. Minor parties and political bodies (which we will sometimes refer to together as "non-major parties") have to go through a signature-gathering campaign to have their nominees appear on the general election ballot, but minor parties are at least able to access benefits under the election code "with respect to special elections, voter registration forms, [and] substituted nominations," *id*. § 2872.2. Ultimately, the distinction between minor parties and political bodies is of less consequence in this case than is the distinction between major parties and non-major parties, since all non-major parties face essentially the same fight to get their candidates on the ballot through the submission of nominating papers. It is the rules governing that process that are the focus of the Aspiring Parties' Complaint.

[4] To appear on the primary ballot, candidates from major parties must submit a certain number of valid signatures depending on the office sought. 25 Pa. Cons. Stat. § 2872.1. The largest number of signatures required for primary ballot access is 2,000 for candidates seeking offices such as President of the United States and Governor of the Commonwealth of Pennsylvania. *Id*. The winner of the primary election automatically appears on the general election ballot as the candidate of his or her respective major party. *Id*. § 2882.

To appear on the general election ballot, minor parties and political bodies are required to file nomination papers with the Secretary of the Commonwealth.[5] *See id.* §§ 2872.2 ("Nominations by minor political parties"), 2911 ("Nominations by political bodies"); *Rogers*, 468 F.3d at 191. Successful nomination papers for a statewide office must include valid signatures equal to two percent of the vote total of the candidate with the highest number of votes for any state-wide office in the previous election. 25 Pa. Cons. Stat. § 2911(b).[6] After being filed, the nomination papers are

[5] Although the Aspiring Parties refer to "nominating petitions," we will use the statutory term "nomination papers" found in § 2911. Under the election code, major party candidates file "nomination petitions" to appear on the primary ballot. 25 Pa. Cons. Stat. § 2872.1. However, candidates of minor political parties and political bodies file "nomination papers" to appear on the general election ballot. *Id*. §§ 2911(b), 2872.2. Although the terms are sometimes used interchangeably, as in certain quotes from the briefings and declarations before us, we will adhere to the statutory distinction as much as possible.

[6] 25 Pa. Cons. Stat. § 2911(b) provides in relevant part:

> Where the nomination is for any office to be filled by the electors of the State at large, the number of qualified electors of the State signing such nomination paper shall be at least equal to two per centum of the largest entire vote cast for any elected candidate in the State at large at the last preceding election at which State-wide candidates were voted for.

examined by the Secretary of the Commonwealth, who must reject the filing of any submission that "contains material errors or defects apparent on [its] face … or on the face of the appended or accompanying affidavits; or … contains material alterations made after signing without the consent of the signers; or … does not contain a sufficient number of signatures as required by law." *Id*. § 2936.

Even after being accepted by the Secretary, however, the papers can be subjected to further examination if a private party files an objection.[7] In particular, the election code provides in § 2937 that

> [a]ll nomination petitions and papers received and filed … shall be deemed to be valid, unless, within seven days after the last day for filing said nomination petition or paper, a petition is presented to the court specifically setting forth

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25 Pa. Cons. Stat. § 2911(b). The non-major party candidates have approximately five months to circulate nomination papers from before the state-run primary to August 1 of the election year. *Rogers*, 468 F.3d at 191.

[7] This process also applies to the nomination petitions filed by major political parties to be placed on the primary ballot. 25 Pa. Cons. Stat. §§ 2936, 2937. The Pennsylvania Supreme Court has held that despite using the word "petition," § 2937 applies to both nomination petitions and nomination papers. *In re Nader*, 905 A.2d 450, 458 (Pa. 2006).

> the objections thereto, and praying that the said petition or paper be set aside.

Id. § 2937. If any objections are filed pursuant to § 2937, the Commonwealth Court reviews and holds a hearing on the objections and determines whether the candidate's name will be placed on the ballot.[8] *Id*. Of special importance to the

[8] Section 2937 provides for the full process by which a nomination petition or nomination paper is challenged:

> A copy of said petition shall, within said period, be served on the officer or board with whom said nomination petition or paper was filed. Upon the presentation of such a petition, the court shall make an order fixing a time for hearing which shall not be later than ten days after the last day for filing said nomination petition or paper, and specifying the time and manner of notice that shall be given to the candidate or candidates named in the nomination petition or paper sought to be set aside. On the day fixed for said hearing, the court shall proceed without delay to hear said objections, and shall give such hearing precedence over other business before it, and shall finally determine said matter not later than fifteen (15) days after the last day for filing said nomination petitions or papers. If the court shall find that said nomination petition or paper is defective under the provisions of section 976, or does not contain a sufficient number of genuine signatures of electors entitled to sign the same

present dispute is that, when an objection is successful and a nomination petition or paper is dismissed, "the court shall make such order as to the payment of the costs of the proceedings, including witness fees, as it shall deem just." *Id*. The Pennsylvania Supreme Court has held that, under § 2937, "an award of costs … is not warranted solely on the basis that the party prevailed"; there must be some further reason, and it is an abuse of discretion for a lower court to award such costs "without identifying any reason specific to [the] case or … why justice would demand shifting costs to them." *In re Farnese*, 17 A.3d 357, 369-70 (Pa. 2011). At the same time, however, the court held that, while "fraud, bad faith, or gross misconduct … may require an award of costs," "a party's conduct need not proceed to such an extreme before" costs can be shifted. *Id*. at 372. Thus, under § 2937, costs may be awarded to the person opposing nomination papers if there is some showing that it would be "just" to do so, despite there

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> under the provisions of this act, or was not filed by persons entitled to file the same, it shall be set aside. If the objections relate to material errors or defects apparent on the face of the nomination petition or paper, the court, after hearing, may, in its discretion, permit amendments within such time and upon such terms as to payment of costs, as the said court may specify. In case any such petition is dismissed, the court shall make such order as to the payment of the costs of the proceedings, including witness fees, as it shall deem just.

25 Pa. Cons. Stat. § 2937 (footnote omitted).

being no "fraud, bad faith, or gross misconduct" on the part of the candidate whose papers were challenged.[9] *Id*.

Finally, a political organization may also lose its status as a political party. If it does not meet the two percent threshold, it descends again to the status of political body. *See* 25 Pa. Cons. Stat. § 2831(a). Therefore, if a political party fielded no candidate in a general election or if its candidates received support from less than two percent of the highest vote-getter, it would qualify only as a political body in the following election. *Id*.

Sections 2911 and 2937 became law in 1937. Section 2911 was amended in 1971 to increase the percentage of signatures required, *see People's Party v. Tucker*, 347 F. Supp. 1, 2 & n.2 (M.D. Pa. 1972), and § 2937 was, in 2011, the subject of an important interpretive opinion by the Pennsylvania Supreme Court, *In re Farnese*, 17 A.3d at 359. The Aspiring Parties have extensive experience with these statutes, having collected signatures, defended nomination papers, and been placed on and struck from election ballots at various times in the past decade.

B. Recent Elections

[9] In *In re Nader*, the Pennsylvania Supreme Court determined that the language of § 2937 "discusses *both* nomination petitions and petitions to set aside a nomination petition. Thus, the court can impose costs, as justice requires, when either the nominating petition is set aside or the petition to set aside the nomination petition is dismissed." *In re Nader*, 905 A.2d at 458 (quoting *In re Lee*, 578 A. 2d 1277, 1279 n.3 (1990)).

In the 2002, 2004, and 2006 elections, the C.G.L. Parties were each "qualified minor parties … because each party had a candidate on the preceding general election ballot who polled the requisite number of votes." (Appellants' Opening Br. at 9.) In 2004, however, independent presidential candidate Ralph Nader and his running mate were ordered to pay $81,102.19 in costs under § 2937, following a court determination that their Pennsylvania "signature-gathering campaign involved fraud and deception of massive proportions." *In re Nader*, 905 A.2d 450, 460 (Pa. 2006). That ruling appears to mark the first time costs were ever imposed pursuant to § 2937, and the reverberations from that decision have been significant.

According to the Aspiring Parties, the *Nader* decision worked a transformation in how § 2937 is understood and applied. The threat of extraordinary costs like those involved in *Nader* "caused several minor party candidates either to withhold or withdraw their nomination petitions" during the 2006 election cycle. (J.A. at 39.) For example, in a declaration filed in this case, Appellant Krawchuk stated that, although the Libertarian Party nominated him as its candidate for United States Senate in 2006, he declined to run "due to the fact that … Ralph Nader and his running mate … had recently been ordered to pay $81,102.19." (*Id*. at 90-91.) Similarly, Christina Valente, the Green Party's nominee for Lieutenant Governor in 2006, stated in her declaration that, "after a challenge was filed against me …[,] I withdrew from the race. My decision to withdraw was based entirely on the fact that I was unwilling to assume the risk of incurring litigation costs pursuant to 25 P.S. § 2937." (*Id*. at 78.)

Thus in 2006, "only one minor party candidate [ran] for statewide office," Appellant Romanelli, the Green Party's nominee for United States Senate. (J.A. at 39) Based on the votes cast in the 2004 general election, Romanelli had to obtain 67,070 valid signatures to get on the ballot in 2006. He submitted 93,829 signatures but was removed from the ballot following a successful objection filed pursuant to § 2937 by private parties affiliated with the Democratic Party. Romanelli was ordered to pay costs totaling $80,407.56. *In re Rogers*, 942 A.2d 915, 930 (Pa. Commw. Ct. 2008). The Commonwealth Court found that costs were warranted due to the failure of Romanelli's campaign and the Green Party to comply with certain court orders, including an order to provide nine people to assist in the review of the nominating signatures[10] and an order to timely provide the court with the

[10] The review of the Romanelli signatures was facilitated by the Statewide Uniform Registry of Electors ("SURE") computer system. The Commonwealth Court ordered that

> [e]ach party shall have present at that time at least nine individuals, in addition to counsel, who are capable of performing computer searches. These individuals will be given a short training session by Department personnel on how to perform SURE system searches. With the assistance of court personnel, the designated individuals of each party shall commence a review of the challenged signatures and shall tabulate, with the assistance of counsel, the numbers of challenged signatures found to be valid and those found to be invalid.

"specifics of what stipulated invalid signatures [Romanelli] believed could be rehabilitated." *Id*. at 929.

Therefore, because of candidates withdrawing their nomination papers and the successful challenge to Romanelli's nomination papers, the C.G.L Parties fielded no candidates for statewide office in the 2006 election. That meant that, under 25 Pa. Cons. Stat. § 2831(a), none of the C.G.L. Parties qualified as minor parties leading up to the 2008 election. They became, instead, political bodies.

In the 2008 election, while the Libertarian Party was able to collect the requisite number of signatures – and those signatures went unchallenged – and to place candidates on the general election ballot, the Constitution and Green Parties were again unable to get any candidates on the ballot. The chairman of the Constitution Party stated in his declaration that, following the 2006 election, his party could not recruit any candidates "willing to submit nomination petitions and thereby risk incurring litigation costs pursuant to 25 P.S. § 2937." (J.A. at 53.) Supporters of that party were also unwilling to donate time and resources to electioneering. Likewise, the chairwoman of the Green Party in 2008 and 2010 stated that her party was unable to regain minor-party status because of the effect that § 2937 challenges and costs had on member morale. She declared that, as Statewide Petition Coordinator for 2012, she "continue[d] to encounter serious difficulty in recruiting petitioners," many of whom

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In re Rogers, 942 A.2d 915, 920 (Pa. Commw. Ct. 2008).

refused to participate in nomination drives because they believe that § 2937 "renders petitioning futile." (*Id*. at 63.)

In 2010, the C.G.L. Parties again resumed the nomination signature gathering process. The Democratic and Republican parties or their "allies" were allegedly behind objections to the nomination papers of the Green and Libertarian Parties. (*Id*. at 41.) The Aspiring Parties point to a challenge to the Libertarian Party's nomination papers as an example of the kinds of threats of financial ruin used by the major parties to shut down competing political activity. The former chair of the Libertarian Party asserts that his party had submitted "more than the 19,056 valid signatures required" under § 2911(b) for its candidates for Governor, Lieutenant Governor, and United States Senator but that the party "withdrew the petitions after three Republican voters, aided by the Pennsylvania Republican Party, challenged them." (*Id*. at 83 (declaration of then-party chair Michael Robertson).) An email from the challengers' attorney, quoted in the Aspiring Parties' Complaint, was hardly subtle:

> Following up on our conversation earlier this morning, I do not have exact figures on what our costs would be if this signature count continues and my clients are required to complete the review and/or move forward with a hearing. However, a rough estimate would be $92,255 to $106,455 … . These costs are comparable to the costs awarded in recent years by the Commonwealth Court in similar nomination paper challenges … . Please let me know if you need any further information in order to discuss with your clients a withdrawal

> of their candidacy… . As I stated, the sooner that your clients agree to withdraw the more likely my clients will agree to not pursue recovery of all their costs incurred in pursuing this matter.

(*Id*. at 87.)

The Libertarian Party candidates responded by withdrawing their nomination papers because "they were unable to assume the risk of incurring the costs," and the party "lacked the financial resources to indemnify them." (*Id*. at 84.) Accordingly, no Libertarian Party candidate appeared on the 2010 ballot.

The Green Party's 2010 United States Senate candidate, Melvin Packer, likewise withdrew his nomination papers following a challenge from Democratic senate candidate Joe Sestak because, Packer said, he "could not afford to have costs assessed against [him] pursuant to Section 2937." (*Id*. at 73.) The Constitution Party's nominee for Governor, John Krupa, "refused to submit [his] Nominating Papers" and "thereby risk incurring litigation costs pursuant to … § 2937." (*Id*. at 56.) As in 2006, "no candidate for statewide office, except the Republican and Democrat, appeared on Pennsylvania's 2010 general election ballot."[11] (*Id*. at 43.)

[11] The events of the 2012 election cycle are intertwined with the procedural history of this case and are accordingly addressed in the portion of the opinion dealing with that history. *See infra* Part I.D.

C. Allegations Regarding Future Elections

The Aspiring Parties' Complaint and the accompanying declarations also contain allegations about the anticipated impact of Pennsylvania's electoral scheme on future elections. Those allegations include, but are not limited to, the following.

Appellant Krawchuk, the Libertarian Party nominee for United States Senate in 2006, declared that he would "no longer run for statewide office … as long as [he] must assume the risk of incurring costs pursuant to Section 2937." (J.A. at 91.) Despite being asked by party members, Krawchuk refused to run as the party's nominee in 2014 because § 2937 remains in effect.

Likewise, Kat Valleley, who was the Libertarian Party's 2010 nominee for Lieutenant Governor but withdrew her candidacy after an objection was filed, declared that "[she] will no longer run for office as a nominee of [the Libertarian Party], as long as [she] must assume the risk of incurring costs pursuant to Section 2937." (*Id*. at 97.)

In addition, the Aspiring Parties allege that candidates are not the only ones affected. Bob Small, Co-Chair of the Green Party's Delaware County Chapter and a nomination drive participant in 2004, 2006, 2008, and 2010, stated that he would not participate in any future petition drives as long as the party's candidates face the threat of litigation.

D. Procedural History

The Aspiring Parties brought this action on May 17, 2012, in the middle of signature drives to place C.G.L. Party candidates on the 2012 general election ballot. They allege in their Complaint that "Pennsylvania's ballot access scheme violated rights guaranteed to them by the First and Fourteenth Amendments of the United States Constitution, by forcing them to assume the risk of incurring substantial financial burdens if they defend nomination petitions they are required by law to submit." (*Id*. at 31.) Count I alleges that §§ 2911(b) and 2937 violate the Aspiring Parties' "freedoms of speech, petition, assembly, and association for political purposes" under the First and Fourteenth Amendments by imposing substantial financial burdens on them to defend their nomination papers. (*Id*. at 46-47.) Count II alleges that §§ 2911(b) and 2937 violate the Aspiring Parties' right to equal protection under the Fourteenth Amendment by requiring them to bear the costs of validating nomination papers, while Republican and Democratic Party candidates are placed on the general election ballots automatically and by means of publicly funded primary elections. Count III alleges that § 2937 is unconstitutional on its face for authorizing the imposition of costs against candidates, even if they do not engage in misconduct, thereby chilling First Amendment rights to freedom of speech, petition, assembly, and association. The Aspiring Parties seek a declaratory judgment in keeping with their allegations, as well as injunctive relief to prevent the Commonwealth "from enforcing the signature requirement imposed by 25 P.S. § 2911(b)." (*Id*. at 50.) They attached 13 declarations to their Complaint and submitted an additional four declarations during the pendency of proceedings in the District Court.

