No. 09-2426

United States Court of Appeals

for the First Circuit

BOB BARR; WAYNE ROOT; LIBERTARIAN PARTY OF MASSACHUSETTS; LIBERTARIAN NATIONAL COMMITTEE, INC.,
Plaintiffs-Appellees,

v.

WILLIAM F. GALVIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANT SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS

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Statement of District Court Jurisdiction

Plaintiffs-appellees Bob Barr ("Barr"), Wayne Root ("Root"), the "Libertarian Party of Massachusetts," and the "Libertarian National Committee" (collectively referred to as "appellees") filed an action in the district court challenging a determination by defendant-appellant William F. Galvin, Secretary of the Commonwealth of Massachusetts ("the Secretary") not to place the names of Barr and Root on the November 2008 statewide ballot as candidates for president and vice president of the United States. Appellees alleged that the Secretary's determination violated their constitutional rights and they asserted, as a basis for jurisdiction, 28 U.S.C. §§ 1331 and 1343(a). The Secretary does not contest that the district court had jurisdiction.

Statement of Appellate Jurisdiction

This is an appeal from a final judgment of the district court. Accordingly, this Court has jurisdiction, pursuant to 28 U.S.C. § 1291.

Statement of Timeliness of Appeal

The district court issued a Memorandum and Order on September 17, 2009, granting appellees' motion for summary judgment, and the court entered final judgment in appellees' favor on September 21, 2009. The Secretary filed a notice of appeal on October 16, 2009. Thus, the appeal is timely.

Statement of Finality of Order Appealed From

The district court entered a final judgment on September 21, 2009. Accordingly, this appeal comports with 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that the Secretary was required to place the names of Barr and Root on the November 2008 statewide ballot in Massachusetts as candidates for president and vice president of the United States, where Barr and Root failed to comply with a constitutionally valid ballot access provision, Mass. G.L. c. 53, § 6, requiring non-party candidates to obtain 10,000 voter signatures as a prerequisite to ballot placement?

2. Whether the district court erred in reaching appellees' claim challenging, as unconstitutionally vague, an unrelated state law provision, Mass. G.L. c. 53, § 14, governing the procedure for filling vacancies in candidates for "state, city or town office" due to a candidate's death, withdrawal, or ineligibility following nomination, where the Commonwealth provided a constitutionally valid means of obtaining ballot access through Mass. G.L. c. 53, § 6, with which Barr and Root failed to comply, and where the challenged provision in Mass. G.L. c. 53, § 14, on its face does not authorize a candidate to gain ballot access as a means of avoiding the signature requirement in Mass. G.L. c. 53, § 6?

STATEMENT OF THE CASE

This case involves a challenge to the Secretary's determination that Barr and Root, who designated themselves as "Libertarian" candidates for president and vice president, were not eligible to have their names printed on the November 2008 statewide ballot in Massachusetts because they failed to comply with the Commonwealth's ballot access statute, Mass. G.L. c. 53, § 6. Under the statute, presidential and vice presidential candidates (such as Barr and Root) who are not enrolled in a legally recognized political party in Massachusetts must gather and file signatures of 10,000 registered voters in order to have their names placed on the ballot. At the time of the November 2008 election, the "Libertarian Party" was not recognized as a "political party" in Massachusetts, having failed to garner the requisite level of public support necessary to achieve recognized party status in the Commonwealth.[1] Barr and Root accordingly were subject to the 10,000 voter signature requirement as a prerequisite to obtaining ballot access and, because they failed to submit 10,000 voter signatures in support of their candidacies, the Secretary properly determined that their names could not be placed on the November 2008 ballot.

[1] For this reason, the term "Libertarian Party" will be placed in quotation marks throughout the brief, to avoid the implication that it was a legally recognized party with the rights that accompany such status.

The Supreme Court has recognized that signature requirements of this sort, which ensure that candidates appearing on the ballot demonstrate measurable community support, serve the state's "vital interests" in avoiding voter confusion, deception, and frustration of the democratic process. American Party of Texas v. White, 415 U.S. 767, 782 & n.14 (1974). Massachusetts' ballot access provision, which is less restrictive than similar provisions upheld by the Supreme Court, satisfies the requirements of the First and Fourteenth Amendments, and therefore is constitutional.

In addition, because the "Libertarian Party" was not a recognized party in Massachusetts at the time of the November 2008 election, the endorsement of the national "Libertarian" convention in May 2008 did not confer any ballot access rights on Barr and Root, who, while free to designate themselves as "Libertarian" candidates, remained subject to the 10,000 voter signature requirement. Although appellees had ample time to collect and submit signatures on behalf of Barr and Root – at least 65 days, even if they chose to delay gathering signatures until after the "Libertarian" convention, and potentially up to five months – they failed to do so.

Instead, appellees initiated this litigation seeking to force the Secretary to "substitute" Barr's and Root's names on the ballot for those of George Phillies and Chris Bennett, two other self-designated "Libertarian" candidates who had

gathered and filed over 10,000 voter signatures in favor of their own candidacies but failed to secure the endorsement of the "Libertarian" convention, and who then sought to "transfer" their voter signatures to Barr and Root. Appellees took this tack notwithstanding the straightforward signature requirements of Mass. G.L. c. 53, § 6, and that the Secretary had advised them, almost two months before the July 29 signature deadline, that state election law did not provide for "substitution" of presidential candidates in these circumstances and that Barr and Root were required to obtain 10,000 voter signatures in order to have their names placed on the ballot.

The "substitution" that the appellees sought (and that the district court granted through issuance of a preliminary injunction directing the Secretary to place Barr's and Root's names on the ballot) was not authorized by Massachusetts law. The "substitution" of Barr's and Root's names on the ballot for those of Phillies and Bennett was directly contrary to the fundamental purpose of Mass. G.L. c. 53, § 6, namely, to require a showing of a modicum of voter support for a particular candidate. Placement of Barr's and Root's names on the ballot in effect enabled Barr and Root to appropriate the signatures of the more than 10,000 voters who had signified their support for Phillies and Bennett, thereby allowing Barr and Root to avoid compliance with the Commonwealth's constitutionally valid ballot access provision.

The district court, which granted summary judgment in favor of appellees, erred in concluding that "substitution" of Barr and Root on the ballot was constitutionally required.

The Massachusetts Statutory Framework

Massachusetts recognizes, as a "political party," a political organization that either (1) had a candidate for statewide office who received at least 3% of the votes in the most recent biennial state election or (2) has enrolled at least 1% of the total number of registered voters in the commonwealth. Mass. G.L. c. 50, § 1. At the time of the November 2008 election, the Commonwealth recognized four political parties: Democratic, Republican, Green-Rainbow, and Working Families. Appendix to the Briefs ("A.") 180. As of the November 2008 election, appellee "Libertarian Party of Massachusetts" was not a recognized "political party" but rather was a "political designation," Mass. G.L. c. 50, § 1, or more informally, a "non-party" or "minor party." A. 180. Appellee "Libertarian National Committee, Inc.," an organization that seeks ballot access for "Libertarian" candidates," A. 10, was not (and is not) recognized in Massachusetts as a party or a "political designation."

Consistent with the "fact . . . that there are obvious differences in kind" between established political parties and smaller organizations that have not achieved party status, the Supreme Court has held that states may properly

"recogniz[e] these differences and provid[e] different routes to the printed ballot." Jenness v. Fortson, 403 U.S. 431, 441-42 (1971). In view of these inherent differences, Massachusetts election law sets forth different procedures governing ballot access for presidential candidates of a recognized political party, on the one hand, and non-party presidential candidates, on the other hand, and the electors who support the party and non-party candidates.[2]

1. Ballot Access Provision Governing Recognized Party Candidates

In order for the presidential and vice presidential candidates of a recognized political party to have their names placed on the November statewide election ballot, the party's state committee is required to meet to choose presidential electors and to submit to the Secretary, by the second Tuesday in September, a form identifying the surnames of the presidential and vice presidential candidates as well as the names and addresses of the presidential electors selected by the committee. Mass. G.L. c. 53, § 8. The electors are required to sign their written

[2] In the case of both recognized parties and non-parties, as a function of the electoral college system, it is the electors who actually elect the president and vice president. U.S. Const. art. II, § I, cl. 2; U.S. Const. amend. XII. Therefore, although the general election ballot contains the names of the presidential and vice presidential candidates (and not the individual names of the electors), voters are actually voting to select "Electors of President and Vice President." Mass. G.L. c. 54, § 3; A. 179, 218. The number of presidential electors to be elected is equal to the number of senators and representatives in Congress to which a State is entitled. U.S. Const. art. II, § 1, cl. 2; Mass. G.L. c. 54, § 151. Massachusetts thus elects 12 electors to the electoral college.

acceptance on the form, thereby pledging to vote for the presidential and vice presidential candidates identified on the form. Mass. G.L. c. 53, § 8. The electors must be registered voters in Massachusetts. Mass. G.L. c. 53, § 9.

2. Ballot Access Provision Governing Non-Party Presidential Candidates

The process is different for candidates who are not affiliated with a recognized political party. In order to have their names appear on the ballot, presidential and vice presidential candidates, such as Barr and Root, who are not enrolled in a political party that is recognized in Massachusetts, must file nomination papers signed by 10,000 registered voters supporting their placement on the ballot. Mass. G.L. c. 53, §§ 6-10. Any registered voter may sign a non-party candidate's nomination papers, and a voter may sign more than one candidate's nomination papers. Mass. G.L. c. 53, § 7. Candidates are free to use volunteers to gather signatures, and nomination papers are available free of charge from the Secretary's office. A. 181.

The nomination papers are required to identify the names of the non-party presidential and vice presidential candidates in the blank space following the words "Candidates for President" and "Vice President," and the papers also may identify a "political designation" with which the candidates are affiliated. Mass. G.L. c. 53, § 8; A. 207. The "political designation" identified on a presidential candidate's

nomination papers may not be longer than three words and may not include the name of a recognized political party. Mass. G.L. c. 53, § 8.

The nomination papers also are required to set forth the names and addresses of 12 presidential electors, whose signatures on the papers signify the electors' support for the presidential and vice presidential candidates identified on the papers. Mass. G.L. c. 53, § 8; Mass. G.L. c. 54, § 78 (candidates for electors are nominated to vote for specified presidential and vice presidential candidates).[3]

After gathering voter signatures on the nomination papers, a non-party candidate is required to submit the papers to the election officials of the city or town in which each voter resides at least 28 days prior to the date for submitting the papers to the Secretary. Mass. G.L. c. 53, § 7. The local officials are required to certify whether the signatures are those of voters registered to vote in the city or town. Id. Following certification by the local officials, the nomination papers must be filed with the Secretary by the last Tuesday in August. Mass. G.L. c. 53, § 10. In 2008, the deadline for submission of nomination papers

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[3] Although the language in Mass. G.L. c. 53, § 8 (referring to "pledge" by electors to vote for presidential and vice presidential candidates) by its terms applies only to party candidates for elector, another statutory provision, Mass. G.L. c. 54, § 78, reflects that all presidential electors (including non-party candidates for elector) are nominated to vote for the specified presidential and vice presidential candidates whose names appear on the ballot. Mass. G.L. c. 54, § 78 (in order to vote for presidential electors, a voter shall make an "x" in the square on the ballot appearing to the right of the surnames of the presidential and vice presidential candidates, "to vote for whom[,] such candidates for electors are nominated").

to local officials was July 29; the deadline for submission to the Secretary was August 26. Mass. G.L. c. 53, §§ 7, 10; A. 181.

Under the foregoing provisions, the fact that a non-party candidate may receive an endorsement from a political entity (such as the "Libertarians") does not confer any ballot access rights on that candidate in Massachusetts; the statute requires that in order to obtain ballot placement, each non-party candidate must comply with G.L. c. 53, § 6, by filing 10,000 voter signatures in support of his or her candidacy. Mass. G.L. c. 53, §§ 6-10.

STATEMENT OF FACTS

The undisputed facts of this case are as follows.

Barr's and Root's Failure to Comply with the Ballot Access Provision

In July 2007, George Phillies sent an email inquiry to the Secretary's office, stating that he was the chairperson of the "Libertarian Party of Massachusetts," which he acknowledged was a political designation rather than a recognized political party, and explaining that he intended to circulate nomination papers beginning the following February. A. 180, 202. He went on to ask whether, if a presidential candidate identified on nomination papers circulated in Massachusetts was not ultimately selected at a national "Libertarian" convention in Denver the following May 2008, the name of the nominee selected at the convention could be "substituted" on the ballot in place of the candidate named on the nomination papers. A. 180-181, 202; Addendum 2-3.