On August 1, 2012, the C.G.L. Parties each submitted nomination papers to the Secretary of the Commonwealth as required under the election code. No objection was brought with respect to papers filed by the Green Party, but private individuals, who were eventually allowed to intervene as defendants in this case, challenged the nomination papers of the Constitution and Libertarian Parties. In response to those challenges, the Aspiring Parties filed a Motion for a Temporary Restraining Order or Preliminary Injunction in the District Court on the basis that the threat of costs would force them to withdraw the nomination papers if the challenges were allowed to proceed.

During the pendency of that motion, the Constitution Party withdrew from the election because, according to the Aspiring Parties, it was unable to comply with a state court order requiring that it provide 20 individuals to assist in the signature review process. On October 10, 2012, the Commonwealth Court found that the Libertarian Party had presented a sufficient number of valid signatures and dismissed the objection to its nomination papers.

The Commonwealth then filed a motion to dismiss this case under Rule 12(b) of the Federal Rules of Civil Procedure. The District Court granted the motion and dismissed the Complaint for lack of standing under Rule 12(b)(1). It denied the preliminary injunction motion as moot. This timely appeal followed.

II. Discussion[12]

[12] We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. Whether the District Court had jurisdiction is the

Article III of the United States Constitution limits the scope of federal judicial power to the adjudication of "cases" and "controversies." U.S. Const. art. III, § 2. A fundamental safeguard of that limitation is the doctrine of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). Only a party with standing can invoke the jurisdiction of the federal courts. At present, the only question for decision is whether the Aspiring Parties have standing – that is, do they even have the right to be heard.

We emphasize at the outset that we are not prejudging the merits of the case. We do not minimize the precedent supporting a state's rational interest in preventing voter confusion, avoiding ballot clutter, and ensuring viable candidates by limiting ballot access. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding Georgia's 5% signature requirement to appear on the general election ballot); *Rogers*, 468 F.3d at 195 (upholding § 2911(b)'s 2% signature requirement to appear on the general election ballot as a

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issue before us. We exercise plenary review over all jurisdictional questions, including those related to standing. *Belitskus v. Pizzingrilli*, 343 F.3d 632, 639 (3d Cir. 2003). Because we are dealing with a facial challenge to jurisdiction, as more fully described herein, "we must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the complaining party." *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir. 2003).

minor party or political body); *cf. Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (upholding Hawaii's prohibition on write-in voting). Nor do we discount the potential success of the Aspiring Parties' First Amendment claims. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on association choices protected by the First Amendment."); *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (holding high filing fees collected to finance primary elections unconstitutional); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 647 (3d Cir. 2003) (holding Pennsylvania's mandatory filing fees unconstitutional as applied to indigent candidates). It would be a sad irony indeed if the state that prides itself on being the cradle of American liberty had unlawfully restrictive ballot access laws. But we are not now concerned with which side may win – a fact that makes much of the Commonwealth's briefing beside the point. (*See, e.g.*, Appellees' Br. at 23 ("[T]he constitutionality of § 2911(b) is not open to debate … ."); *id*. at 40 ("[I]t is too late to question the validity of the statutory petition requirement."); *id*. at 42 ("This Court … has already upheld § 2911(b), and Pennsylvania courts have already found § 2937 constitutional.").) The merits of the Aspiring Parties' claims are not before us, and, with that in mind, we first consider the standard of review that the District Court should have applied in addressing the question of standing.

A. Rule 12(b)(1) Standard

The District Court dismissed the Aspiring Parties' Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure. "A motion to dismiss for want of standing is ...

properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter." *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007). A district court has to first determine, however, whether a Rule 12(b)(1) motion presents a "facial" attack or a "factual" attack on the claim at issue, because that distinction determines how the pleading must be reviewed. *In re Schering Plough Corp. Intron*, 678 F.3d 235, 243 (3d Cir. 2012) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

A facial attack, as the adjective indicates, is an argument that considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court because, for example, it does not present a question of federal law, or because there is no indication of a diversity of citizenship among the parties, or because some other jurisdictional defect is present. Such an attack can occur before the moving party has filed an answer or otherwise contested the factual allegations of the complaint. *See Mortensen*, 549 F.2d at 889-92 (noting the distinction between a facial attack and a "factual evaluation," which "may occur at any stage of the proceedings, *from the time the answer has been served* until after the trial has been completed." (emphasis added) (footnote omitted)). A factual attack, on the other hand, is an argument that there is no subject matter jurisdiction because the facts of the case – and here the District Court may look beyond the pleadings to ascertain the facts – do not support the asserted jurisdiction. So, for example, while diversity of citizenship might have been adequately pleaded by the plaintiff, the defendant can submit proof that, in fact, diversity is lacking. *See id.* at 891 ("[T]he trial court is free to weigh the evidence … and the existence of disputed material facts will not preclude the trial

court from evaluating for itself the merits of jurisdictional claims."). In sum, a facial attack "contests the sufficiency of the pleadings," *In re Schering Plough Corp.*, 678 F.3d at 243, "whereas a factual attack concerns the actual failure of a [plaintiff's] claims to comport [factually] with the jurisdictional prerequisites." *CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008) (internal quotation marks omitted) (alterations in original).

In reviewing a facial attack, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *In re Schering Plough Corp.*, 678 F.3d at 243 (quoting *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)) (internal quotation marks omitted). Thus, a facial attack calls for a district court to apply the same standard of review it would use in considering a motion to dismiss under Rule 12(b)(6), *i.e.*, construing the alleged facts in favor of the nonmoving party. *Id.* This is in marked contrast to the standard of review applicable to a factual attack, in which a court may weigh and "consider evidence outside the pleadings." *Gould Elecs. Inc.*, 220 F.3d at 176 (citing *Gotha v. United States*, 115 F.3d 176, 178-79 (3d Cir. 1997)).

The District Court here construed the Aspiring Parties' motion to dismiss as a "factual attack" and said that, "to the extent that certain of the plaintiffs' jurisdictional allegations are challenged on the facts, those claims receive no presumption of truthfulness." *Constitution Party v. Aichele*, No. 12-2726, 2013 WL 867183, at *4 (E.D. Pa. Mar. 8, 2013). That was error. The Commonwealth filed the attack before it filed any answer to the Complaint or otherwise

presented competing facts. Its motion was therefore, by definition, a facial attack. *Mortensen*, 549 F.2d at 892 n.17 ("A factual jurisdictional proceeding cannot occur until plaintiff's allegations have been controverted."). A factual attack requires a factual dispute, and there is none here. *See Int'l Ass'n of Machinists & Aerospace Workers v. Nw. Airlines, Inc.*, 673 F.2d 700, 711 (3d Cir. 1982) ("[Defendant's] motion was supported by a sworn statement of facts. It therefore must be construed as a factual, rather than a facial attack … ."). As the Commonwealth itself said in its Answering Brief on appeal, "the actual facts of this case were not contested in any real sense." (Appellee's Br. at 27.) The motion was thus a facial attack on subject matter jurisdiction, and the Aspiring Parties were entitled to the more generous standard of review associated with such an attack. *Cf. Askew v. Church of the Lord Jesus Christ*, 684 F.3d 413, 417 (3d Cir. 2012) ("As the defendants had not answered and the parties had not engaged in discovery, the first motion to dismiss was facial."); *Mortensen*, 549 F.2d at 891 ("The facial attack does offer … safeguards to the plaintiff: the court must consider the allegations of the complaint as true."). The Commonwealth conceded the District Court's error in this regard, stating at oral argument that the motion to dismiss "was made initially as a facial attack." Oral Arg. Tr. at 36:14-15.

Nevertheless, the Commonwealth argues that the District Court's error was merely one of terminology and was harmless.[13] The Aspiring Parties point out obvious problems

[13] The Commonwealth also argues that, "[b]y filing their motion for injunctive relief, the [C.G.L. Parties] themselves caused this case to advance beyond the pleading

with that assertion. They rightly note that the District Court rejected some facts as "conjectural or hypothetical" and declared that it was "not persuaded" by certain allegations, *Constitution Party*, 2013 WL 867183, at *7, none of which could have occurred if the Court had accepted the allegations in the Complaint and the supporting declarations as true.[14] For instance, the Court stated that, "[a]lthough the plaintiffs blame their recruitment difficulties on the possibility of being assessed fees and costs, they provide nothing more than conjecture and conclusory assertions as support." *Id.* at *8. But that is simply not so. The Aspiring Parties provided 13 declarations, which, taken as true, establish that candidates from the C.G.L. Parties have not run for office precisely because of the threat that, under § 2937, they would be saddled with the high costs of litigating over nomination papers that must be submitted under § 2911(b). For example,

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stage" such that "the district court was entitled to take … additional information … into account in its standing analysis" and might have been justified in viewing the challenge to jurisdiction as a factual rather than facial attack. (Appellees' Br. at 26.) That reasoning is at odds with the Commonwealth's concession that the facts are not disputed. The Aspiring Parties' argument is that the District Court did not credit their factual allegations or the additional information in their declarations. That argument remains unrebutted.

[14] The Commonwealth is correct, however, that the District Court, while required to accept "factual assertions … [that] plausibly suggest an entitlement to relief," is not required to accept "bare assertions," *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009), or legal conclusions. *Id*. at 678.

Krawchuk, though he had been a candidate before, expressly declared that he would "no longer run for statewide office … as long as [he] must assume the risk of incurring costs pursuant to Section 2937." (J.A. at 91.)

Particularly telling is the District Court's comment that it was "not persuaded" by the allegations that "future candidates will be assessed costs." *Constitution Party*, 2013 WL 867183, at *7. The words "not persuaded" betray a foray into fact-finding which, in the review of a facial attack on subject matter jurisdiction, the District Court was not entitled to undertake. Moreover, the District Court misapprehended the Aspiring Parties' argument. It is not, as the Court viewed it, simply that future costs may be assessed, but rather that the threat of high costs has imposed, and will continue to impose, a real and chilling effect on political activity. The Aspiring Parties allege and have adduced proof –uncontroverted at this stage – that Pennsylvania's election scheme provoked, and will continue to provoke, costly major party challenges to the Aspiring Parties' efforts to field candidates.[15] The effects are not merely a matter of conjecture. Despite attaining minor-party status and a place on the ballot in 2008, all of the Libertarian Party candidates withdrew their 2010 nomination

[15] The likelihood of future legal challenges is hardly farfetched. The undisputed facts establish that the nomination papers of candidates representing one or more of the C.G.L. Parties have been challenged in all but one election cycle for the past decade. Taking that history in the light most favorable to the Aspiring Parties sufficiently establishes, for purposes of overcoming a facial attack, that they would face similar obstacles in the future.

papers after receiving a direct threat from a lawyer representing challengers allied with a major party.

The District Court did not review the Complaint in the light most favorable to the Aspiring Parties, and that resulted in an incorrect standing analysis. The question remains, however, whether the Aspiring Parties' allegations, if accepted, meet the legal requirements for standing. As that calls for a purely legal analysis, we proceed with it now rather than remanding the question to the District Court. *See Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 100 (3d Cir. 2011) (declining to remand, despite the district court's legal error, where the undisputed facts in the record allowed for a conclusive analysis under the correct legal standard).

B. Standing

"The standing inquiry … focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 734 (2008). To establish that stake, a plaintiff must show three elements: injury-in-fact, causation, and redressability. In the seminal standing opinion *Lujan v. Defenders of Wildlife*, the Supreme Court described those elements as follows:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct

> complained of – the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61 (alterations in original) (citations omitted). The same elements must be examined with respect to each individual claim advanced by the Aspiring Parties. *See In re Schering Plough Corp.*, 678 F.3d at 245 ("[A] plaintiff who raises multiple causes of action 'must demonstrate standing for each claim he seeks to press.'" (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006))).

In its review of the Complaint, the District Court relied heavily on our unreported decision in *Constitution Party of Pennsylvania. v. Cortes*, 433 F. App'x 89 (3d Cir. 2011).[16] In *Cortes*, the same political entities before us now, the C.G.L. Parties, filed a complaint in the United States District Court for the Eastern District of Pennsylvania that challenged, among other things, the constitutionality of § 2937.[17] *Id*. at

[16] We are cognizant of our Internal Operating Procedure No. 5.7, which states that "by tradition [we] do[] not cite to [our] not precedential opinions as authority." Here we do not cite *Constitution Party of Pennsylvania. v. Cortes*, 433 F. App'x 89 (3d Cir. 2011) because it serves as authority but because it is the foundation of the District Court's opinion, and, as such, we must refer to it.

[17] The plaintiffs in *Cortes* also challenged § 2872.2,

91. The district court dismissed the complaint on standing and ripeness grounds, and we affirmed on standing alone. *Id*. at 93. While *Cortes* included a challenge to § 2937 by some of the same parties before us now, it is without precedential effect. Even if it had precedential value, though, it presented quite different circumstances because the complaint in that case lacked the specificity and the supporting declarations present here, *see id*. at 93 ("[T]here is simply no allegation in the Amended Complaint, other than conclusory assertions … ."). Despite that crucial difference, the District Court adopted the analysis from *Cortes* and held that the Aspiring Parties cannot be heard because they did not establish the injury and causation elements of standing. *Constitution Party*, 2013 WL 867183, at *8.

The Aspiring Parties argue that the District Court erroneously dismissed their Complaint for lack of standing and that the dismissal "is tantamount to holding Section 2911(b) and Section 2937 immune from judicial review." (Appellants' Opening Br. at 19.) We agree.

1. Injury-in-Fact

When standing is contested, "the injury-in-fact element is often determinative." *In re Schering Plough Corp.*, 678 F.3d at 245 (quoting *Toll Bros., Inc. v. Twp. of Readington*, 555 F. 3d 131, 138 (3d Cir. 2009)) (internal quotation marks omitted). As earlier noted, injury-in-fact requires "an invasion of a legally protected interest which is (a) concrete

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which deals with the nomination papers of minor political parties, not § 2911, which is challenged here and regulates the nomination process for political bodies. 433 F. App'x at 90.

and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61 (citations omitted) (internal quotation marks omitted). The injury "must 'affect the plaintiff in a personal and individual way.'" *In re Schering Plough Corp.*, 678 F.3d at 245 (quoting *Lujan*, 504 U.S. at 560 n.1). The Supreme Court has instructed that "the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis*, 554 U.S. at 734. However, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects." *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983) (second alteration in original) (internal quotation marks omitted) (citation omitted); *cf. Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) ("A plaintiff … lacks standing if his 'injury' stems from an indefinite risk of future harms inflicted by unknown third parties.").

The District Court determined that the Aspiring Parties' alleged injury "could not be considered a real, immediate, and direct injury." *Constitution Party*, 2013 WL 867183, at *7 (internal quotation marks omitted). The Court downplayed their claims as being based on "the *possibility* of assessed costs," and it characterized the threat of costs as merely "conjectural or hypothetical." *Id*. Further, the Court stated that it was "not persuaded by the [Aspiring Parties'] arguments that because non-major party candidates have been assessed costs in the past, their future candidates will be assessed costs." *Id*. It also concluded that the Aspiring Parties set forth no allegation that a Pennsylvania court would actually assess costs against a candidate who does not engage in misconduct. *Id*.

In all of that, the District Court overlooked the Aspiring Parties' allegations and evidence, as we have already described. Moreover, it took no account of the principle that the factual support needed "to establish standing depends considerably upon whether the plaintiff is himself an object of the action ... . If he is, there is ordinarily little question that the action or inaction has caused him injury … ." *Lujan*, 504 U.S. at 561-62; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983) ("Thus, when an individual who is the very object of a law's requirement or prohibition seeks to challenge it, he always has standing."). Here, the portions of the Pennsylvania election code challenged by the Aspiring Parties directly regulate the conduct of political bodies and their candidates. 25 Pa. Cons. Stat. §2911 ("Nominations by political bodies"); *id*. § 2937 ("Objections to nomination petitions and papers"). Under § 2911(b), political bodies, *i.e.*, organizations which, like the C.G.L. Parties, did not attain two percent of the vote received by the statewide candidate with the most votes in the prior election, are the explicit objects of the nomination-paper requirements. The statute sets forth what such organizations must do to appear on the general election ballot. Thus, to say that the Aspiring Parties are not objects of the scheme is untenable. That is especially so since the Commonwealth's merits arguments – which are broadly referenced throughout its briefing – plainly demonstrate that political bodies are indeed the target of § 2911(b), which operates in conjunction with § 2937.[18] The

[18] As mentioned above, § 2872.2 establishes the nomination-paper mandate for minor political parties. It is

Commonwealth will contend on the merits, as it has in the past, that Pennsylvania has an interest in preventing minor political players from cluttering the ballot. *See Rogers*, 468 F.3d at 194 ("The state interests here are avoiding ballot clutter and ensuring viable candidates."). It is inconsistent to the point of whiplash to suggest that minor players like the Aspiring Parties are properly subject to the challenged provisions because there is a legitimate government interest in limiting their access to the ballot, *id.*, but then to contend in the standing context that those same provisions are not, in fact, aimed at the very same parties.