Because Phillies' email was incorrectly addressed, the Secretary's office did not actually receive it until September 2007. A.180. A staff attorney in the Secretary's Elections Division thereafter responded, in an email dated October 26, 2007. A. 26, 181. In the email, the staff attorney stated that "our Office can prepare a form that allows members of the party to request the substitution of the candidate. All of the electors who appear on the nomination papers will need to complete the form." (emphasis added). A. 26, 181; Addendum 3.

On February 6, 2008, nomination papers for the November 2008 statewide election were made available by the Secretary's office. A. 181. At some point thereafter, in early 2008, Phillies, in conjunction with the "Libertarian Party of Massachusetts" and the "Libertarian National Committee," began to circulate nomination papers identifying Phillies and his running mate, Chris Bennett, as non-party candidates for president and vice president, and also identifying the names of twelve electors on the nomination papers. A. 182, 207. In the blank space on the nomination papers identifying their "political designation," they included the word "Libertarian." A. 182, 207.

At the "Libertarian" national convention on May 25, 2008, Phillies and Bennett competed against Barr and Root for the convention's endorsement as candidates for president and vice president. Newspaper articles reported that Phillies and Barr "diverge[d] significantly" in their political views. A. 187, 211.

Ultimately, the convention endorsed Barr and Root, rather than Phillies and Bennett, as candidates for president and vice president. Addendum 3.

A few days later, on May 29, 2008, Phillies again contacted the Secretary's office, inquiring whether Barr and Root, the convention-endorsed candidates, could be "substituted" for Phillies and Bennett (whom he referred to as "stand-ins" on the nomination papers). A. 182, 203; Addendum 3. As of early June 2008, Phillies and Bennett had gathered roughly 7,000 signatures in support of their own candidacies. Addendum 3.

The Secretary's office responded to Phillies' inquiry on June 5, 2008, explaining that "substitution" was not authorized and that Phillies and the "Libertarians" "have almost 2 months to obtain the requisite number of signatures and comply with the statutory requirements to obtain ballot access." A. 182-183, 204-205; Addendum 3. The Secretary's office thus advised that, in order to obtain ballot placement for Barr and Root, the "Libertarians" would have to submit nomination papers identifying Barr and Root as the candidates for president and vice president and obtain signatures of 10,000 voters in support of ballot placement for Barr and Root, rather than "continuing to get signatures on [the] nomination papers" listing Phillies and Bennett as the candidates. A. 182-183, 205.[4] In an e-

[4] By way of further explanation, the Secretary's office noted that, in the 2000 election, the Secretary had allowed the vice presidential candidate selected by the

(footnote continued)

mail to the Libertarian National Committee on June 13, 2009, the Secretary's office reiterated that the "substitution" sought by Phillies was not authorized and "there remains a statutory process to gain ballot access for candidates nominated at your national convention," namely, the circulation and filing of nomination papers containing 10,000 voter signatures supporting the placement of Barr and Root on the ballot. A. 183, 206.

Notwithstanding the Secretary's June 5 correspondence (as reiterated on June 13), Phillies nevertheless continued to circulate and gather signatures on the Phillies/Bennett nomination papers in June and July 2008. A. 183; Addendum 3-4. Phillies ultimately submitted nomination papers to the Secretary on August 13, 2008, reflecting certification by local election officials of 15,675 voter signatures, thereby entitling Phillies and Bennett to appear as "Libertarian" candidates for

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(footnote continued)
"Reform Party," a political designation, to be placed on the ballot in lieu of a candidate whose name was earlier identified on nomination papers, because of the "unique circumstances" then presented, namely, that the "Reform Party" convention did not occur until August, after the late July deadline for submission of nomination papers to local election officials, with the result that "it was not possible for the Reform Party to obtain the requisite signatures for the new [vice presidential] candidate" in advance of the July deadline. A. 204-205. The Secretary's office emphasized that the Secretary "has not applied a process which would obviate the statutory mechanism for a Presidential candidate of a political designation to seek ballot access when this mechanism remains available." A. 204. The Secretary's office concluded by underscoring that, in contrast to the circumstances presented in 2000, the "statutory mechanism" available to non-party candidates (namely, filing nomination papers with 10,000 voter signatures by the July 29 deadline) remained available to Barr and Root. A. 205.

president and vice president on the November 2008 ballot in Massachusetts. A. 183; Addendum 2. Barr and Root did not submit any nomination papers to the Secretary, nor did they provide any evidence to the Secretary that they had gathered any voter signatures (much less 10,000 signatures) or identified 12 electors who supported their candidacies. A. 183-184. In contrast, in New Hampshire, both the Phillies/Bennett and the Barr/Root campaigns submitted enough signatures under that State's law to appear, and they did appear, on the 2008 New Hampshire ballot as "Libertarian" candidates. A. 189, 220. Under Massachusetts law, nothing prevented Barr/Root and Phillies/Bennett from both appearing on the ballot as "Libertarian" candidates for president and vice-president.

The District Court Complaint and Request for Preliminary Injunctive Relief

Instead of attempting to gather signatures on their own behalf, Barr and Root, together with the "Libertarian Party of Massachusetts" and the "Libertarian National Committee," instituted this litigation on August 6, 2008, seeking an injunction requiring the Secretary to "substitute" Barr and Root on the ballot in place of Phillies and Bennett and a declaration that the Secretary's refusal to permit "substitution" was unconstitutional. A.23. The complaint alleged that (1) the Secretary, "by refusing to permit the substitution requested by Plaintiffs," and by adhering to the signature requirement in Mass. G.L. c. 53, § 6, had infringed upon

their rights to free speech, vote, and association, and that (2) the Secretary's enforcement of the signature requirement denied them equal protection of the laws vis-à-vis the major political parties and in relation to other non-parties. A. 21-22.

In their preliminary injunction papers, appellees asserted an additional claim. Although they conceded in the complaint that "Massachusetts does not have a statutory mechanism" for the "substitution" that they sought, A.13, appellees nevertheless seized upon language in Mass. G.L. c. 53, § 14, governing the filling of vacancies of candidates for "state, city or town office" who die, withdraw, or are found ineligible following nomination. Contending that section 14 authorized "substitution" but expressing doubt that its reference to candidates for "state" office could be applied to presidential candidates, appellees argued that section 14 was unconstitutionally vague.

In their preliminary injunction papers, appellees also argued that, notwithstanding the Secretary's statement on June 5, 2008, that "substitution" was not authorized and that Barr and Root still had sufficient time to gather 10,000 signatures on nomination papers featuring their names, the Secretary should be estopped from refusing to "substitute" Barr's and Root's names on the ballot, by virtue of the October 2007 email in which an Elections Division staff attorney had suggested that appellees could "request" "substitution."

The District Court's Preliminary Injunction Ruling

The district court (Gorton, J.) held a hearing on the motion for preliminary injunction, on September 12, 2008, soon before the date on which the Secretary was required to finalize the ballots for printing. A. 5, 123. Following the hearing, the court, faced with a claim for ballot access on the eve of a national presidential election, granted appellees' motion for a preliminary injunction, finding that appellees would suffer irreparable harm absent injunctive relief. A. 154-165.[5] With respect to appellees' likelihood of success on the merits, the district court rejected appellees' estoppel claim but found that Mass. G.L. c. 53, § 14, which the court described as "the most relevant statute," would "likely fail constitutional scrutiny" as applied. A. 158-161. In its discussion of the merits, the district court made no mention of the ballot access provision, Mass. G.L. c. 53, § 6, nor did the court address the Secretary's argument that, because appellees had a constitutionally valid route to the ballot under Mass. G.L. c. 53, § 6, the court need not reach the constitutionality of Mass. G.L. c. 53, § 14. A. 158-161.

The district court issued a preliminary injunction, ordering the Secretary to place the names of Barr and Root on the November 2008 statewide ballot, instead of Phillies and Bennett, as the "Libertarian" candidates for president and vice

[5] The district court's preliminary injunction opinion is published at 584 F.Supp.2d 316 (D. Mass. Sept. 22, 2008).

president. A. 165. In accordance with the order, the names of Barr and Root appeared on the November 2008 ballot in Massachusetts, but the names of Phillies and Bennett did not appear on the ballot. A. 218.

At the November 2008 election, Barr and Root obtained 13,189 votes (about 0.4% of all votes cast), which did not meet the 3% threshold required in order to qualify the "Libertarians" as a recognized political party in Massachusetts. A. 186; Addendum 4 n.1. However, Robert J. Underwood, a candidate for United States Senator from Massachusetts who also designated himself as a "Libertarian," received over 3% of the total votes for that office. A. 186. As a result, following the November 2008 election, and at the present time, the "Libertarian Party" is recognized as a political party in Massachusetts. A. 186.[6]

The District Court's Summary Judgment Decision

Following the November 2008 election, the Secretary filed a motion for summary judgment on March 31, 2009, and appellees opposed the Secretary's motion and cross-moved for summary judgment.

On September 17, 2009, the district court issued a Memorandum and Order, denying the Secretary's motion and granting appellees' cross-motion for summary

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[6] Because of the recurring nature of the constitutional issues presented, the fact that the Libertarian Party became a recognized party as a result of the November 2008 election did not render moot the subsequent district court summary judgment proceedings, nor does it render this appeal moot. See infra Argument Section II.

judgment. At the outset of its decision, the district court found that, despite the passage of the 2008 presidential election, the case was not moot, "because the controversy is 'capable of repetition, yet evading review.'" Addendum 5 (citation omitted).

Turning to the merits, the district court acknowledged the "presumed constitutionality" of the Commonwealth's ballot access provision, Mass. G.L. c. 53, § 6, requiring that non-party candidates file nomination papers with 10,000 voter signatures as a condition to ballot placement. Addendum 13. The district court further recognized that section 6 did not authorize the "substitution" sought by appellees. Addendum 12.

However, the district court held that a "right to substitute is guaranteed by the Equal Protection Clause of the Constitution to ensure that the names of the actual candidates appear on the ballot." Addendum 12. Based on that premise, the district court went on to hold that Mass. G.L. c. 53, § 14, which governs the filling of vacancies when candidates for "state, city or town office" die, withdraw, or are disqualified after nomination, provides a mechanism for "substitution" but was unconstitutionally vague because it was "ambiguous" whether that section applied to presidential nominees. Addendum 7-8.

The district court rejected the Secretary's argument that, because section 6 provided a constitutionally valid means of obtaining ballot access, the court need

not even reach the constitutionality of section 14 (which, the Secretary further argued, was not intended to enable a candidate to avoid compliance with the ballot access requirements in section 6). Addendum 11-13. Instead, based on the initial premise that "substitution" was required as a matter of equal protection, and based on its further holding that section 14 was unconstitutionally vague as applied to this case, the district court concluded that "the presumed constitutionality of § 6 does not mitigate the constitutional infirmity of § 14." Addendum 8, 13.

Although appellees continued to press their estoppel argument during the summary judgment proceedings, the district court did not address it in the summary judgment decision, declining to re-visit its conclusion from the preliminary injunction stage that estoppel did not apply.

On October 16, 2009, the Secretary filed a timely notice of appeal. A. 298-299.

Other Candidates, as Well as Petitioners for Ballot Initiatives, Have Satisfied the Massachusetts Ballot Access Requirements

Other non-party presidential candidates have satisfied the Massachusetts ballot access requirements in 2008 and in earlier elections. In 2008, the campaign for Ralph Nader collected at least 15,694 signatures in only 42 days (significantly less than the 65 days that appellees had to obtain 10,000 signatures for Barr and Root), and Mr. Nader appeared on the November 2008 ballot as a candidate for president, together with his running mate, under the political designation

"Independent." A. 184-186, 218. Similarly, presidential and vice presidential candidates Chuck Baldwin and Darrell Castle filed over 15,000 certified signatures with the Secretary and met the other ballot access requirements necessary to have their names appear on the November 2008 ballot under the political designation "Constitution." A. 184-185, 218.

In 1996, three non-party campaigns satisfied the ballot access requirements in Mass. G.L. c. 53, § 6. John Hagelin and Michael Tompkins were named on the ballot as candidates for president and vice president under the political designation "Natural Law"; Monica Morehead and Gloria LaRivere were named on the ballot as candidates for president and vice president under the political designation "Workers' World"; and Ross Perot and Pat Choate were named on the ballot as candidates for president and vice president under the political designation "Reform." A. 185. All of those candidates met the 10,000 signature requirement. A. 185.

Finally, petitioners for three separate ballot initiatives in 2008, who were required to obtain signatures from multiple counties and who were required to obtain more signatures in a shorter time period than Barr and Root, also were able to meet the requirements for ballot access. A. 185-186, 218-219.