In addition, the District Court gave little consideration to noteworthy developments in Pennsylvania law in the last ten years that affect our analysis here: first, highly publicized awards of costs against would-be candidates; second, new case law allowing such costs to be awarded despite the good

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true that "both major party candidates seeking to appear on a primary election ballot, and minor party candidates seeking to appear on a November election ballot, are subject to § 2937." (Appellee's Letter filed March 19, 2014.) That makes little practical difference, however, as political bodies, such as the Aspiring Parties, are the sole object of § 2911. Nor does it matter under the language of *Lujan* if some few others are the statutory objects of § 2937, as long as the plaintiffs themselves are the object of the statute. *See Lujan*, 504 U.S. at 561 (stating that the standing inquiry "depends considerably upon whether the plaintiff is himself an object of the action"). And, we will not be so blind as to ignore the uncontested facts set forth in the Aspiring Parties' declarations, which establish how § 2937 in practice has been applied only to non-major parties.

faith efforts of people facing challenges to nomination papers; and, third, repeated threats to pursue similar cost awards against the C.G.L. Parties' candidates.

As to the first point, it is no accident that this case arises now. The Commonwealth itself highlights in its briefing the recent increase in litigation surrounding Pennsylvania's election code, saying that "there are five appellate decisions, rendered between 2006 and 2011, that cannot be ignored." (Appellees' Br. at 11.) The Aspiring Parties are not ignoring them and neither will we. It matters greatly how § 2937 has been applied in the last decade, a period in which that statute has been a vehicle for imposing significant litigation expenses on non-major parties and their candidates. *Cf. Susan B. Anthony List v. Driehaus*, 573 U.S. __ (2014) (slip op., at 14) (finding injury-in-fact where there was a substantial "threat of future enforcement," noting that, "[m]ost obviously, there is a history of past enforcement here").

Next, the Pennsylvania Supreme Court only recently addressed the standard for deciding when to award costs under § 2937. In *In re Farnese*, the court said that there are various "factors relevant to the discretionary assessment of whether to shift costs." 17 A.3d at 372. It looked at the statutory statement that when a nomination petition or paper is dismissed, the costs of the proceedings associated with the dismissal can be assessed against a candidate as is deemed just, and it interpreted the word "just" to include cases of "fraud, bad faith, or gross misconduct," but not to be limited to that kind of malfeasance. *Id*. In other words, it appears that a candidate can proceed in good faith to seek a spot on the ballot and still be subjected to high litigation costs.

Whether that interpretation of § 2937 leaves the standard for cost shifting unconstitutionally vague and overbroad is yet open to debate.[19]

What is not open to debate on the record before us, viewed in the plaintiff-friendly light that it must be, is that the award of costs in past cases has had a chilling effect on protected First Amendment activity. Political actors have used the recent precedents from Pennsylvania courts as a cudgel against non-major parties and their candidates. According to the Aspiring Parties, Democrats and Republicans – acting strategically, as one would expect of people in high-stakes political contests – have tried and will continue to try to block anyone from the ballot box who might strip votes from their favored candidates. As quoted

[19] To bolster its determination that future harm was too speculative, the District Court here also relied on the fact that, in the two cases where costs were imposed pursuant to § 2937, "the Pennsylvania courts found that the candidates had participated in fraud, bad faith, or similar inappropriate conduct prior to assessing costs." *Constitution Party*, 2013 WL 867183, at *7. The Court went on to state that "[t]he Plaintiffs make no allegation a court will assess costs against a candidate who acted in good faith." *Id.* That statement transforms the outcome in *Farnese* into the kind of bright-line standard (good faith on one side and bad faith on the other) that was expressly rejected by the Pennsylvania Supreme Court. *In re Farnese*, 17 A.3d at 371. The Aspiring Parties' argument is not that, under *Farnese*, courts will start randomly ordering costs but that citizens do not know what conduct will lead to such orders. It is the alleged uncertainty itself that leads to the Aspiring Parties' injury.

earlier, a shrewd lawyer engaged on behalf of three private challengers affiliated with the Republican Party expressly threatened to move for upwards of $100,000 in costs if the Libertarian Party went forward with its nomination efforts. Referencing *Rogers* and *Nader*, the lawyer said, "[t]hese costs are comparable to the costs awarded in recent years by the Commonwealth Court in similar nomination paper challenges." (J.A at 87.) The threat had the intended effect, and the Libertarian Party withdrew its 2010 nomination papers. The Democratic Party similarly pushed the Green Party's candidate out of the race for United States Senate in 2010, when the Democratic candidate filed a challenge pursuant to § 2937. The threat of cost shifting, entirely believable in light of recent history, chills the Aspiring Parties' electioneering activities.

That is the injury, and cogent precedent shows it to be intolerable. In *Susan B. Anthony List v. Driehaus*, the Supreme Court this term unanimously held that political advocacy groups had established injury-in-fact, in part because the threat of future prosecution, which was "bolstered by the fact that authority to file a complaint" was not limited to a government actor, could be used as a political tool. *Susan B. Anthony List*, 573 U.S., at __ (slip op., at 14). The Court stated that, "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, *there is a real risk of complaint from, for example, political opponents*." *Id.* (emphasis added). [20]

[20] Although the opinion in *Susan B. Anthony List* addressed a criminal statute, the Supreme Court said that it would "take the threatened [election] Commission

In short, as we have already discussed, there are ample allegations of a present and continuing injury, despite the Commonwealth's desire to minimize the problem as involving nothing more than "potential financial burdens." (Appellees' Br. at 39.) It is quite true that a "chain of contingencies" amounting to "mere speculation" is insufficient for an injury-in-fact. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). But the injury alleged by the Aspiring Parties is not a speculative series of conditions. Construed in the light most favorable to the Aspiring Parties, their Complaint establishes that, when they submit nomination papers as they must under § 2911(b), they face the prospect of cost-shifting sanctions, the very fact of which inherently burdens their electioneering activity. *See Susan B. Anthony List*, 573 U.S., at __ (slip op., at 15-16) (noting the burden imposed on electoral speech, including "divert[ing] significant time and resources to hire legal counsel"). They have produced sworn and uncontested declarations that their plans for seeking public office are directly impeded by the

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proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify preenforcement review." 573 U.S. __ (2014) (slip op., at 15). The Court did not decide if such a threat, alone, gives rise to an injury-in-fact, because the Commission proceedings at issue in that case were "backed by the additional threat of criminal prosecution." *Id.* The Pennsylvania statute, by contrast, does not provide for criminal sanctions; however, the Court's analysis of threats used to stifle electoral activity informs us here.

relevant provisions of the election code.[21] "Because

[21] Our dissenting colleague dismisses the Aspiring Parties' efforts to have their day in court as founded solely on subjective fears. (Dissent Op. at 1.). For the reasons already outlined, we disagree with that characterization, as we do the dissent's reliance on *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). While our colleague is troubled by a supposed chain of contingencies (Dissent Op. at 3-4) – three links long – *Clapper*'s statement that injury must certainly be impending does not mean that Aspiring Party candidates must certainly be assessed costs. (*Id*. at 4.) It is enough that there is a reasonable evidentiary basis to conclude that the Aspiring Parties' electioneering activity will be limited by Pennsylvania's electoral scheme. The credible threat of costs imposes the injurious restraint on political activity.

Moreover, our colleague's reliance on *Clapper* overlooks at least three ways in which that case is distinguishable. First, *Clapper* addresses the unique realm of national security in which peculiar balance-of-power concerns, which are not present here, abound. *See Clapper*, 133 S. Ct. at 1147 ("[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs."). Second, the Court's holding that respondents did not have standing was based on a detailed review of the particular statutory scheme at issue in that case, which, by the Court's count, included five levels of safeguards and contingencies. *See id*. at 1148-50 (discussing the complex operation of the Foreign Intelligence Surveillance Act as applied to the respondents). Third, and most importantly, the law at issue in *Clapper* did not directly regulate the respondents. *Id*. at 1148 ("[R]espondents' theory

campaign planning decisions have to be made months, or even years, in advance of the election to be effective, the plaintiffs' alleged injuries are actual and threatened." *Miller v. Brown*, 462 F.3d 312, 317-18 (4th Cir. 2006); *see also New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500–01 (10th Cir. 1995) (finding injury from the existence of a New Mexico statute relating to campaign expenditures that caused a congressman to engage in fundraising differently than he otherwise would have, even though the congressman had not yet announced his intention to run for

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necessarily rests on their assertion that the Government will target *other individuals* – namely, their foreign contacts."). This third point alone makes *Clapper* inapposite and renders any language from it regarding subjective speculation or chains of contingencies inapplicable here. The Supreme Court in fact relied on that very point to distinguish other standing cases from the facts of *Clapper*. *See id.* at 1153. ("As an initial matter, none of these cases holds or even suggests that plaintiffs can establish standing simply by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part."); *see also id.* at 1150 ("[R]espondents can only speculate as to whether *their own communications* … would be incidentally acquired."). In contrast, the Pennsylvania scheme compels the Aspiring Parties to file nomination papers and directly regulates their conduct in doing so.

Finally, it bears repeating that, in this case, we are addressing a fundamental First Amendment right to political participation – not an inconvenience or burden, but wholesale disenfranchisement.

office).

As those are the undisputed facts before us, the Aspiring Parties have established injury-in-fact. We thus consider whether they also satisfy the other prerequisites for standing: causation and redressability. [22]

[22] To the extent that a separate declaratory judgment standing analysis is required, *see Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 194 (3d Cir. 2004) (separately reviewing "the standing requirements for a declaratory judgment case" and Article III standing) – something we have not expressly held but to which the Commonwealth devotes a great deal of space in its briefing – we reject the Commonwealth's argument against such standing. Although the Commonwealth contends that standing for declaratory judgment is an "extra layer to the analysis," (Appellee's Br. at 31) we have often framed the inquiry as part of the injury-in-fact analysis. "A plaintiff seeking a declaratory judgment must possess constitutional standing but need not have suffered 'the full harm expected.'" *Khodara Env't, Inc.*, 376 F.3d at 193 (quoting *St. Thomas–St. John Hotel & Tourism Ass'n v. V.I.*, 218 F.3d 232, 240 (3d Cir. 2000)). Such a plaintiff "has Article III standing if 'there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* at 193-94 (quoting *St. Thomas–St. John Hotel & Tourism Ass'n,* 218 F.3d at 240). The Commonwealth claims that the interests of the parties are not adverse because Commonwealth officials only accept nomination papers for filing and have no role in any challenge posed to the papers. Enforcement of the law can, however, establish an adverse interest. *See St. Thomas–St.*

2. Causation

The District Court held that, even if the Aspiring Parties could establish injury-in-fact, they had failed to establish causation. *Constitution Party*, 2013 WL 867183, at *7-8. A federal court may "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The Commonwealth argues that, because private parties are the ones who bring lawsuits objecting to the nomination papers, the independent decisions of those objectors constitute a break in any actionable link to the Commonwealth's conduct. Essentially, the argument is that Commonwealth officials only accept the nomination papers for filing, and they do none

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John Hotel & Tourism Ass'n, 218 F.3d at 240-41 ("The parties' interests in this action could not be more adverse, as the government and employees, both defendants here, seek to enforce the protections provided by the [statute], and the employers … seek to avoid enforcement of those protections."). The Commonwealth also asserts that the controversy is not of "sufficient immediacy and reality" because the results of the 2012 nomination paper process depended on a "host of contingencies." (Appellee's Br. at 34.) That argument fails for the same reasons discussed above regarding the immediate nature of the injury-in-fact. The Aspiring Parties satisfy the prerequisites to bring a declaratory judgment action. Having said that, we reiterate that we are not deciding the merits and express no opinion on whether a declaratory judgment should ultimately issue.

of the things about which the Aspiring Parties complain. We cannot agree with that self-serving characterization.

Causation in the context of standing is not the same as proximate causation from tort law, and the Supreme Court has cautioned against "wrongly equat[ing] … injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997). Moreover, there is room for concurrent causation in the analysis of standing, *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (holding that if a petition witness residency requirement was "at least in part responsible for frustrating [plaintiff's] attempt to fully assert his First Amendment rights in Virginia, the causation element of *Lujan* is satisfied"), and, indeed, "an indirect causal relationship will suffice, so long as there is a fairly traceable connection." *Toll Bros. Inc.*, 555 F.3d at 142 (citations omitted) (internal quotation marks omitted). There are two types of cases in which standing exists even though the direct source of injury is a third party:

> First, a federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action. Second, standing has been found where the record present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and likelihood of redress.

Bloomberg L.P. v. CFTC, 949 F. Supp. 2d 91, 116 (D.D.C. 2013) (alterations in original) (citations omitted) (internal quotation marks omitted). At issue here is causation of the second type.

The District Court concluded that the Aspiring Parties provided "nothing more than conjecture and conclusory assertions" to support their allegation that candidate recruitment problems stemmed from § 2937 costs. *Constitution Party*, 2013 WL 867183, at *8. It also held that "any multitude of other factors" could have resulted in candidate reluctance. *Id*. Again, this largely ignores the Complaint and the declarations submitted with it. To the extent that the Court addressed the Aspiring Parties allegations and proof, it certainly did not take them as true. Candidates and canvassers refuse to participate in the political process because, they have declared, they cannot bear the risk of litigation costs imposed under § 2937. That is a direct and un-refuted statement of causation. Because the "mere existence of the … law causes these [electoral] decisions to be made differently than they would absent the law … the standing inquiry's second requirement of a causal connection between the plaintiffs' injuries and the law they challenge" is satisfied. *Miller*, 462 F.3d at 318 (citing *Simon*, 426 U.S. at 41–42).

The Commonwealth cannot hide behind the behavior of third parties when its officials are responsible for administering the election code that empowers those third parties to have the pernicious influence alleged in the Complaint. To hold otherwise would mean that political bodies could never seek prospective relief because the objectors to their nomination papers will always be unknown

until it is too late to actually obtain a meaningful injunction. We cannot accept the Commonwealth's argument that the only way to challenge the statutory scheme is in a lawsuit over a particular set of nominating papers. Oral Arg. Tr. at 47:12-25. By the impossible logic of the Commonwealth, the Aspiring Parties will never have a prospective remedy for their injury, because there will never be standing, because there will never be causation, because the third parties who might challenge their nomination papers are always unknown until the opportunity for prospective relief has passed.[23] *Cf. Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 633 (2007) (Scalia, J., concurring in the judgment) ("The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason."). All the while, the C.G.L. Parties allege that they cannot advance from "political body" status precisely because they cannot recruit volunteers to even gather signatures.

Under this specific statutory scheme, it is not the actions of other actors alone that cause the injury. Those third parties could take no action without the mechanisms by which the Commonwealth's officials oversee the election code provisions at issue here. Therefore, "the record present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct,

[23] Some may say this goes too far and that the Aspiring Parties need not wait until a challenge is brought, but could come to court as soon as there are credible threats from third-party challengers. However, given the months and years of strategy that go into campaigning in our modern era, forcing political bodies to live under such uncertainty is, as already addressed above, subject to challenge.

leaving little doubt as to causation and likelihood of redress." *Bloomberg L.P.*, 949 F. Supp. 2d at 116 (alteration in original) (internal quotation marks omitted).

In fact, in reviewing other election challenges, it appears to be standard operating procedure for plaintiffs to bring these type of suits against the officials who administer the state election system, which here includes the Secretary of the Commonwealth and state election commissioners. *See Belitskus*, 343 F.3d at 638 (finding standing where the defendants were the Secretary of the Commonwealth and the Commissioner for the Bureau of Commissions, Elections and Legislation). For example, in *American Party of Texas v. White*, 415 U.S. 767, 770 (1974), plaintiffs brought claims "against the Texas Secretary of State seeking declaratory and injunctive relief against the enforcement of various sections of the Texas Election Code," and the Supreme Court undertook no standing analysis other than to note that other minor parties initially involved in the litigation lost standing during the proceedings, *id*. at 770 n.2. That the Supreme Court went straight to the merits of a similar ballot-access claim, brought for declaratory and injunctive relief against state officials charged with administering the election code, is not lost on us. *See id*. at 780. It implies the propriety of finding standing here, where the defendants exercise the same kinds of government authority. The Aspiring Parties have established that their injury-in-fact can fairly be traced to the actions of the Commonwealth officials, and the causation element is satisfied.