SUMMARY OF ARGUMENT

1. The constitutional claims presented are "capable of repetition yet evading review," and the case accordingly is not moot. (pages 24-25)

2. Mass. G.L. c. 53, § 6, required that Barr and Root gather and submit 10,000 voter signatures in a period of approximately five months (February to late July 2008), including approximately 60 days following the Libertarian convention in May 2008. Under the "sliding scale" approach used by the Supreme Court to assess the constitutionality of ballot access measures of this kind, the Massachusetts provision, which is less restrictive than other ballot provisions upheld by the Supreme Court, satisfies the First Amendment and the Fourteenth Amendment, including the Equal Protection Clause. It follows that the Secretary, consistently with the Constitution, properly applied section 6 to deny ballot access to Barr and Root, who failed to submit *any* voter signatures in support of their own candidacies and thus did not comply with Mass. G.L. c. 53, § 6. (pages 27-34)

3. The district court erred in reasoning that the endorsement of the "Libertarian" convention made Barr and Root the "actual candidates" and that their "substitution" on the ballot therefore was required as a matter of equal protection. Massachusetts may, consistent with the Equal Protection Clause, provide different routes to the ballot for party candidates and non-party candidates. And because the "Libertarians" were not a recognized political party at the time of the November

2008 election, the endorsement of the "Libertarian" convention did not confer any ballot access rights on Barr and Root, who as non-party candidates remained subject to the 10,000 voter signature requirement. Because Barr and Root failed to satisfy that requirement, they had no "right," under the Equal Protection Clause or otherwise, to have their names placed on the ballot. (pages 35-42)

4. Based on the erroneous premise that "substitution" was required as a matter of equal protection, but recognizing that Mass. G.L. c. 53, § 6, did not authorize the "substitution" sought by Barr and Root, the district court further erred in proceeding to address the constitutionality of a different statutory provision, Mass. G.L. c. 53, § 14, which governs the filling of vacancies of candidates for "state, city or town office" who, having already been nominated, subsequently die, withdraw, or are found ineligible. Apparently adopting appellees' view that section 14 provides a mechanism for "substitution" but finding an ambiguity as to whether the phrase "candidate nominated for a state . . . office" as used in section 14 could encompass presidential candidates, the district court went on to conclude that section 14 was unconstitutionally vague as applied in this case. Because Mass. G.L. c. 53, § 6, provided a constitutionally valid means for Barr and Root to obtain ballot access, the district court should not have reached their claim challenging the constitutionality of Mass. G.L. c. 53, § 14, as any alleged imprecision in that

provision is irrelevant to the Secretary's determination not to place Barr and Root on the ballot. (pages 43-46)

5. Moreover, it is plain on the face of the statute that section 14 does not provide a means by which a candidate can plan in advance to obtain ballot access as an alternative to complying with the signature requirements of section 6. (pages 46-49)

ARGUMENT

I. THE STANDARD OF REVIEW.

Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the movant party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Once the moving party avers the absence of genuine issues of material fact, the nonmovant must show that a factual dispute does exist, but summary judgment cannot be defeated by relying on improbable inferences, conclusory allegations, or rank speculation." Ingram v. Brink's, Inc., 414 F.3d 222, 228-29 (1st Cir. 2005). Here, the parties do not dispute any material fact in the case but instead dispute the legal conclusions to be drawn from those undisputed facts.

An appellate court reviews entries of summary judgment de novo. Id. at 228.

II. THE CASE IS NOT MOOT, BECAUSE THE CLAIMS ARE CAPABLE OF REPETITION YET EVADING REVIEW.

In the summary judgment proceedings, both parties agreed, and the district court found, that although the November 2008 election was over, the constitutional claims presented in the complaint, concerning the Secretary's adherence to the signature requirement and his determination that "substitution" is not available in these circumstances, were "capable of repetition yet evading review." The case accordingly was not moot during the summary judgment proceedings and it is not moot now. See Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) (reviewing decision upholding ballot access provision for independent candidates and holding that "[t]he 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidates, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.'") (internal citation omitted); Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (similarly treating challenge to ballot access provision as capable of repetition yet evading review).[7]

[7] See generally Gjertsen v. Board of Election Commissioners of the City of Chicago, 751 F.2d 199, 201-02 (7th Cir. 1984) (discussing application of mootness doctrine at different procedural postures of an election case).

The constitutional issues presented are likely to recur, as it reasonably can be anticipated that other non-party candidates will seek ballot access in Massachusetts in future elections.[8] These very same appellees indeed could present the identical issue in the next presidential election, in the event that the Libertarian Party fails to retain its new status as a recognized political party after the biennial election in 2010. See Libertarian Party of Maine v. Diamond, 992 F.2d 365, 369 n.5 (1st Cir.) (appeal from dismissal of action challenging constitutionality of Maine ballot access provisions was not moot, in part because "[s]o long as the challenged statutory scheme remains in effect," the "possibility exists" that "the [plaintiff] Party and other small parties" would be affected by the challenged signature requirements in the future), cert. denied, 510 U.S. 917 (1993).[9]

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[8] The issues likely to recur are the constitutional claims advanced by appellees. In contrast, appellees' claim under an estoppel theory is not likely to recur, and that claim accordingly is moot. Because the estoppel claim was not addressed in the district court's summary judgment decision, this Court should not address it on appeal.

[9] In finding that an election case is "capable of repetition yet evading review," the Supreme Court has not required a showing that a particular plaintiff candidate is likely to run for office again. See Anderson v. Celebrezze, 460 U.S. 780, 784 n.3 (1983) (on review of challenge to ballot access provision, the Court held that "although the 1980 election is over, the case is not moot," but the Court did not inquire into whether plaintiff John Anderson himself would run for president again); Lawrence v. Blackwell, 430 F.3d 368, 372 (6th Cir. 2005), cert. denied, 547 U.S. 1178 (2006).

III. THE DISTRICT COURT ERRED IN HOLDING THAT BARR AND ROOT, WHO FAILED TO COMPLY WITH THE COMMONWEALTH'S CONSTITUTIONALLY VALID BALLOT ACCESS PROVISION, WERE ENTITLED TO HAVE THEIR NAMES PLACED ON THE BALLOT.