3. Redressability

Finally, standing requires that there be redressability, which is "a showing that 'the injury will be redressed by a favorable decision.'" *Toll Bros. Inc.*, 555 F.3d at 142 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). The District Court did not address this requirement, *Constitution Party*, 2013 WL 867183, at * 8, nor do the parties give it much consideration. We agree that it does not need extensive attention. Redressability here follows the rest of the standing analysis primarily because, by establishing causation, the Aspiring Parties have also established redressability. *See Toll Bros. Inc.*, 555 F.3d at 142 (finding that redressability is "closely related to traceability [causation], and the two prongs often overlap"). If the Commonwealth officials do not enforce the election provisions at issue, then the Aspiring Parties will not be burdened by the nomination scheme embodied in §§ 2911(b) and 2937, allowing the C.G.L. Parties' candidates to run for office and build functioning political parties.[24] The Aspiring Parties have therefore alleged sufficient facts to establish standing.[25]

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[24] We are not suggesting that framing a remedy, should that ever become necessary, would be a simple matter. We are only holding that the redressability prong of a constitutional standing analysis is satisfied under the present circumstances.

[25] The Aspiring Parties also contend that it was error for the District Court not to separately consider their § 2937 facial challenge. "Litigants asserting facial challenges involving overbreadth under the First Amendment have standing where 'their own rights of free expression are [not] violated' because 'of a judicial prediction or assumption that

V. Conclusion

While the merits of their claims must await a hearing on some future day, the Aspiring Parties have standing to pursue their claims and have them heard. The order of the District Court dismissing the Complaint will be reversed.

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the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 238 (3d Cir. 2010) (alteration in original) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)); *Amato v. Wilentz*, 952 F.2d 742, 753 (3d Cir. 1991) ("The Supreme Court rather freely grants standing to raise overbreadth claims, on the ground that an overbroad ... regulation may chill the expression of others not before the court."). A separate analysis of the § 2937 facial claim and the statute's impact on parties not before the Court is unnecessary at this juncture because we have determined that the Aspiring Parties have standing to bring all three claims in their Complaint.

Lastly, the Commonwealth argues that the controversy was not ripe when it was filed. The ripeness inquiry involves various considerations including whether there is a "sufficiently adversarial posture," the facts are "sufficiently developed," and a party is "genuinely aggrieved." *Peachlum v. City of York*, 333 F.3d 429, 433-34 (3d Cir. 2003). Although the District Court did not reach the question of ripeness, we hold that, for the reasons discussed above, the case was ripe for adjudication.

The Constitution Party of Pennsylvania, et al.
v. Carol Aichele, et al.
No. 13-1952

AMBRO, Circuit Judge, dissenting

Were the law on standing a blank slate, perhaps the plaintiffs[1] here would have standing. It is not, and they do not. Instead, precedent establishes clear and exacting standards for when fear of a possible harm generates standing. Because the plaintiffs have not met those standards, I respectfully dissent.

As the Supreme Court stated more than four decades ago, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . . ." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Here, the plaintiffs have specifically and with supporting declarations alleged that they and their members subjectively fear the future imposition of costs. Contrary to the majority's position, our task is to determine

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[1] As discussed in the majority opinion, it is difficult to select an appropriate short-hand label for the plaintiffs in this case, who include the Constitution Party of Pennsylvania, the Libertarian Party of Pennsylvania, and the Green Party of Pennsylvania, as well as several party officials and current or former candidates. The majority's preferred name, "Aspiring Parties," seems fit only for the organizations (and even there it may be gratuitously laudatory). Because the standing analysis in cases like this one focuses on the claims made by a party in its complaint and supporting documents, I have used the term "plaintiffs" rather than "appellants."

whether that subjective fear has a sufficient objective basis to render it an injury sufficient to confer standing to sue today.

Clapper v. Amnesty International USA, 133 S. Ct. 1138 (2013), is particularly instructive in conducting this evaluation. There a variety of lawyers and activist groups brought a constitutional challenge to expanded surveillance under an amended portion of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a, that they feared might intercept their communications given their work with targeted groups. *Id.* at 1145. The Second Circuit, reversing the District Court, found standing based on both what the plaintiffs termed an "objectively reasonable likelihood" of future interception and the actions of the plaintiffs based on fear of that interception. *Id.* at 1146.

The Supreme Court reversed the Circuit Court, ruling that the plaintiffs did not have standing. The threat of future surveillance was too speculative to create standing because it "relie[d] on a highly attenuated chain of possibilities . . . ." *Id.* at 1148. As to the applicable test, "the Second Circuit's 'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be *certainly impending* to constitute injury in fact.'" *Id.* at 1147 (emphasis added) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Instead, that "Circuit's analysis improperly allowed respondents to establish standing by asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not 'fanciful, paranoid, or otherwise unreasonable.'" *Id.* at 1151 (quoting *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011)).

My majority colleagues make the same error, implicitly allowing the plaintiffs to establish standing without showing a sufficiently certain harm. Their opinion states: "The threat of cost shifting, *entirely believable in light of*

recent history, chills the Aspiring Parties' electioneering activities." Maj. Op. at 35 (emphasis added). I do not doubt that the threat of cost shifting is "entirely believable," *id.*, nor, for the sake of argument, do I doubt that the plaintiffs in good faith believe costs would be assessed if the plaintiff organizations were to run candidates. Yet this fear alone is simply not enough to create standing.

Instead, to generate standing, cost assessments must be "certainly impending." They are not in at least three ways. First, assuming that a candidate were to collect and submit the necessary signatures (something the candidate is responsible for), someone would have to challenge his or her nomination papers. Even if it is true that "[t]he likelihood of future legal challenges is hardly farfetched," Maj. Op. at 27 n.15, a "hardly farfetched" threat is not enough. The complaint alleges that in recent years some non-major party candidates have been challenged while others have not been challenged (in particular, the Libertarian Party nominees in 2008). That some but not all recent candidates have been challenged does not support the inference that any particular nomination will inevitably be challenged in the future.

Second, if a nomination were challenged, the candidate would have to lose before costs could be imposed—*i.e.*, his or her nomination papers would have to be disqualified. Based on the complaint and supporting declarations, there is no basis for concluding that successful defenses against challenges are impossible or even improbable, particularly when (as the plaintiffs repeatedly assert) a candidate believes in good faith that he or she submitted sufficient valid signatures. The mere fact of a challenge does not make disqualification a *fait accompli*.

Third, even if a challenge is successful, costs can be imposed under *In re Farnese*, 17 A.3d 357 (Pa. 2011), only if

a court deems such an assessment "just" after considering "the particular facts, the nature of the litigation, and other considerations as may appear relevant." *Id.* at 372. A cost assessment is not automatic or inevitable after a challenge is lost, but rather is the subject of a case-specific balancing process by a neutral state court. Although *Clapper* requires certainty, the majority inexplicably writes that it is post-*Farnese* cost assessments' "*alleged uncertainty* itself that leads to the Aspiring Parties' injury." Maj. Op. at 35 n.19 (emphasis added). Yet, as the majority notes, the provision allowing cost assessments has been law for over 75 years and the signature threshold has been unchanged for over 40 years. *See id.* at 12 (citing *People's Party v. Tucker*, 347 F. Supp. 1, 2 & n.2 (M.D. Pa. 1972)). In all that time, the plaintiffs have identified just two instances in which a Pennsylvania court has assessed costs against a non-major party candidate under this provision, each involving particular facts that cause courts to "send a message" by way of a sanction. The first major cost award involved widescale fraud, while the second involved repeated failure to comply with court orders. These two cases, particularly in light of *Farnese*, do not support the conclusion that a candidate who is challenged and loses will inevitably be assessed costs. What we have instead is, like *Clapper*, a "highly attenuated chain of possibilities [that] does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 133 S. Ct. at 1148.

Nor can the plaintiffs create standing by acting on their subjective fear. Their filings are filled with language suggesting coercion, saying that would-be candidates have been "forced" or "compelled" to withdraw or not to run and referring to "threats" to seek costs by people associated with major parties. The *Clapper* plaintiffs made analogous claims, such as "that the threat of surveillance sometimes compels them to avoid certain e-mail and phone conversations, to 'tal[k] in generalities rather than specifics,' or to travel so that

they can have in-person conversations." *Id.* at 1151 (alterations in original) (citations omitted). The Supreme Court roundly rejected those contentions, writing that "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* The same applies here: actions the plaintiffs or their "member-supporters" have taken or not taken out of fear of cost assessments do not create standing for the same reason that fear itself does not.

In response, my majority colleagues argue without citation that "[i]t is enough that there is a reasonable evidentiary basis to conclude that the [plaintiffs'] electioneering activity will be limited by Pennsylvania's electoral scheme." Maj. Op. at 37 n.21. In their view, so long as there is a "credible threat," *id.*, of some negative consequence for the exercise of one's First Amendment right, a plaintiff can show standing by specifically alleging that he or she will not exercise the right out of subjective fear that consequence could occur. This is not the law, and the majority's purported bases for distinguishing *Clapper*, which amount to the conclusion that our case does not involve identical facts, are unavailing. Thus I turn to what *Clapper* teaches.[2]

[2] I read the Supreme Court's opinion in *Susan B. Anthony List v. Driehaus*, 573 U.S. ___ (2014), as simply an extension of the long-established special standing analysis in cases involving potential criminal prosecution for violating a prohibition on speech. *See id.* (slip op. at 16) ("The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an

I know no basis for concluding that *Clapper*'s reach is limited to national security cases beyond the vague half-sentence quoted by the majority. *Clapper* relies, with the exception of *Laird*, overwhelmingly on standing cases from outside the national security context. For the central proposition that a threatened harm must be certainly impending, the Court relied on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and a case where one death row inmate attempted to assert standing on behalf of another death row inmate, *Whitmore v. Arkansas*, 495 U.S. 149 (1990). *See Clapper*, 133 S. Ct. at 1147 (citing *Lujan*, 504 U.S. at 565 n.2); *id.* (citing *Whitmore*, 495 U.S. at 158). To conclude that costs incurred out of fear of a non-certain harm do not generate standing, the Court in *Clapper* looked to *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), a tax dispute among several states, and *National Family Planning & Reproductive Health Association, Inc. v. Gonzales*, 468 F.3d 826 (D.C. Cir. 2006), a challenge to grant restrictions on family planning services. *See Clapper*, 133 S. Ct. at 1151. This range of sources strongly suggests that the Court meant for us to apply *Clapper* to standing decisions well beyond the narrow national security context.

Article III injury under the circumstances of this case."); *see also, e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("When contesting the constitutionality of a *criminal* statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" (alterations in original) (emphasis added) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974))). This case involves neither the threat of criminal prosecution nor a prohibition of any kind, and thus the *Babbit-Steffel* standing analysis does not apply.

Moreover, in *Clapper*'s "detailed review of the particular statutory scheme at issue," Maj. Op. at 38 n.21, the Court did not reach its conclusion based on some isolated, idiosyncratic feature of the FISA amendments. It reviewed the statute to determine whether it made the purported harm certainly impending and concluded it did not. *See* 133 S. Ct. at 1148-50. A thorough review of the statutory scheme here reveals similar uncertainty and thus, I believe, leads to the same conclusion.

The majority also argues that *Clapper* does not apply because the plaintiffs there alleged that their First Amendment rights were burdened by possible surveillance of their contacts, *see id.* at 1148, while the plaintiffs here fear costs that might be assessed against them and their candidates directly. *See* Maj. Op. at 38 n.21. It is a distinction without a difference. That the *Clapper* plaintiffs feared government action against others rather than directly against themselves was simply one among many reasons the Court held that the harm *to the plaintiffs* from this hypothetical surveillance was too speculative to generate standing. *See* 133 S. Ct. at 1148. It was not, however, the basis of the Supreme Court's conclusion, established in standing law since *Laird*, that a subjective chilling effect in general is insufficient for standing unless the feared harm is certainly impending. *See id.* at 1152 (quoting *Laird*, 408 U.S. at 13-14). This rule clearly still applies to the plaintiffs in our case.

The majority's description of the statutory scheme as "not an inconvenience or burden, but wholesale disenfranchisement," Maj. Op. at 38-39 n.21, hyperbolizes the law's actual effects. The plaintiffs themselves have repeatedly characterized the Pennsylvania laws' collective effect as a "burden" on their constitutional rights but have not come close to alleging Pennsylvania "disenfranchises" them. *See* J.A. at 44 ("The application of Section 2911(b) and

Section 2937 has severely impacted Plaintiffs and continues to impose severe burdens on them."); *id.* at 47 ("Section 2911(b) and Section 2937, as applied, violate Plaintiffs' freedoms of speech, petition, assembly, and association for political purposes, and their right to due process of law, as guaranteed by the First and Fourteenth Amendments, by imposing or threatening to impose substantial financial burdens on them . . . ."); *id.* at 49 ("The threat of incurring such financial burdens injures Plaintiffs.").

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. A subjective fear alone, no matter how deeply perceived, does not create a case or controversy the Constitution empowers us to hear unless that fear has a sufficient objective basis. The majority believes that the plaintiffs—who have alleged only two instances ever of cost assessments against non-major-party candidates and speculate costs may be assessed again—have shown such a basis here. I disagree because "hypothetical future harm that is not certainly impending" does not confer standing. *Clapper*, 133 S. Ct. at 1143. Thus I respectfully dissent.

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

THE CONSTITUTION PARTY OF PENNSYLVANIA, et. al.,	:	
Plaintiffs,	:	**CIVIL ACTION**
v.	:	**12-CV-2726**
PEDRO CORTES, et. al.	:	
Defendants.	:	

MEMORANDUM

Stengel, J. **July 23, 2015**

This is an action brought by three political parties to challenge a portion of Pennsylvania's Election Code. The Constitution Party of Pennsylvania (CPPA), the Libertarian Party of Pennsylvania (LPPA), the Green Party of Pennsylvania (GPPA), and several party leaders[1] contend that the Commonwealth's ballot access rules violate the First and Fourteenth Amendments to the United States Constitution. Specifically, plaintiffs attack 25 P.S. § 2911(b)[2] and 25 P.S. § 2937[3] which, in combination, force a

[1] In addition to the three minor parties, plaintiffs include Joe Murphy, chairman of the CPPA; Carl Romanelli, chairman of the GPPA; Thomas Robert Stevens, chairman of the LPPA; James Clymer, a member of the CPPA; and Ken Krawchuk, a former candidate of the LPPA.

[2] The statute provides in relevant part: "Where the nomination is for any office to be filled by the electors of the State at large, the number of qualified electors of the State signing such nomination paper shall be at least equal to two per centum of the largest entire vote cast for any elected candidate in the State at large at the last preceding election at which State-wide candidates were voted for…." 25 P.S. § 2911(b).

[3] The statute provides in relevant part: "All nomination petitions and papers received and filed within the periods limited by this act shall be deemed to be valid, unless, within seven days after the last day for filing said nomination petition or paper, a petition is presented to the court specifically setting forth the objections thereto, and praying that the said petition or paper be set aside.… Upon the presentation of such a petition, the court shall make an order fixing a time for hearing which shall not be later than ten days after the last day for filing said nomination petition or paper, and specifying the time and manner of notice that shall be given to the candidate or candidates named in the nomination petition or paper sought to be set aside. On the day fixed for said hearing, the court shall proceed without delay to hear said objections, and shall give such hearing precedence over other business before it, and shall finally determine said matter not later than fifteen (15) days after the last day for filing said nomination petitions or papers. If the court shall find that said nomination petition or paper is defective under the provisions of [25 P.S. § 2936] or does not contain a sufficient number of genuine signatures of electors entitled to sign the same under the

minority party to assume the risk of incurring substantial financial burdens to defend nomination papers they are required by law to submit. Plaintiffs assert both as-applied and facial challenges against the Election Code. The defendants are Pedro Cortes, the Secretary of the Commonwealth, and Jonathan Marks, the Commissioner of the Bureau of Commissions, Elections, and Legislation.[4] The plaintiffs and the defendants have filed cross motions for summary judgment. For the reasons that follow, I find that the statutes are unconstitutional as applied to the plaintiffs but they are facially valid.

I Background

To place the plaintiffs' allegations in context, I will first discuss the relevant provisions of the Pennsylvania Election Code.

a) The Pennsylvania Election Code

The Pennsylvania Election Code distinguishes political parties from political bodies. 25 P.S. § 2831(a). A political party is one whose candidates "polled a total vote in the State equal to at least two per centum of the largest entire vote cast in the State for any elected candidate" in the preceding general election.[5] Id. Political bodies are those groups which do not cross the 2% threshold. §2381(c). The Election Code further classifies political parties as either major or minor parties. Constitution Party of Pennsylvania v. Aichele, 757 F.3d 347, 350-51 (3d Cir. 2014) (citing §2872.2(a)). A

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provisions of this act, or was not filed by persons entitled to file the same, it shall be set aside…. In case any such petition is dismissed, the court shall make such order as to the payment of the costs of the proceedings, including witness fees, as it shall deem just…."25 P.S. § 2937.

[4] This case was originally filed against Secretary of the Commonwealth Carol Aichele. On June 2, 2015, the Pennsylvania Senate confirmed Pedro Cortes as the Secretary of the Commonwealth. Thus, Mr. Cortes is substituted for Ms. Aichele as the real party in interest. Attorney General Kathleen Kane was also a defendant, but the Third Circuit dismissed all claims against her because she "does not have a discrete role in administering the Pennsylvania Election Code." Constitution Party of Pennsylvania v. Aichele, 757 F.3d 347, 350 n. 3 (3d Cir. 2014).

[5] Political parties must also cross the 2% threshold in at least 10 counties. §2381(a).

minor party is "a political party whose state-wide registration is less than fifteen per centum of the combined state-wide registration for all state-wide political parties…." §2872.2(a). The major parties[6] are those whose membership exceeds 15% of all registered voters. Aichele, 757 F.3d at 350-51. "At present, there are only two major parties in Pennsylvania, the Democratic Party and the Republican Party, as has been the case since the election code was enacted more than three-quarters of a century ago." Id. at 351.

Neither the CPPA, LPPA nor GPPA fielded candidates in the 2014 general election and are currently classified as political bodies. Pls.' Statement of Undisputed facts, doc. no. 60-2, ¶ 40. In earlier years, plaintiffs have qualified as minor political parties. Pls.' Statement of Undisputed Facts ¶¶ 1-3.[7] "Ultimately, the distinction between minor parties and political bodies is of less consequence in this case than is the distinction between major parties and non-major parties, since all non-major parties face essentially the same fight to get their candidates on the ballot through the submission of nominating papers." Constitution Party of Pennsylvania v. Aichele, 757 F.3d 347, 351 (3d Cir. 2014). Despite the plaintiffs' current classification, I will, at times, refer to the plaintiffs as the minor parties.

The major political parties place their candidates on the general election ballot by way of publicly funded primary elections. §2862. To access the primary election ballot,

[6] The Pennsylvania Election Code does not use the term major party. Rather, there are only minor political parties and non-minor political parties. I will use the term major party, as employed by the Third Circuit, for ease of reference.

[7] Defendants agree that plaintiffs each qualified as minor parties during prior elections. Defendants and plaintiffs dispute in what years plaintiffs qualified as minor parties. This dispute is immaterial. It is enough that the both sides agree that plaintiffs at one time or another qualified as minor parties.

major party candidates for President, United States Senator and Governor[8] must submit nomination petitions containing at least 2,000 valid signatures of registered members of their party. §2872.1. Major party candidates for Pennsylvania Treasurer, Auditor General and Attorney General must obtain 1,000 valid signatures.[9] Id. Major party candidates for statewide office circulate nomination petitions for three weeks ending on the tenth Tuesday prior to the primary election when they must file the petitions with the Secretary of the Commonwealth. §§ 2868, 2873(c). "The winner of the plurality of votes in the primary is placed on the general election ballot as the candidate of his or her respective party." Rogers v. Corbett, 468 F.3d 188, 191 (3d Cir. 2006).

Minor party, political body and independent candidates do not run in primary elections. §2872.2; §2911. Instead, they must circulate nomination papers in order to place their names on the general election ballot. §2911(b). For statewide candidates,[10] the number of valid signatures required must exceed 2% of the "largest entire vote cast for any elected candidate in the State at large at the last preceding election at which State-wide candidates were voted for." § 2911(b). In recent years, the minimum signature requirement has been 25,697 in 2004; 67,070 in 2006; 24,666 in 2008; 19,056 in 2010; 20,601 in 2012; and 16,639 in 2014. Pls.' Statement of Undisputed Facts ¶ 10. Candidates have approximately five months to circulate nomination papers which must be filed on or before August 1. §2913(b); Rogers, 468 F.3d at 191; Dfs.' Statement of

[8] A gubernatorial candidate's petition must include 100 signatures from each of at least ten counties. §2872.1

[9] These petitions must include 100 signatures from each of at least five counties. §2872.1

[10] In congressional and state legislative races, "the number of qualified electors of the electoral district signing such nomination papers shall be at least equal to two per centum of the largest entire vote cast for any officer, except a judge of a court of record, elected at the last preceding election in said electoral district…." § 2911(b). Plaintiffs' complaint focuses on their efforts to place statewide candidates on the general election ballot. Therefore, I will not discuss the different regulations applicable to non-statewide candidates.

Undisputed Facts, doc. no. 59-2, ¶ 14.[11] The 2% signature requirement was enacted in 1971,[12] Aichele, 757 F.3d at 353 (internal citations omitted), and does not violate plaintiffs' associational rights or their rights to equal protection of the law. Rogers, 468 F.3d at 197 – 98.

The Secretary must examine both the nomination petitions filed by major party candidates and the nomination papers[13] filed by non-major party candidates and reject those petitions and papers which contain material errors, material alterations, or an insufficient number of signatures. § 2936. Although permitted to do so, id., the Secretary and his staff do not review the validity of signatures appearing on the nomination petitions and papers. Defs.' Statement of Undisputed Facts ¶ 18. The verification of signatures is left to private parties who, within seven days of the filing deadline, may object to the validity of a candidate's signatures and petition[14] the Commonwealth Court to set aside the nomination petition or paper. §2937; In re Nader, 905 A.2d 450, 459 (Pa. 2006) ("Commonwealth Court has original exclusive jurisdiction of matters relating to statewide office."). The Commonwealth Court must set aside the nomination petition or paper if it finds:

[11] Although §2913(c) requires minor party candidates to file nomination papers on or before the second Friday subsequent to the primary, the state moved the filing deadline to August 1 pursuant to two consent decrees entered in Hall v. Davis, 84-cv-1057 (E.D. Pa.) and Libertarian Party of Pennsylvania v. Davis, 84-cv-0262 (M.D. Pa.).

[12] The 1971 amendment to the Election Code quadrupled the signature requirement. People's Party v. Tucker, 347 F. Supp. 1, 2 (M.D. Pa. 1972).

[13] Nomination petitions and nomination papers are terms of art under the election code. Major party candidates file nomination petitions. All other candidates file nomination papers. "Although the terms are sometimes used interchangeably, … [I] will adhere to the statutory distinction as much as possible." Aichele, 757 F.3d at 352 n. 5.

[14] Section 2937's use of the term petition to define the device by which parties may object to nomination petitions and papers is imprecise and confusing leading to disagreement among the justices of the Pennsylvania Supreme Court about the interpretation of the statute. *Compare* In re Nader, 905 A.2d 450, 458 (2006) *with* Id. at 461 (Saylor, J., dissenting) (disagreeing about the meaning of "in case any such petition is dismissed").

> that said nomination petition or paper is defective under the provisions of [§2936] or does not contain a sufficient number of genuine signatures of electors entitled to sign the same under the provisions of this act, or was not filed by persons entitled to file the same….

§ 2937. "[A] member of an opposing party [or an unaffiliated elector] does not have standing to challenge the nomination petition of a candidate in another party's primary election." In re Williams, 625 A.2d 1279, 1281 (Pa. Cmwlth. 1993). On the other hand, any registered voter in the Commonwealth, regardless of party affiliation, may challenge the nomination paper of a non-major party candidate seeking a place on the general election ballot. *Cf*. In re Barlip, 428 A.2d 1058, 1060 (Pa. Cmwlth. 1981) ("[I]t is clear that any person who is registered to vote in a particular election has a substantial interest in obtaining compliance with the election laws by any candidate for whom that elector may vote in that election, and such electors therefore have standing to challenge the nominating petitions of those candidates.")

Pennsylvania is the only state which venues petition verification in the judiciary. Pls.' Statement of Undisputed Facts ¶ 13. Other states shoulder the costs of petition verification, and the task is conducted by the employees of an executive branch agency. Id. The process is quite different in Pennsylvania. At the beginning of each challenge proceeding, the Commonwealth Court issues its standing order instructing both the candidate and objector to provide workers to review the signatures on the challenged nomination paper. Pls.' Statement of Undisputed facts ¶ 13. The workers compare the information on the nomination paper with the information recorded in the Statewide

Uniform Registry of Electors ("SURE") system.[15] Defs.' Statement of Undisputed Facts ¶ 22. Based on this review, the candidates and objectors stipulate to the validity or invalidity of as many signatures possible. Order at ¶ 5, In Re: Nomination Paper of Virgil H. Goode, No. 508 M.D. 2012 (Pa. Commw. August 10, 2012), doc. no. 60-1, p. 8-11. The Court then reviews the signatures that remain in dispute and ultimately determines whether the candidate should be placed on the ballot. Defs.' Statement of Undisputed Facts ¶ 26. The Commonwealth Court's procedure for signature verification is an exercise of its inherent powers. The procedures are not mandated by the Election Code. Id. ¶ 24.

At the conclusion of an objection proceeding, the Commonwealth Court may award costs "as it shall deem just." §2937. "[A]n award of costs to the prevailing party is not warranted solely on the basis that the party prevailed in the underlying nomination petition challenge." In re Farnese, 17 A.3d 357, 369 (Pa. 2011) (reversing an award of costs to candidate). An award of costs may be appropriate where "fraud, bad faith, or gross misconduct is proven, … [but] a party's conduct need not proceed to such an extreme before an award of costs may be dictated by justice." Id., at 372. In awarding costs, the Commonwealth Court must keep in mind: the candidate's right to run for office; the voters' right to elect the candidate of their choice; that objections serve an

[15] The SURE system is a statewide database of registered electors which the Pennsylvania Department of State maintains. The system contains the name, address, voting district and signature of all registered voters. Defs.' Statement of Undisputed Facts ¶ 23.

important check on the nomination process; and that "both parties in election contests are operating within the truncated timeframes[16] of the Election Code." Id. at 372 – 73.

b) Recent Elections

In 2000, 2002 and 2004, the minor parties had candidates on Pennsylvania's general election ballot. Pennsylvania Department of State, Election Returns, http://www.electionreturns.state.pa.us. Each of the plaintiffs crossed the 2% threshold in 2004 and attained minor party status. *See* Pls.' Statement of Undisputed Facts ¶ 15. Ralph Nader and Peter Camejo also attempted to place their names on the 2004 ballot as independent candidates for President and Vice President respectively. However, private parties successfully challenged the Nader/Camejo nomination papers, and the Commonwealth Court removed the independent candidates from the ballot. Additionally, the Court ordered the independent candidates to pay the objectors' court costs in the amount of $81,102.19 upon a finding of extensive fraud and deception in the signature gathering efforts. In re Nader, 905 A.2d 450, 459, 466 (Pa. 2006) *cert. denied* 549 U.S. 1117 (2007). This was the first time costs were assessed against a defending candidate for failing to submit the required number of valid signatures.[17] Aichele, 757 F.3d at 353; Pls.' Statement of Undisputed Facts ¶ 16. The imposition of such substantial costs was

[16] Thus, candidates file signatures well in excess of the number required to access the ballot, and objectors have limited opportunity to investigate nomination papers prior to filing objections. In re Farnese, 17 A.3d at 373.

[17] That is not to say that the Commonwealth Court was unfamiliar with its discretion to impose costs. The Court has assessed costs against a candidate who did not meet the residency requirements. In re Nomination Petitions of McIntyre, 778 A.2d 746 (Pa. Commw. Ct. 2001). The Court has regularly awarded costs against unsuccessful challengers. In re Nomination Petition of Cooper, 643 A.2d 717 (Pa. Commw. Ct. 1994); Petition of Hennessey, 606 A.2d 612 (Pa. Commw. Ct. 1992); In re Wagner, 516 A.2d 1276 (Pa. Commw. Ct. 1986); In re Johnson, 516 A.2d 1290, 1293 (Pa. Commw. Ct. 1985). In one case, the Commonwealth Court taxed costs against a defending Democratic legislative candidate who did not have enough valid signatures, but the Supreme Court reversed the order finding the petition to set aside was untimely. In re Lee, 578 A.2d 1277, 1279 (Pa. 1990). Finally, in a confusing decision, the Court ordered a Democratic legislative candidate, who successfully fended off a residency challenge, to pay his challenger's costs. In re T. Milton Street, 516 A.2d 791, 796 (Pa. Commw. Ct. 1986).

shocking to plaintiffs and has hindered the minor parties' efforts to recruit and place candidates on the general election ballot.

In 2006, the CPPA, GPPA and LPPA nominated candidates for Governor, Lieutenant Governor and U.S. Senate.[18] Pls.' Statement of Undisputed Facts ¶ 17. Due to the threat of litigation costs, the CPPA and LPPA candidates refused to file nomination papers. Id. The GPPA candidates filed nomination papers and an objection was filed. For fear of cost shifting, Marakay Rogers and Christina Valente, the GPPA candidates for Governor and Lieutenant Governor, withdrew from the election upon receiving the challenge. Id.; First Decl. of Christina Valente, doc. no. 46-1 at 13-14,[19] ¶ 5. Carl Romanelli, the GPPA candidate for United States Senate, was the only minor party candidate to defend his nomination papers. Pls.' Statement of Undipusted Facts ¶ 18. Mr. Romanelli's defense was unsuccessful.

The Commonwealth Court ordered Mr. Romanelli and the objectors to each provide nine individuals to verify signatures for each day of the challenge, In re Nomination Paper of Rogers, 942 A.2d 915, 920 (Pa. Commw. Ct.) *aff'd sub nom*. In re Rogers, 959 A.2d 903 (Pa. 2008), but Mr. Romanelli was unable to comply with this order. Rather, on average, only six individuals were present for Mr. Romanelli during the 29 days of proceedings. Id. at 926. Despite Mr. Romanelli filing 99,802 signatures, the challengers were able to successfully strike over 32,000 signatures, and the court set aside the nomination papers. Pls.' Statement of Undisputed Facts ¶ 18. As a result, no

[18] The CPPA nominated Jim Panyard for Governor and Hagan Smith for U.S. Senate. The GPPA nominated Marakay Rogers for Governor, Christina Valente for and Lieutenant Governor and Carl Romanelli for U.S. Senate. The LPPA nominated Ken Krawchuk for U.S. Senate.

[19] All citations to page numbers in the record refer to the pagination created by ECF.

plaintiff fielded a candidate in the 2006 election and each lost their status as a minor party. Pls.' Statement of Undisputed Facts ¶ 20.

The Commonwealth Court awarded costs to Mr. Romanelli's challengers in the amount of $80,407.56. In re Nomination Paper of Rogers, 942 A.2d at 930. The first portion of the award represented court and witness fees in the amount of $32,122.56. Id. at 923 – 927.[20] The court awarded this amount pursuant to §2937 because Mr. Romanelli's failure to provide nine workers each day unnecessarily prolonged the review process. Id. at 926. The second portion of the award was for the challengers' counsel fees totaling $48,285.00.[21] Id. at 929. Since the Election Code does not authorize the imposition of attorney fees, the court relied on the Judicial Code which allows for counsel fees as a sanction for "dilatory, obdurate or vexatious conduct." Id. at 928 (citing 42 Pa.C.S. § 2503(7)). In addition to failing to provide adequate signature verifiers, the court found that Mr. Romanelli and his counsel had been disingenuous in their representations that they could rehabilitate enough signatures to keep Mr. Romanelli on the ballot. Id. at 922. Thus, the Court found that the conduct of Mr.Romanelli had "crossed the line into bad faith" warranting attorney's fees.[22] Id. at 928.