Although recognizing that the Massachusetts ballot access provision, Mass. G.L. c. 53, § 6, was "presumed" to be constitutional and that Barr and Root had not submitted 10,000 voter signatures in compliance with that provision, the district court nevertheless went on to conclude that "a right to substitute is guaranteed by the Equal Protection Clause of the Constitution to ensure that the names of the actual candidates appear on the ballot." Addendum 12-13. As explained below, the district court's analysis was fundamentally flawed.

In its decision, the district court noted that the Secretary had devoted a significant portion of his summary judgment memorandum to a discussion of the constitutionality of Mass. G.L. c. 53, § 6, "even though the plaintiffs do not challenge it." Addendum 11. The Secretary respectfully submits that, under a proper analysis of the issues presented, a determination that Mass. G.L. c. 53, §, 6, is constitutional, compels rejection of appellees' claims in their entirety. Because Mass. G.L. c. 53, § 6, readily satisfies the First and Fourteenth Amendments, including the Equal Protection Clause, the district court should have entered judgment in favor of the Secretary, rejecting appellees' claim that "substitution" was required. Thus, because the constitutionality of Mass. G.L. c. 53, § 6, is

central to resolution of the issues raised, the Secretary addresses the constitutionality of that provision at some length here as well.

A. The Signature Requirement in Mass. G.L. c. 53, § 6, Is Consistent with the Voting and Associational Rights Protected by the First and Fourteenth Amendments.

States are empowered to regulate elections, see U.S. Const. art. II, § 1, cl. 2 (authorizing states to decide manner of selecting presidential electors), and the Supreme Court has long recognized that "as a practical matter, there must be a substantial regulation of elections [by the States] if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Storer, 415 U.S. at 730. "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

States must, of course, exercise this broad regulatory authority within the limits imposed by the Constitution. Williams v. Rhodes, 393 U.S. 23, 29 (1968); Cool Moose Party v. Rhode Island, 183 F.3d 80, 82 n.2 (1st Cir. 1999). State limitations on access to the ballot by unaffiliated candidates and minor parties implicate "the rights of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams, 393 U.S. at 30. Balancing the rights of

voters and parties against the interests of the State in maintaining the integrity of elections has led the Supreme Court to devise "something of a sliding scale approach" to assessing ballot access restrictions. McClure v. Galvin, 386 F.3d 36, 41 (1st Cir. 2004) (citing Timmons, 520 U.S. at 359). Restrictions imposing "severe burdens" on plaintiffs' rights must be "narrowly tailored and advance a compelling state interest." Timmons, 520 U.S. at 358. In contrast, "[l]esser burdens" trigger "less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" Id. Because Mass. G.L. c. 53, § 6, imposes a relatively small burden on plaintiffs' voting and associational rights, it is subject to a less exacting review, under which it easily passes constitutional muster.

1. The Signature Requirement Placed Only a Minimal Burden On Appellees and Therefore Is Not Subject to Strict Scrutiny.

The Supreme Court has made clear that restrictions of the kind imposed by Mass. G.L. c. 53, § 6, do not represent "severe burdens" on the First or Fourteenth Amendment rights of voters and parties. The Court upheld, for example, a Georgia law requiring an independent candidate to get signatures representing 5% of the registered voters at the last general election for the office in question, within six months, and file them in June before the November general election. Jenness v. Fortson, 403 U.S. at 433-34, 440. The Court also approved a Texas law requiring

minor party candidates to gather, within 55 days, notarized signatures representing 1% of the total vote cast for governor in the previous election (at the time, approximately 22,000 signatures) from voters who had not voted in any other party's primary, and file them 120 days before the general election. White, 415 U.S. at 777-78, 783-84, 786-87 & n.18. And the Court has stated in dictum that a California statute requiring an independent candidate to gather 325,000 signatures in 24 days did not, without more, impermissibly burden the constitutional rights of the candidate, the voters, or the party. Storer, 415 U.S. at 738-40.

In comparison to those provisions, the burden imposed by Mass. G.L. c. 53, § 6, is small. The statute required appellees to gather 10,000 signatures from "voters," without regard to political affiliation or whether those voters had participated in a previous primary; moreover, there was no requirement that signatures be obtained from voters in different geographical areas, and voters could sign multiple petitions in support of different candidates. Mass. G.L. c. 53, § 6; compare, e.g., White, 415 U.S. at 785-88 (approving Texas provision requiring approximately 22,000 signatures of voters who had not participated in any other primary). As a percentage of the 2,243,835 voters who voted in the 2006 statewide election (the most recent statewide election before the 2008 election), 10,000 signatures represents only 0.45%; as a percentage of the 2,927,455 voters who voted in the 2004 statewide election, 10,000 signatures represents only 0.34%. A.

186. This did not place a significant burden on appellees' constitutional rights. Jenness, 403 U.S. at 433-34, 440; White, 415 U.S. at 777-78, 783-84, 786-87; see also Diamond, 992 F.2d at 373.

Once nomination papers became available in early February 2008, a non-party candidate had until late July to gather the 10,000 signatures. A. 181. In this case, Barr supporters could have utilized this entire 5-month period to circulate his petitions. Even if appellees had waited to gather signatures until after the Libertarian convention in late May 2008, they still had 65 days left to obtain those signatures. And even measured from the date on which the Secretary informed Phillies in writing that "substitution" was not authorized, i.e., June 5, 2008, the appellees still had 54 days in which to gather signatures, a time period that was not unduly burdensome. The fact that other candidates, and initiative petitioners, have satisfied the signature requirements and obtained ballot placement, see A. 184-186, further establishes that the requirement is not unduly burdensome. See, e.g., White, 415 U.S. at 787 ("we are . . . unimpressed with arguments that burdens like those imposed by [the State] [through a signature requirement] are too onerous, especially where two of the original party plaintiffs themselves satisfied these requirements.").

Substantially shorter periods of time have been upheld because they do not burden significantly the constitutional rights of voters, candidates, or parties.

White, 415 U.S. at 785-788 (55 days in which to gather 22,000 signatures ruled permissible); Storer, 415 U.S. at 740 (24 days in which to gather 325,000 signatures, without more, not impermissible) (dictum).[10]

2. The Signature Requirement Directly Serves the State's Important Interest in Safeguarding the Integrity of Elections.

"Substantial support" requirements, such as those in Mass. G.L. c. 53, § 6, are "meant to safeguard the integrity of elections by avoiding overloaded ballots and frivolous candidacies, which diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome runoffs, and may ultimately discourage voter participation in the electoral process." Diamond, 992 F.2d at 371 (collecting cases). The Supreme Court has characterized these interests as "of the highest order" and of "fundamental importance," Lubin v. Panish, 415 U.S. 709, 715 (1974), as "vital" and "compelling," White, 415 U.S. at 782 & n.14, as "undoubted," Munro v. Socialist Workers Party, 479 U.S. 189, 194 (1986), and as duties of the State,

[10] The Supreme Court has held that a deadline to file signatures 120 days in advance of the election is a reasonable restriction on voting and associational rights, as "some cut off period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges." White, 415 U.S. at 787 n.18. Accordingly, the Massachusetts deadline to file nomination papers with local election officials, which, in 2008, was July 29, and which was only 98 days before the election, is well within constitutional parameters.

Bullock v. Carter, 405 U.S. 134, 145 (1972). A State's interest in having "ballots of reasonable size" is no longer "open to debate": "That 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion." Lubin v. Panish, 415 U.S. at 715.

The signature requirements in section 6 plainly survive the "less exacting review" applied to restrictions of general applicability that do not impose severe burdens on constitutional rights, as is the case here. Timmons, 520 U.S. at 358 (a state's "important regulatory interests" are generally enough to justify reasonable, non-discriminatory restrictions); Burdick v. Takushi, 504 U.S. 428, 440 n.10 (1992) ("limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable").

Moreover, the 10,000 signature requirement is reasonably related to the accomplishment of the State's objectives. That is all that is required under the less searching standard of review implicated here. Timmons, 520 U.S. at 358. The Supreme Court has repeatedly affirmed the use of signature requirements as a reasonable means of accomplishing these State objectives. E.g., White, 415 U.S. at 782-83; Storer, 415 U.S. at 738-40; Jenness, 403 U.S. at 442.

The "substitution" sought by Barr and Root, and which the district court allowed through its preliminary injunction ruling, circumvented the requirement

that a candidate demonstrate a measure of voter support as a condition of ballot access. It also undermined the integrity of the signature process by allowing Barr and Root to "appropriate" the signatures of voters who signed nomination papers in support of Phillies and Bennett. It is reasonable to assume that some voters who signed nomination papers supporting Phillies and Bennett would be surprised by, if not upset about, the use of their signatures to obtain "substitution" of Barr and Root on the ballot, particularly given the reported philosophical differences between Phillies and Barr.[11]

Moreover, in addition to having failed to obtain any voter signatures (much less the required 10,000), Barr and Root did not obtain the signatures of 12 electors supporting their candidacies. The 12 elector candidates for Phillies and Bennett, having accepted their nomination as electors, pledged, or at least indicated to

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[11] Appellees' argument that the voters who signed nomination papers for Phillies and Bennett were thereby signifying their support for ballot placement of the "Libertarian Party" generally, rather than for specific presidential and vice presidential candidates, ignores the constitutionally valid distinction in Massachusetts election law between recognized political parties, whose convention-selected nominee for president automatically appears on the ballot, and non-party candidates, who may appear on the ballot only by filing 10,000 voter signatures in support of their individual candidacy. That the statute is intended to ensure demonstrable community support for placement on the ballot of a particular non-party candidate is underscored by the fact that, under state law, multiple non-party presidential candidates identifying themselves as "Libertarian" (or any other such designation) could have obtained access to the November 2008 ballot as long as each candidate individually had met the signature requirement. This was in fact the case in New Hampshire, as discussed in the text above at page 14.

nomination paper signers their intent, to support Phillies and Bennett at the electoral college. Appellees made no showing that any of the 12 elector candidates switched their allegiance to Barr and Root or approved, as of the date of submission of the nomination papers to the Secretary in mid-August 2008, the substitution of Barr's and Root's names on the ballot. The absence of evidence that the electors had agreed to "substitution" provided an additional reason against "substitution," which would subvert state and federal law provisions recognizing the vital role of the presidential electors. But even an affirmative showing that the electors in fact had favored it would not warrant "substitution," which was neither constitutionally required nor statutorily authorized and thwarted the will of the over 10,000 voters who signed the nomination papers listing Phillies and Bennett as the candidates supported by the electors.[12]

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[12] Appellees' supplemental memorandum filed with the district court on September 17, 2008, included a "representation" by appellees' counsel that "the twelve elector candidates named in the nomination papers either support the substitution or would, as part of the substitution, agree to withdraw and be replaced by a new elector supporting Barr and Root." Appellees, however, did not submit an affidavit – or any evidence – establishing that the 12 elector candidates in fact supported "substitution" or were willing to withdraw and, indeed, one of the 12 electors stated in a web posting and in an e-mail to the Secretary that he did not support Barr's placement on the ballot. A. 188, 215-217. The belated "representation" by appellees' counsel, which did not constitute evidence, was insufficient to create any material issue of fact. Fed. R. Civ. P. 56(e) (affidavits opposing summary judgment must set out facts that would be admissible in evidence).

B. The Signature Requirement Does Not Deprive Appellees of Equal Protection of the Laws.

1. The Claim In Relation to Major Parties.

Appellees alleged that the Secretary's refusal to allow "substitution" of Barr and Root discriminated against the "Libertarians" vis-à-vis the major parties, in violation of appellees' rights under the Equal Protection Clause, and the district court apparently agreed, holding that "a right to substitute is guaranteed by the Equal Protection Clause of the Constitution to ensure that the names of the actual candidates appear on the ballot." A. 22; Addendum 12. At its core, appellees' equal protection claim is that, as a consequence of the Secretary's refusal to place Barr and Root on the ballot, "a nominating petition for a minor party's candidate is only valid when tied to a particular candidate, while votes in the previous election serve to validate any candidate a major party puts forth." A. 22. While the foregoing statement is accurate, the result – which does not suggest discrimination between similarly situated parties or candidates – does not violate the Equal Protection Clause. The district court erred in holding otherwise.

The district court's holding is at odds with settled Supreme Court case law recognizing that States, consistent with the Equal Protection Clause, may provide different ballot access procedures for non-party candidates and major party candidates. In Socialist Workers Party v. Davoren, 378 F. Supp. 1245 (D. Mass. 1974), the court, entertaining a nearly-identical equal protection challenge to a

previous version of Mass. G.L. c. 53, § 6, held that such a claim, "although perhaps not yet treated by the Supreme Court to a ritual burial, has been decapitated by Jenness . . . , and by . . . White . . . ." Socialist Workers Party v. Davoren, 378 F. Supp. at 1249.[13]

In making an equal protection claim, appellees must "demonstrate in the first instance a discrimination against them of some substance. Statutes create many classifications which do not deny equal protection; it is only invidious discrimination which offends the Constitution." White, 415 U.S. at 781 (emphasis added) (citations and internal quotations omitted). It is well-established that a statute that treats non-parties or independent candidates or voters differently from recognized parties is not, by itself, unlawful.