[20] The court cost and fees included $25,481.13 for the ten individuals who verified and tabulated signatures for the challengers ($87.86 x 10 person x 29 days); $1,500 for handwriting experts; and $3,726.28 for stenographic and transcription costs. In re Nomination Paper of Rogers, 942 A.2d 915, 923 - 927 (Pa. Commw. Ct. 2008).

[21] Counsel's hourly was rate $185. The court extended this cost out 9 hours a day for 29 days. In re Nomination Paper of Rogers, 942 A.2d at 927.

[22] Specifically, the Commonwealth Court found:

> Candidate was not cooperative, often times disingenuous to the process. There is a duty and obligation upon the parties, counsel and this Court to advance the proceedings because of the Court's mandate under the Election Code to resolve these matters expeditiously. It must be recognized in the election process that there is the right of a candidate to participate and the right to challenge the validity of a candidacy. The parties must proceed with the greatest candor to ensure that the process moves quickly and efficiently. A candidate who is cooperative does not delay in such important matters.

In 2008, the LPPA fielded candidates for President, Vice President, Attorney General, Auditor General and Treasurer, and their nomination papers went unchallenged.[23] Pls' Statement of Undisputed Facts ¶ 22. While the national Constitution and Green Parties nominated candidates for President and Vice President in 2008, the parties did not file nomination papers in Pennsylvania because "supporters were unwilling to devote time and resources to a petition drive that could result in substantial assessment of costs against their nominees." Pls' Statement of Undisputed Facts ¶ 23.

In 2010, the LPPA and GPPA candidates filed nomination papers for U.S. Senator and Governor. John Krupa, CPPA's 2010 nominee for Governor, did not submit papers to the Department of State because he could not afford to incur litigation costs. Id. ¶ 28. Challengers aided by the Democratic and Republican parties objected to the LPPA and GPPA nomination papers. As a result, Melvin Packer, GPPA's nominee for U.S. Senate, withdrew his nomination papers. Id. ¶ 27. On August 16, Ronald Hicks, Esq., the attorney representing LPPA's challengers, sent an email to Marc Arrigo, Esq., LPPA's attorney, stating:

> Following up on our conversation earlier this evening, I do not have exact figures on what our costs will be if this signature count continues and my clients are required to complete the review and/or move forward with a

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> Candidate has had more than adequate time to comply with the orders of this Court. Candidate's failure to comply alone is a sufficient reason to disallow rehabilitation, regardless of waiver. This Court believes that Candidate's cumulative disingenuousness in these proceedings has crossed the line into bad faith on the part of Candidate and his counsel.

In re Nomination Paper of Rogers, 942 A.2d 915, 928-29 (Pa. Commw. Ct. 2008).

[23] In 2008, Attorney General Tom Corbett was investigating the illegal use of state resources to support political campaigns. The resulting presentment detailed how staff of the Pennsylvania House Democratic Caucus orchestrated and supported the challenges to Ralph Nader's and Carl Romanelli's nomination papers. *See* Presentment of the 28th Statewide Investigating Grand Jury, http://old.post-gazette.com/downloads/harrisburg_presentment.pdf (last visited June 8, 2015), at 58-59. The LPPA theorizes their papers were not challenged due to the higher scrutiny that was focused on the nomination paper objection process. Pls.' Satement of Undisputed Facts ¶ 21.

> hearing. However, a rough estimate would be $92,255 to $106,455…. These costs are comparable to the costs awarded in recent years by the Commonwealth Court in similar nomination paper challenges… which, as you know, were assessed not only against the candidates but also their lawyers and their law firms.

Pls.' Statement of Undisputed Facts ¶ 25. The LPPA candidates withdrew their nomination papers the next day. Id. ¶ 26. As a result, only Democratic and Republican candidates appeared on the 2010 general election ballot. Id. ¶ 29.

In 2012, Jill Stein and Cheri Honkala, the Green Party Candidates for President and Vice President, filed nomination papers which went unchallenged. Id. ¶ 39. On August 8, 2012, private parties filed challenges to the nomination papers submitted by the CPPA and LPPA. Id. ¶ 33. On August 10, 2012, the Commonwealth Court filed an order in each objection proceeding:

> Each party shall have present 20 individuals, in addition to counsel, who are capable of performing computer searches utilizing the SURE system…. The signature review will continue between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday until further order of Court…. The individuals designated by the parties shall review the challenged signatures commencing with those alleged to be unregistered and shall tabulate the number of signature stipulated to be valid and those stipulated to be invalid.

Order, *In re: Goode,* No. 508 M.D. 2012, doc. no. 60-1 at 8-11, ¶¶ 4 and 5 (August 10, 2012); Order, *In re: Robinson,* No. 507 M.D. 2012, doc. no. 60-1 at 56. The signature review commenced on August 20, 2012. Id.

The 2012 CPPA candidates[24] submitted 36,000 total signatures to satisfy the 20,601 signature requirement. Decl. of Alan Goodrigch, doc. no. 60-1 at 2-6, ¶ 6. To survive the challenge the CPPA needed a validity rate of approximately 57%, but by the

[24] CPPA's slate of candidates in 2012 included: Virgil H. Good for President, Jim Clymer for Vice President, Donna Fike for Treasurer and Alan Goodrich for Auditor General. Decl. of Alan Goodrich, doc. no. 60-1 at 2-6, ¶¶ 4 and 5.

end of the first day, the CPPA only had a 30% validity rate.[25] Id. at ¶ 8. On the second day, the challengers' attorney threatened to seek costs against the CPPA and its candidates personally unless the CPPA withdrew its nomination papers. Pls.' Statement of Undisputed Facts ¶ 36. The Commonwealth Court also warned the CPPA that it would consider a motion for costs and fees if the CPPA pursued its defense. Third Decl. of James Clymer, doc. no. 46-1 at 36-38, ¶ 10; Defs.' Resp. to Pls.' Statement of Undisputed Facts ¶ 36. The CPPA candidates withdrew their nomination papers because they were concerned by the number of signatures that were being invalidated and they did not believe they could continue to provide 20 workers to review signatures. Decl. of Alan Goodrich ¶ 11; *Compare* Pls.' Statement of Undisputed Facts ¶ 36 *with* Defs.' Resp. to Pls.' Statement of Undisputed Facts ¶ 36.[26] According to the CPPA,[27] its defense cost $10,000 to $15,000. Pls.' Statement of Undisputed Facts ¶ 50.

The 2012 LPPA candidates[28] submitted 49,164 signatures to the Department of State. Decl. of William Redpath, doc. no. 60-1 at 51-54, ¶ 5. Commonwealth Court Judge James Gardner Collins ordered the candidates to provide 20 workers to validate

[25] Plaintiffs argue that the challengers were able to invalidate signatures of qualified, registered voters based on hyper-technicalities. Decl. of Alan Goodrich ¶ 8.

[26] The parties dispute the primary reasoning behind the CPPA candidates' withdraw from the election. Plaintiffs contend the candidates withdrew because they could not provide 20 workers per day to verify signatures. Defendants assert that the candidates withdrew because they did not have enough valid signatures. I have included both theories in the discussion, but I will not rely on either alleged fact in deciding the motions.

[27] Defendants maintain that the estimation of defense costs in this case are too vague and lack sufficient evidentiary support to be given any weight. Defs.' Resp. to Pls.' Statement of Undisputed Facts ¶ 50. According to defendants, $15,000 is an unreasonable amount to spend on an objection which consisted of a single court hearing and at most two days of signature review. Id. Since this fact is in dispute, I will not rely on the costs averred by the CPPA in deciding these motions. However, I think it is fair to say that the CPPA's costs were not insignificant.

[28] The LPPA candidates included Gary Johnson for President, James Gray for Vice President, Rayburn Smith for Senator, Marakay Rogers for Attorney General, Betsy Summers for Auditor General and Patricia Fryman for State Treasurer. 2012 General Election Official Returns, Pennsylvania Department of State, http://www.electionreturns.state.pa.us/Default.aspx?EID=27&ESTID=2&CID=0&OID=0&CDID=0&PID=0&DISTID=0&IsSpecial=0 (last updated May 13, 2015)

signatures for the first 10 days of the challenge. Decl. of Paul Rossi, doc. no. 60-1 at 74-86, ¶ 13; Defs.' Resp. to Pls.' Statement of Undisputed Facts ¶ 42. Judge Collins only required eight workers for the last three days of review. Id. At the conclusion of signature review, the parties stipulated that 12,686 signatures remained contested. Id. ¶ 24. The parties argued the legal validity of the remaining signatures until Judge Collins denied the objection on October 10, 2012. Id. ¶ 36.

The LPPA successfully defended the nomination papers undeterred by threats that the challengers would move for $100,000 in costs. Pls.' Statement of Undisputed Facts ¶ 37. The defense was an all-consuming task. The LPPA expended at least $47,500[29] on the effort and recruited over 70 volunteers to validate signatures. Id. ¶¶ 52, 53. The LPPA received significant support from the Libertarian National Committee and the campaign of Gary Johnson, the Libertarian candidate for president. Id. ¶ 55, 56. The LPPA expended most of their resources on the nomination challenge to the detriment of the 2012 campaign. Decl. of Steve Sheetz, doc. no. 60-1 at 69-73, ¶ 8.

No CPPA, GPPA or LPPA candidate was able to gather enough signatures to submit nomination papers to the Department of State for the 2014 Gubernatorial Election. Pls.' Statement of Undisputed Facts ¶ 40. According to plaintiffs, their unsuccessful 2014 petition drive resulted from the combined effect of § 2911(b) and § 2937.

[29] The LPPA submits detailed evidence supporting the cost of its defense. The defendants, however, deny "that all of this money was spent efficiently or wisely or was necessary to successfully defend the objection case." Defs.' Resp. to Pls.' Statement of Undisputed Facts ¶ 50. If defendants wish to create a disputed issue of fact, they should point to evidence of record rather than pure conjecture. Furthermore, the LPPA's claimed costs are substantially lower than, and therefore consistent with, the costs assessed against Mr. Nader and Mr. Romanelli. Considering that the LPPA 2012 effort extended for a longer period of time and required more workers than either the 2004 or 2006 challenges, these costs seem modest.

> Members and supporters of CPPA, GPPA and LPPA are increasingly unwilling to dedicate the time and resources necessary to conduct a successful petition drive, because they know that the filing of a challenge pursuant to section 2937 may force the petitions to be withdrawn, whether or not they include enough valid signatures to comply with Section 2911(b)

Pls.' Statement of Undisputed Facts ¶ 46.[30] Additionally, unlike 2012, the GPPA and LPPA did not have a presidential campaign to assist with signature gathering or defending nomination papers. Decl. of John Sweeney, doc. no. 60-1 at pp. 12 – 15, ¶ 6; Decl. of William Redpath ¶ 12. Since the plaintiffs did not field any candidates in 2014, they are currently classified as "political bodies."

c) Procedural History

Plaintiffs filed their complaint on May 17, 2012 in the middle of the signature drive to place minor party candidates on the general election ballot. Aichele, 757 F.3d at 356. "Count I alleges that §§ 2911(b) and 2937 violate the Aspiring Parties'[31] 'freedoms of speech, petition, assembly, and association for political purposes' under the First and Fourteenth Amendments by imposing substantial financial burdens on them to defend their nomination papers." Id. "Count II alleges that §§ 2911(b) and 2937 violate the Aspiring Parties' right to equal protection under the Fourteenth Amendment by requiring them to bear the costs of validating nomination papers, while Republican and Democratic Party candidates are placed on the general election ballots automatically and by means of publicly funded primary elections." Id. "Count III alleges that § 2937 is unconstitutional on its face for authorizing the imposition of costs against candidates, even if they do not

[30]Defendants do not deny that plaintiffs failed to nominate a gubernatorial candidate in 2014 for fear of the financial burdens imposed by §2937. Defs.' Resp. to Pls.' Statement of Undisputed Facts ¶ 46. "[Defendants] do however deny that [plaintiffs'] logic is sound, based upon a reasonable interpretation of 2937…." Id. Defendants' position does not create a disputed issue of fact.

[31] The Third Circuit referred to the minor parties as aspiring parties. Aichele, 757 F.3d at 350 n. 2.

engage in misconduct, thereby chilling First Amendment rights to freedom of speech, petition, assembly, and association." Id.

Following a hearing on September 11, 2012, I dismissed the complaint ruling that the plaintiffs lacked standing. Constitution Party v. Aichele, No. CIV.A. 12-2726, 2013 WL 867183, at *7 (E.D. Pa. Mar. 8, 2013). "A party facing prospective injury has standing to sue where the threatened injury is real, immediate and direct." Davis v. FEC, 554 U.S. 724, 734 (2008). I concluded that allegations of the past enforcement of Section 2937 did not establish the likelihood that costs would be assessed against the plaintiffs in the future. On appeal, the Third Circuit reversed. Relying on Susan B. Anthony List v. Driehaus, 134 S.Ct. 2334, 2346 (2014), the court found that "the threat of cost shifting [was] entirely believable in light of recent history." Aichele, 757 F.3d at 364.[32] The Court of Appeals' opinion only addressed the issue of standing and did not reach the merits of the case. Nonetheless, several of the court's observations are relevant to the resolution of the pending motions.

[32] When I dismissed the complaint, I did not have the benefit of the Supreme Court's opinion in Susan B. Anthony List v. Driehaus which bears a remarkable resemblance to the facts of this case. The Susan B. Anthony List (SBA), a pro-life advocacy organization, complained of an Ohio statute which prohibits "certain 'false statements' 'during the course of any campaign for nomination or election to public office or office of a political party.'" 134 S.Ct. 2334, 2338 (2014). Any person can file a complaint with the Ohio Election Commission alleging a violation of the statute. Id. A violation of the statute is a first – degree misdemeanor punishable by up to a six month prison sentence and a $5,000 fine. Id. at 2339.

Former Congressman Stephen Driehaus filed a complaint with the Commission alleging that the SBA had made a false statement about his vote for the Affordable Care Act. Id. The SBA maintained that its characterization of Mr. Driehaus's vote was true. Id. The Commission found probable cause that the SBA violated the statute, but Mr. Driehaus withdrew the complaint after he lost the election. Id. at 2340. Nonetheless, the SBA sued in federal court alleging the statute chilled their protected political speech. The district court dismissed the case for lack of standing, and the Sixth Circuit affirmed holding "that SBA's prior injuries… 'do not help it show an imminent threat of future prosecution'…." Id.

The Supreme Court reversed finding that several of the complaints well-pleaded allegations established a threat of imminent injury. First, the Court noted that the history of prior enforcement was good evidence the statute would be enforced against the SBA in the future. Second, the statute permitted anyone with personal knowledge of a violation to file a complaint. Therefore, the statute was subject to abuse by political adversaries. Third, the credibility of the threat was bolstered by the frequency with which false statement complaints were filed with the commission. As I discuss throughout this memorandum, Section 2937 displays these same hallmarks.

On remand, plaintiffs filed an amended complaint adding new facts describing events which occurred since they filed the original complaint in 2012. The counts remain the same. Plaintiffs request a declaratory judgment that 25 P.S. § 2911(b) and 25 P.S. § 2937 are unconstitutional as applied to plaintiffs and that § 2937 is invalid on its face. Plaintiffs and defendants have filed cross motions for summary judgment which are now ripe for disposition.

II Legal Standard

A motion for summary judgment may be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Summary judgment is proper when no "reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A party seeking summary judgment initially bears the burden of identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is therefore appropriate when the non-moving party fails to rebut the moving party's argument by pointing to evidence that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.

III Discussion

a) Counts I and II – Section 2937 and Section 2911(b), as applied to plaintiffs, violate the First and Fourteenth Amendments

I will analyze Counts I and II together because, in the ballot access context, freedom of association claims and equal protection claims are nearly identical. The Third Circuit has recognized that "equal protection challenges essentially constitute a branch of the associational rights tree." Rogers, 468 F.3d at 194 (citing Republican Party of Arkansas v. Faulkner Co., 49 F.3d 1289, 1293 n.2 (8th Cir. 1950)). "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." Anderson v. Celebrezze, 460 U.S. 780, 793 (1983). Thus, the framework established by Anderson governs my review of both Counts I and II. *See* Rogers, 478 F.3d at 194 ("[W]e conclude that Anderson sets out the proper method for balancing both associational and equal protection concerns and the burdens that the challenged law creates on these protection as weighed against the proffered state interests.").