Thus, in White, the Court rejected an equal protection challenge to a Texas provision requiring minor party candidates to gather, within 55 days, notarized signatures from 1% of voters in previous gubernatorial election: "So long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously

[13] The previous version of the statute required the candidates to obtain a number of signatures equal to 2% of the entire vote cast in the most recent gubernatorial election if running for state-wide office, or 2% of the votes cast in the most recent gubernatorial election in the electoral district or division for which the candidate was seeking election. See Davoren, 378 F. Supp. at 1247 (citing Mass. G.L. c. 53, § 6, as amended by St. 1973, c. 849).

treated, may be required to establish their position in some other manner." 415 U.S. at 782-83. Similarly, in Jenness, the Court rejected an equal protection challenge to a Georgia provision requiring independent candidates to obtain signatures representing 5% of registered voters at the last general election, while party candidates were elected through a primary process. 403 U.S. at 440-41 ("We cannot see how [the State] has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.").

The Court has further explained, "'There are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences, and providing different routes to the printed ballot.'" Jenness, 403 U.S. at 441-42; see also Diamond, 992 F.2d at 375 (quoting Jenness).

The Massachusetts ballot access provision does just that: it offers certain privileges, but also imposes certain obligations, on established political parties. Not only does the statute require maintenance of a consistent threshold level of voter support at each biennial election, but, as the court observed in Davoren, political party status in Massachusetts is "not an unmixed blessing," as it entails substantial regulation (including control by the party's voters) from which non-

party candidates, such as Barr and Root, are free. 378 F. Supp. at 1247.[14] Non-party presidential candidates are free from such regulation under state law but must demonstrate a requisite level of support before their names may be placed on the ballot. Mass. G.L. c. 53, § 6. This distinction reflects the inherent differences between the major parties, on the one hand, and non-party candidates, on the other. The mere fact that the statute provides different paths to the ballot for non-party and party candidates provides no basis for an equal protection claim.

The district court ignored the foregoing principles. As noted above, the court reasoned that "substitution" was required as a matter of equal protection in order "to ensure that the names of the actual candidates appear on the ballot." Addendum 12. This reasoning was based on the erroneous premise that Barr and Root, by virtue of having received the endorsement of the "Libertarian" convention

[14] For example, in the case of presidential election, state law closely regulates the selection of electors by a party's state committee and thus ensures that the will of the party's tens or hundreds of thousands of voters is carried out with respect to the party's nominee for president. Specifically, Mass. G.L. c. 52, § 1, requires that the members of a party's state committee be democratically elected from each of 40 districts by registered voters of that party. The state committee then nominates the presidential electors who, by virtue of Mass. G.L. c. 53, § 8, pledge to vote for the presidential candidate named in the party's filing with the Secretary. In contrast, state law neither authorizes the selection nor regulates the actions of persons like appellees insofar as they claim decision-making authority on behalf of a non-party grouping of voters who signed particular nomination papers, such as those voters who signed papers on which Phillies and Bennett used the "Libertarian" designation in 2008.

in Denver, were the "actual" "Libertarian" candidates. But because the "Libertarians" were not recognized as a political party in Massachusetts as of November 2008, the endorsement of the "Libertarian" convention did not confer any ballot access rights on Barr and Root, who remained subject to the signature requirement in Mass. G.L. c. 53, § 6. Having failed to comply with that requirement, Barr and Root were not "actual" candidates under Massachusetts election law.[15]

It is precisely the point of cases like White and Jenness that, consistent with the Equal Protection Clause, Massachusetts may require non-party candidates to comply with the signature requirement as a condition of ballot placement, while providing that, in the case of a recognized party, the presidential candidate selected at the party's national convention is automatically accorded a place on the ballot in November. Consequently, the Secretary's adherence to the signature requirement in Mass. G.L. c. 53, § 6, and his refusal to allow Barr and Root to avoid the requirements of that provision through "substitution," did not violate Barr's and

[15] The district court's ruling also appears to have rested on another related – and equally incorrect – premise advanced by the appellees, namely, the notion that voters who signed nomination papers for non-party candidates such as Phillies and Bennett "were signing/voting for a party, not the specific candidates." A 22. That assertion ignores that the "Libertarians" were not a recognized party at the time of the November 2008 election and thus that, under Massachusetts law, the nomination papers for Phillies/Bennett (or for any non-party candidate) could potentially confer ballot access rights only on the individual candidates named in the papers.

Root's rights, under the Equal Protection Clause or otherwise, as against the rights of major party candidates.

The only case law cited by the district court in support of its conclusion on the equal protection issue, Anderson v. Firestone, 499 F. Supp. 1027 (N.D. Fla. 1980), is not controlling. In that case, a Florida district court held that "substitution" of the name of the vice presidential running mate ultimately selected by John Anderson, following the filing of his nominating petition, was constitutionally required, where that running mate differed from the candidate identified on the nominating petition previously circulated by Anderson. 499 F. Supp. at 1029-31. This Court should not follow Anderson v. Firestone, which has not been cited in any published court decision except the district court's injunction ruling and summary judgment decision, see 584 F. Supp. 2d at 321 and Addendum 12. The decision in Anderson contains only the most cursory discussion of equal protection principles, with virtually no analysis of the leading Supreme Court cases, such as White and Jenness, as applied to the equal protection claim presented. In short, Anderson should be ignored.[16]

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[16] In their summary judgment memorandum, appellees noted that the Secretary on one past occasion had cited Anderson v. Firestone, in a 1995 letter suggesting that the Secretary would allow "substitution" if required as a matter of equal protection. A. 54-55. At the time of the 1995 letter, the Secretary was not presented with a fully developed equal protection claim, and the Secretary, while citing Anderson based on the guidance then available, certainly did not contemplate the case to

(footnote continued)

2. The Equal Protection Claim in Relation to Other Non-Party Candidates.

Appellees also claimed that the Secretary violated their right to equal protection in relation to other non-parties, insofar as