The fact that both Counts I and II assert as-applied challenges also supports my joint review of these claims. An as-applied attack contends that a law's "application to a particular person under particular circumstances deprived that person of a constitutional right." United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010) (citing Wis. Right to Life, Inc. v. FEC, 546 U.S. 410, 411–12 (2006). A successful as-applied attack blocks the enforcement of a statute against the plaintiff alone. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 331 (2010). As-applied challenges fundamentally differ

from facial challenges. I will address these differences in greater detail in my discussion of Count III which avers that the Section 2937 is facially invalid.

1) The Anderson Test

"Restrictions on ballot access burden [the] fundamental right[]… 'of individuals to associate for the advancement of political beliefs.'" llinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (citing Williams v. Rhodes, 393 U.S. 23, 30(1968)). A state law which affects the exercise of a fundamental right is "subject to strict scrutiny and will pass constitutional muster only if it is narrowly tailored to serve a compelling state interest." Maldonado v. Houstoun, 157 F.3d 179, 184 (3d Cir. 1998) (citations omitted). However, ballot access cases are an exception. Traditional strict scrutiny analysis does not apply. Rather, Anderson teaches that I must balance the burden the state regulation imposes on plaintiffs' associational rights against the asserted state interest for the rule. 460 U.S. at 789.

Under Anderson, I "first consider the character and magnitude of the asserted injury" to plaintiffs' association rights. 460 U.S. at 789. Freedom to associate for political ends has little practical value if the plaintiffs cannot place their candidates on the ballot and have an equal opportunity to win votes. Illinois State Bd. of Elections, 440 U.S. at 184 (citing Williams v. Rhodes, 393 U.S. 23, 30(1968)). Furthermore, the impact of Section 2911(b) and Section 2937 on voters is relevant to this inquiry. *See* Illinois State Bd. of Elections, 440 U.S. at 184 (ballot access restrictions also burden the fundamental right of voters to "cast their votes effectively"). This is because "the rights of voters and the rights of candidates do not lend themselves to neat separation….." Bullock v. Carter,

405 U.S. 134, 143 (1972). Ballot access regulations may impinge on voters' rights by "limit[ing] the field of candidates from which voters might choose." Anderson, 460 U.S. at 786 (quoting Bullock, 405 U.S. at 143).

After considering the magnitude of the burden, I "must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule." Id. at 789. The Constitution grants Pennsylvania broad power to regulate elections. *See* Clingman v. Beaver, 544 U.S. 581, 586 (2005) (citing Art. I, § 4, cl. 1; Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986)). The Supreme Court has recognized that some regulation is necessary to preserve the integrity of the democratic process and to ensure that elections are fair and produce reliable results. Anderson, 460 U.S. at 788. Inevitably, each election regulation will have some effect on the "individual's right to vote and his right to associate with others for political ends." Id. It follows, therefore, that not every burden on the right to vote and freedom to associate can offend the Constitution if we are to have a workable Election Code. Belitskus v. Pizzingrilli, 343 F.3d 632, 643 (3d Cir. 2003) (citations omitted).

Finally, I "must … determine the legitimacy and strength of each of [the state] interests, [and] the extent to which those interests make it necessary to burden the plaintiff's rights." Anderson, 460 U.S. at 789. "The results of this evaluation will not be automatic; …there is 'no substitute for the hard judgments that must be made.'" Id. at 789-90 (citing Storer v. Brown, 415 U.S. 724, 730 (1974)). Pennsylvania must regulate elections "by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued

availability of political opportunity." Lubin v. Panish, 415 U.S. 709, 716 (1974). "[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." Anderson, 460 U.S. at 793. "[B]allot access must be genuinely open to all, subject to reasonable requirements." Lubin, 415 U.S. at 719 (citing Jenness v. Fortson, 403 U.S. 431, 439 (1971)).

Later cases have adopted a two-track approach to analyzing ballot access claims. Crawford v. Marion county Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring) ("Burdick forged Anderson's amorphous 'flexible standard' into something resembling an administrable rule." (citing Burdick v. Takushi, 504 U.S. 428 (1992))). When the right to vote and freedom to associate "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" Burdick, 504 U.S. at 434 (citing Norman v. Reed, 502 U.S. 279, 289 (1992)). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Burdick, 504 U.S. at 434 (quoting Anderson, 460 U.S. at 788). Thus, while strict scrutiny does not automatically apply to ballot access claims, an election regulation may be subject to strict scrutiny review if the regulation is sufficiently severe. Crawford, 553 U.S. at 205.

Accordingly, the first step in the Anderson analysis is to determine the severity of the burden. Belitskus, 343 F.3d 644 (3d Cir. 2003). While Burdick refined the Anderson

standard, the Supreme Court has not set forth a clear test for what constitutes a severe burden. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997) ("No bright line separates permissible election-related regulation from unconstitutional infringements."); Demian A. Ordway, Disenfranchisement and the Constitution: Finding A Standard That Works, 82 N.Y.U. L. Rev. 1174, 1192 (2007) ("The word 'burden' is exceedingly vague when left unqualified, inviting courts to make ad hoc judgments concerning what is 'excessive' and what is 'reasonable.'"). Justice Scalia has suggested that a burden is "severe if it goes beyond the merely inconvenient." Crawford, 553 U.S. at 205. In Storer v. Brown, the court asked "could a reasonably diligent independent candidate be expected to satisfy" the suspect regulation. 415 U.S. 724, 742 (1974). In yet another case, the court found that "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." Williams v. Rhodes, 393 U.S. at 31. "Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." Storer, 415 U.S. at 742 (1974).

State election regulations which impose financial burdens on candidates are severe if they work to exclude legitimate candidates from the ballot. Bullock, 405 U.S. at 143. The Bullock Court considered a Texas statute which placed the burden of financing the primary election on the candidates rather than the government. Id. at 139. The statute accomplished this by charging a filing fee proportionate to the salary of the office sought. Id. at 138. The fees assessed against the plaintiffs in that case ranged from $1000 to

$6,300. Id. at 136. Adjusted for inflation, those fees would be $5,660 to $35,000 in 2015. Bureau of Labor and Statistics, CPI Inflation Calculator, http://data.bls.gov.cgi-bin/cpicalc.pl (last visited June 11, 2015). These are not the type of fees "that most candidates could be expected to fulfill from their own resources or at least through modest contributions." Bullock, 405 U.S. at 143.

The Bullock Court found the size of the fees had a "patently exclusionary character." Id. at 143. Since the statute provided no alternative means of accessing the ballot, "[m]any potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." Id. Furthermore, the exclusionary fees would limit the voters' choice of candidates and would fall with unequal weight "on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system." Id. at 144.

> By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice.

Id. at 149. Accordingly, the court subjected the law to strict scrutiny and invalidated the statute. Id.

Building on Bullock, the Court in Lubin strictly scrutinized California's substantially smaller filing fees. 415 U.S. at 710 ($701.60 filing fee). The Lubin Court

focused on the lack of alternative means to access the ballot and held that "a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." Id. at 718. Such alternative means include requiring minor political parties "to file petitions for a place on the ballot signed by a percentage of those who voted in a prior election." Id. (citing American Party of Texas v. White, 415 U.S. 767 (1974). Relying on Lubin, the Third Circuit recently invalidated Pennsylvania's filing fees which ranged from $5 to $200. Belitskus, 343 F.3d at 636, 647. The Court reasoned that "[i]n the absence of a reasonable alternative means of ballot access, any mandatory fee, **no matter how small**, will inevitably remain 'exclusionary as to some aspirants.'" Id. at 645 (emphasis added) (citing Lubin, 415 U.S. at 718).

Significantly for this case, the Eleventh Circuit invalidated a Florida statute which required minor party candidates to pay for petition signature verification. Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992). In Florida, county employees of the Supervisors of Elections verify the signatures on nomination petitions. *See* Id. at 1540. However, Florida statute authorized the supervisors to charge candidates a ten cent per signature verification fee. Id. The statute also provided for a fee waiver for indigent Democratic and Republican candidates, but specifically denied the fee waiver to minor party candidates. Id. (citing Fla. Stat. § 99.097(4)). In 1988, Ms. Fulani, a minor party candidate for President, had to submit petitions containing 56,312 signatures to access Florida's general election ballot. Id. at 1540. (citing Fla. Stat. § 103.021(3)). The signature verification fee was $5,631.20. Id. (citing Fla. Stat. § 99.097(1)(b)). The Eleventh Circuit found that the fee structure placed an unequal burden on minor party

candidates and made it more difficult for minor party candidates to access the ballot. Id. at 1544 - 45. The Court of Appeals invalidated the statute because the state was unable to identify any interest to justify the burden. Id. at 1547.

2) Section 2911(b) and Section 2937 impose a severe and unequal burden on plaintiffs' associational rights.

The combined effect of Section 2911(b) and Section 2937 imposes a severe burden on plaintiffs' associational rights. The potential costs which a minor party must absorb are astonishing. A minor party's defense of nomination papers, if taken to its conclusion, can cost up to $50,000. If that defense is unsuccessful, the party may then be liable for the challenger's costs which, in the last eleven years, have twice been levied in excess of $80,000. Thus, a minor party candidate who seriously wants to place his or her name on the general election ballot must be prepared to assume a $130,000 financial liability. This figure is staggering and would deter a reasonable candidate from running for office. *See* Storer, 415 U.S. at 742. These costs go far beyond what the Bullock Court considered to be "patently exclusionary." 405 U.S. at 143.

I recognize that the costs of defending a nomination paper in Pennsylvania differ from the fees imposed by the statutes discussed in Bullock and its progeny. There are no mandatory fees to file nomination papers in Pennsylvania. Belitskus, 343 F.3d at 636, 647. Theoretically, a minor party candidate should only incur costs of a defense when there is a problem with his or her nomination paper. Realistically, however, a minor party candidate can expect an aggressive challenge to his or her nomination paper and a failed defense will lead to great costs. *See* Bullock, 405 U.S. at 143 ("In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their

impact on voters."). Recent history shows that a nomination paper challenge is a near certainty. These challenges seem to be filed without regard for the strength of a candidate's support or the number of signatures collected. There is no realistic way for a minor party candidate to avoid the cost of defending an objection. The near certainty of incurring costs pursuant to §2937 brings the facts of this case in line with Bullock.

Additionally, a motion for costs has become a routine weapon which major party challengers deploy against the minor party candidates. As the Third Circuit observed in the appeal of this matter, the major party challengers have used the decisions in In re Nader and In re Nomination Paper of Rogers "as a cudgel against non-major parties and their candidates." Aichele, 757 F.3d at 363.[33] "The threat of cost shifting, entirely believable in light of recent history, chills the Aspiring Parties' electioneering activities." Id. at 364. If a minor party candidate wishes to run in the general election, he has no alternative but to bear the cost of signature validation and the risk that he will have to pay his opponent's costs as well. *Cf.* Susan B. Anthony List, 134 S.Ct. at 2346 (there is a "real risk" objections will be filed since they may be filed by political opponents).

While the cost of ballot access is problematic under Bullock, the lack of alternative means to access the ballot creates problems pursuant to Lubin and Belitskus. The typical alternative to onerous ballot access costs is higher signature requirements for minor party candidates, Lubin, 415 U.S. at 718, but the Election Code already demands more signatures from minor party candidates than it does of the major parties. *Compare* §2372.1 *with* § 2911(b). It is the combined effect of the signature requirement with

[33] While the Third Circuit made these findings in a different procedural posture, they were based on facts alleged in the complaint which the plaintiffs have proven and the defendants have been unable to controvert. Defendants do not deny that major party challengers now routinely threaten minor party candidates with motions for costs.

Section 2937's signature validation procedures which creates the substantial burdens in this case. Storer, 415 U.S. 727 ("[A] number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights."). Thus, an additional signature requirement would not provide an alternative means to ballot access. "By failing to provide such an alternative, the Commonwealth has made economic status a decisive factor in determining ballot access [and] has run afoul of the Supreme Court's ballot access jurisprudence." Belitskus, 343 F.3d at 647 (citing Anderson, 460 U.S. at 805).

The burdens imposed by Pennsylvania's Election Code are not only financial in nature. A nomination paper challenge involves a substantial investment in time and resources. In 2012, the LPPA recruited 70 volunteers, their strongest supporters, to validate signatures.[34] The objection proceedings extended from August 20 until October 10. Decl. of Paul Rossi ¶¶ 11, 36. As a result, the LPPA's general election resources were completely diverted to the nomination paper defense. *See* Susan B. Anthony List, 134 S.Ct. at 2346 (expressing concern that a commission proceeding requires the target "to divert significant time and resources … in the crucial days leading up to an election"). By essentially silencing minor parties during the heat of a campaign, Section 2911(b) and Section 2937 render the plaintiffs' associational rights meaningless. *See* Illinois State Bd. of Elections, 440 U.S. at 184 ("The freedom to associate as a political party … has diminished practical value if the party can be kept off the ballot" (citing Williams v. Rhodes, 393 U.S. 23, 30(1968)).

[34] While this work has, at times, been performed by hired temp workers, the plaintiffs fare much better when the work is performed by people who support the candidate. Pls.' Statement of Undisputed Facts ¶ 59.

The chilling effect of Pennsylvania's regime is not temporally limited to the pendency of a challenge proceeding. The minor parties cannot grow within the confines of the Election Code. First, the parties have had trouble recruiting candidates because members have been unwilling to submit nomination petitions for fear of shifting litigation costs. Second, members of the minor parties see electioneering as a futile effort. They believe that even if they collect enough signatures to place a candidate on the ballot, the nomination papers will be challenged and the candidate will withdraw from the election. Pls.' Statement of Undisputed Facts ¶ 46. The ability of the minor parties to organize and voice their views has been decimated by Section 2911(b) and Section 2937. *See* Aichele, 757 F.3d at 364 ("When [plaintiffs] submit nomination papers as they must under § 2911(b), they face the prospect of cost-shifting sanctions, the very fact of which inherently burdens their electioneering activity." (citing Susan B. Anthony List v. Driehaus, 134 S.Ct. 2334, 2346 (2014)). The plaintiffs' right to develop their political parties has been severely burdened. *See* Noman v. Reed, 502 U.S. 279, 288 (1992) (citizens have a constitutional right to create and develop new political parties).

The severity of the burdens imposed by Section 2911(b) and Section 2937 is demonstrated by the disappearance of minor parties from the general election ballot. Storer, 415 U.S. at 742 (1974). ("Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.") Prior to the Pennsylvania Supreme Court's ruling in In re Nader, minor party candidates regularly appeared on the general election ballot. Due to the looming threat of cost and the inability to organize post

In re Nader, no minor party or independent candidates appeared on the ballot in the 2006, 2010 and 2014 elections. The GPPA has only been able to field two candidates[35] since 2004, and CPPA has not made a single appearance on the statewide ballot in the last decade.

The implications for Pennsylvania voters are obvious. Bullock, 405 U.S. at 143 ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation….."). With few exceptions over the last decade, the electorate has been forced to choose between Democratic and Republican candidates, alone, for statewide office. The fact that the LPPA has been moderately successful during presidential election years does not minimize the impact on voters. The Election Code is hostile to minor parties and threatens to eliminate all competition to the major parties. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." Illinois State Bd. of Elections, 440 U.S. at 184. Thus, Section 2911(b) in combination with Section 2937 severely burdens the right to vote.

The Commonwealth defendants argue that plaintiffs enjoy the equal protection of the law because major party and minor party candidates are subjected to the same burdens under Section 2937. To an extent, this is true. Section 2937 governs challenges made against a major party candidate petitioning for a place on the primary ballot, and the same statute allows for objections to minor party candidate nomination papers. However, the burden of these challenges is not equal. At most, a major party statewide candidate must file 2,000 valid signatures to run in the primary election. To the contrary,

[35] These candidates were Jill Stein and Cheri Honkala who ran as a Presidential ticket in 2012.

minor party candidates, on average, must file ten times as many signatures, and of course, they file well in excess of the minimum in anticipation of the inevitable challenge. It is only logical that the cost of defending a minor party nomination paper will far exceed the cost of any major party candidate who must defend far fewer signatures. A challenge to a major party nomination petition would also require less time and less resources. Consequently, cost shifting pursuant to Section 2937 becomes formidable for minor party candidates but not equally so for the major party candidates.

The defendants rely on Rogers to avoid the appearance of inequality. 468 F.3d at 197. They maintain that the minor parties' greater financial burden is solely attributable to the signature requirements in Section 2911(b), and since the signature requirements are constitutionally sound, there can be no equal protection problem. No one is disputing the validity of Section 2911(b). Rather, plaintiffs contend that it is the combined effect of Section 2911(b) and Section 2937 which violate their constitutional rights. It is well established that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." Storer, 415 U.S. 737. That is what has happened here. Pennsylvania election law imposes a financial burden on political candidates' First Amendment rights proportionate to Section 2911 (b)'s signature requirement. Since statewide minor party candidates will always need to file more signatures than major party candidates, the financial burden of ballot access will always weigh heavier on the minor parties. Pennsylvania may require minor party candidates to submit more signatures than major party candidates to run for office, Rogers, 468 F.3d at 197, but the Commonwealth may not impose a heavier financial

burden on minor parties without depriving the minor parties of the equal protection of the law. Fulani, 973 F.2d 1539.

Defendants note the Pennsylvania Supreme Court held that "Section 2937 does not impinge upon any constitutional rights in a way that would warrant constitutional scrutiny." In re Nader 905 A.2d at 459. The Pennsylvania Supreme Court is competent to adjudicate claims arising under the Constitution of the United States. Burt v. Titlow, 134 S. Ct. 10, 15 (2013). However, the Pennsylvania high court did not have the benefit of the facts developed in this litigation. Indeed, the minor parties did not feel the chilling effects of Section 2937 until after In re Nader. It was the Supreme Court's decision in that case coupled with the sanctions imposed by the Commonwealth Court on Mr. Romanelli which gave rise to the credible threat of astronomical litigation costs.[36] Afterwards, the major party challengers began using these decisions as a tactic to force minor party candidates to withdraw from elections. No other state court decision has since considered the constitutional implications of Section 2937. *See* In re Farnese, 17 A.3d at 373 ("[W]e will not reach the constitutional arguments presented by the objectors, having been able

[36] Defendants also argue that I lack jurisdiction to hear a collateral attack on the Supreme Court's decisions in In re Nader and In re Nomination Petitions of Rogers. That is undoubtedly correct. *See* Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). However, this cannot be considered collateral attack and the Rooker-Feldman doctrine does not apply because neither Ralph Nader nor Carl Romanelli are parties to this case. *See* Lance v. Dennis, 546 U.S. 459, 464 (2006) ("Rooker–Feldman [is] inapplicable where the party against whom the doctrine is invoked was not a party to the underlying state-court proceeding.").

Otherwise, there is no basis to abstain from this case. Bufford abstention does not apply because plaintiffs are not appealing a state regulatory order capable of state review. Alabama Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 346 (1951). Pullman does not assist defendants because there are no issues of state law capable of resolving the issue. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941); see also Kusper v. Pontikes, 414 U.S. 51, 55 (1973). Thiobaux is not implicated because this is not a diversity action involving a novel issue of state law. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 26 (1959). Finally, there are no pending and parallel state actions resembling Younger v. Harris, 401 U.S. 37, 53-54 (1971) or Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976).

to decide this case on statutory grounds."). If the Supreme Court reconsidered the issue in light of recent history, the justices may well reach a different result.

Finally, defendants believe that the burden on the minor parties is not imposed by the statute. Rather, the Commonwealth Court issues the management orders which require the candidates to validate the signatures on their nomination papers. These procedures are not dictated by the Election Code. Defendants also claim that it is private individuals, not state actors, who pursue court costs. To the contrary, it is the statute that makes this all possible. It is the statute which venues nomination paper objections in the judiciary, rather than the executive. It is the statute which allows private parties to challenge nomination papers. Aichele, 757 F.3d at 367 ("The Commonwealth cannot hide behind the behavior of third parties when its officials are responsible for administering the election code that empowers those third parties to have the pernicious influence alleged in the Complaint."). It is the statute which provides for cost shifting. In any event, the actions of the judiciary are no less the action of the state, NAACP v. Alabama, 357 U.S. 449, 463 (1958) ("It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize."), and there is compelling, although not undisputed, evidence that state employees have played a pivotal role in prosecuting objections. *See infra* note 23.

3) The state interest are outweighed by the burden imposed on plaintiffs' associational rights

Since plaintiffs have established that the Section 2911(b) in combination with Section 2937 impose a severe burden on their associational rights, the state must establish that the regulation is 'narrowly drawn to advance a state interest of compelling importance.'" Burdick, 504 U.S. at 434 (citing Norman, 502 U.S. at 289).

Defendants maintain that the Section 2937 deters candidates from submitting fraudulent and meritless petitions. It is well settled that Pennsylvania has a strong interest "to protect the integrity of its political processes from frivolous or fraudulent candidacies." Bullock, 405 U.S. at 145. (citing Jenness, 403 U.S. at 442).[37] According to the defendants, the financial burdens imposed by Section 2937 motivate candidates to "ensure their circulators are gathering valid signatures," and incentivizes candidates to strike invalid signatures from their nomination papers. Defs.' Mot. for Summary J., doc. no. 59, at 16. There can be little doubt that the costs associated with Section 2937 discourage the submission of fraudulent nomination papers and petitions. However, Section 2937 "is extraordinarily ill-fitted to that goal," because the statute has a tendency to exclude legitimate candidates as well. Bullock, 405U.S. at 146.

In the defendants' view, the statute is narrowly tailored because "candidates who use due diligence in collecting signatures and file nomination papers that in objective

[37] I note a subtle distinction in defendants' argument. Defendants not only assert an interest in preventing frivolous from accessing the ballot. Instead, they wish to prevent frivolous candidates from filing nomination papers in the first place. I am not aware of any court decision to recognize so broad an interest. Rather, a state's signature validation process is adequate to weed out the frivolous from the non-frivolous candidates.

As a result, I cannot accept defendants' alternative argument that removing a candidate from the ballot is insufficient to deter the filing of frivolous nomination papers. To the contrary, removal from the ballot is more than adequate to protect the states compelling interest of avoiding ballot clutter and ensuring that only serious candidates appear on the ballot. By adding financial penalties to the mix, Pennsylvania chills prospective protected conduct which, for the reasons discussed in this memorandum, is impermissible.

good faith comply with the requirements of the Election Code" can avoid the costs associated by Section 2937. While this is true in the superficial sense, no amount of good faith will fend off a nomination paper challenge, and motions for costs are now a routine part of the process. In fact, the Court of Appeals, in its decision on the standing issue, acknowledged that recent history justifies the minor parties very real fear of objections and litigation costs. Aichele. 757 F.3d at 364; *See also* Susan B. Anthony List, 134 S.Ct. at 2345 ("past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'" (citing Steffel v. Thompson, 415 U.S. 452, 459(1974)). As a result, Section 2937 imposes severe financial burdens on minor party candidates no matter how strong their support. Since no candidate can be expected to shoulder these extraordinary costs, Section 2937 undoubtedly excludes non-frivolous minor party candidates.

Finally, defendants maintain that the threat of sanctions deters meritless objections. There is absolutely no evidence supporting this conclusion. There is no real threat that a court would impose sanctions against an unsuccessful objector. No party has ever been fined for challenging the nomination papers of a minor party candidate for statewide office. In any event, the rate at which challenges are filed suggests that the threat of sanctions has no deterrent effect.

Defendants have failed to justify the financial burdens which Section 2937 and Section 2911 (b) impose on plaintiffs. The statutes are not narrowly tailored to advance Pennsylvania's compelling interest in keeping frivolous candidates off the general election ballot because the threat of sanctions undoubtedly excludes non-frivolous minor

party candidates. The statutes are unconstitutional as applied to plaintiffs.[38] Therefore, I will grant plaintiffs' motion for summary judgment as to Counts I and II.

b) Count III – Section 2937 is facially valid.

While Counts I and II advance an as-applied challenge to Section 2911(b) and Section 2937, Count III is a facial attack on Section 2937 and calls for the complete invalidation of the statute. "A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case." United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010) (citing City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 n. 11 (1988)). Plaintiffs bear a very heavy burden to prove the statute is facially invalid. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Plaintiffs allege that Section 2937 is facially invalid because it is vague and overbroad. *See* City of Chicago v. Morales, 527 U.S. 41, 52 (1999) (recognizing that laws can be attacked on their face under these two theories).

A law is impermissibly overbroad if a "'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008) (citing New York v. Ferber, 458 U.S. 747, 769-771 (1982)). The overbreadth must be both real and substantial. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). The doctrine is premised on "a judicial prediction or assumption that the statute's very

[38] This conclusion is not to be construed as invalidating Section 2911(b)'s signature requirements which the Third Circuit has upheld. Rogers, 468 F.3d at 197 – 98.

existence may cause others not before the court to refrain from constitutionally protected speech or expression." Id. at 612. "It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984). The overbreadth doctrine is "strong medicine" and must be employed with hesitation, and as a last resort. Los Angeles Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 39, 120 S. Ct. 483, 489, 145 L. Ed. 2d 451 (1999) (citing Ferber, 458 U.S. at 769). The doctrine does not apply "where the parties fail to describe the instances of arguable overbreadth of the contested law." Washington State Grange, 552 U.S. at 449 n. 6.

In considering the validity of Section 2937, I am mindful that this is an action for declaratory judgment. "[T]he Declaratory Judgment Act 'expands the scope of available remedies' and permits persons 'to seek a declaration of the constitutionality of the disputed government action.'" Deveraux v. City of Chicago, 14 F.3d 328, 330 (7th Cir. 1994) (citing Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 71 n. 15 (1978). However, granting declaratory relief in this context can contravene the rule of avoiding needless adjudication of constitutional questions. El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 494 (1st Cir. 1992) (citing Kelly v. Illinois Bell Tel. Co., 325 F.2d 148, 151 (7th Cir.1963)). "In this vein, … declaratory judgments concerning the constitutionality of government conduct will almost always be inappropriate when the constitutional issues are freighted with uncertainty and the underlying grievance can be remedied for the time being without gratuitous exploration

of uncharted constitutional terrain." Id. (citing Gross v. Fox, 496 F.2d 1153, 1154–55 (3d Cir.1974)). [39]

I begin by noting the statute has a plainly legitimate sweep. Pennsylvania may require candidates for public office to submit nomination petitions and papers containing a prescribed number of signatures. Rogers, 468 F.3d at 197. It follows that the Commonwealth may also establish a method to verify that the signatures on the nomination petitions and papers are valid. In re Farnese, 17 A.3d 357, 372 (2011) ("Indeed, the existence of specific filing requirements envisions that there will be challenges."). The fact that Pennsylvania, unlike any other state, has chosen to venue this process in the judiciary does not, in and of itself, raise constitutional concerns. The possibility that costs may be shifted at the discretion of the court is unsurprising within the context of modern American litigation.

Section 2937 applies to major party, minor party and independent candidates alike, but there is no evidence that Section 2937 is having any impact on the speech of the major parties or their candidates. Due to the number of signatures required, validating signatures on a nomination petition to run in a statewide primary does not appear onerous. Additionally, costs have never been assessed against a major party candidate for statewide office. The fact that Section 2937 does not burden the speech of the major parties is demonstrated by the highly competitive 2014 Democratic Primary for Governor in which four candidates competed for the nomination.

[39] My disposition of this motion would not change if plaintiffs had requested an injunction. "District courts granting injunctions … should craft remedies 'no broader than necessary to provide full relief to the aggrieved plaintiff.'" Belitskus, 343 F.3d at 649-50 (citing McLendon v. Continental Can Co., 908 F.2d at 1182 (3d Cir.1990).

Since Section 2937 does not restrict the speech of the major parties, the statute is not unconstitutional in a "substantial number of its applications." Washington State Grange, 552 U.S. at 449 n.6 (citing Ferber, 458 U.S. at 769-771). While it is certainly possible that the statute could be impermissibly applied to a major party candidate or an independent candidate not represented in this litigation, a mere possibility is not enough to find the statute overbroad. *See* City Council of City of Los Angeles, 466 U.S. at 800. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Broadrick, 413 U.S. at 615-16; *see also* Belitskus, 343 F.3d at 648 n. 10 (a suit challenging filing fees for nomination petitions and papers "must, by definition, be brought as an as-applied challenge and decided on its facts.")

Furthermore, plaintiffs do not identify any circumstances in which the statute would be overbroad. *See* Washington State Grange, 552 U.S. at 449 n. 6. Instead, plaintiffs maintain they "have submitted evidence that Section 2937 is causing citizens to refrain from circulating, submitting and defending nomination petitions, and to abandon their efforts to associate for political purposes…." Pls. Mot. for Summary J., doc. no. 60, at 23. However, this evidence only pertains to plaintiffs and their supporters. A declaration that Section 2937 is unconstitutional as applied to plaintiffs should remedy the chilling effect that the law is having on the First Amendment rights of the plaintiffs and their supporters. At this time, no broader relief is necessary to redress the harm caused by the statute.

Finally, Section 2937 is not unconstitutionally vague. A statute is void for vagueness if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or if it authorizes arbitrary enforcement. City of Chicago, 527 U.S. at 56, (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)). The statute must "clearly mark the boundary between permissible and impermissible speech." Buckley v. Valeo, 424 U.S. 1, 40-41 (1976). While "the general test for vagueness applies with particular force in review of laws dealing with speech," Hynes v. Mayor & Council of Borough of Oradell, 425 U.S. 610, 620 (1976), courts should show "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) (citing Barenblatt v. United States, 360 U.S. 109, 137 (1959)); *see also* Buckley, 424 U.S. at 40-41 ("Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests."). I will read Section 2937 with the same construction given by the Pennsylvania Supreme Court. *See* City of Chicago, 527 U.S. at 61 (citing Smiley v. Kansas, 196 U.S. 447, 455 (1905)).

An award of costs pursuant to Section 2937 may be appropriate where "fraud, bad faith, or gross misconduct is proven, … [but] a party's conduct need not proceed to such an extreme before an award of costs may be dictated by justice." In re Farnese, 17 A.3d at 372. Plaintiffs aver that the In re Farnese Court's interpretation of the statute fails to

distinguish between prohibited and permissible conduct.[40] I disagree. Shifting costs during the course of litigation is commonly available in state and federal courts. *See* Fed. R. Civ. P. 54(d)(1); Pa. R. Civ. P. 1023.1. Where not authorized by rule or statute, a court may tax cost pursuant to its "inherent powers to control the conduct of those who appear before them," Hygienics Direct Co. v. Medline Indus., Inc., 33 F. App'x 621, 626 (3d Cir. 2002) (citing Chambers v. NASCO, Inc., 501 U.S. 32 (1991)), and is typically committed to the trial court's sound discretion. *See* In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 458 (3d Cir. 2000). By allowing the Commonwealth Court to determine when an award of costs is just, Section 2937 reflects this well-established American jurisprudence and can hardly be called vague.

Furthermore, the Farnese Court warned the Commonwealth Court not to award costs when it would chill First Amendment expression. 17 A.3d at 372 ("First, we note that the Election Code must 'be liberally construed to protect a candidate's right to run for office and the voters' right to elect the candidate of their choice.'" (citing In re Nomination Petition of Driscoll, 847 A.2d 44, 49 (2004)). Just as state courts are competent to adjudicate constitutional disputes, I am confident that the Commonwealth Court will be mindful of the First Amendment issues implicated by Section 2937, and will refrain from taxing costs in a manner which will chill protected political speech in Pennsylvania. Since Section 2937 is neither overbroad nor impermissibly vague, I will grant defendants' motion for summary judgment as to Count III.

[40] Plaintiffs do not claim that the provisions for nomination paper challenges are void for vagueness.

IV Conclusion

For the foregoing reasons, I will grant plaintiffs' motion for summary judgment as to Counts I and II. I will grant defendants' motion for summary judgment as to Count III. The motions are otherwise denied.

An appropriate order follows.

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

THE CONSTITUTION PARTY OF PENNSYLVANIA, et. al.,	:	
Plaintiffs,	:	
	:	**CIVIL ACTION**
v.	:	
	:	**12-CV-2726**
PEDRO CORTES, et. al.	:	
Defendants.	:	

FINAL JUDGMENT

AND NOW this 23rd day of July 2015, upon granting plaintiffs' motion for summary judgment in part and granting defendants' motion for summary judgment in part, **IT IS HEREBY ORDERED** that:

1. Judgment is entered in favor of the plaintiffs on Counts I and II.

2. Judgment is entered in favor of defendants on Count III.

3. 25 P.S. § 2911(b) and 25 P.S. § 2937 are hereby **DECLARED UNCONSTITUTIONAL AS APPLIED** to plaintiffs.

4. The clerk is directed to mark this case **CLOSED.**

BY THE COURT

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL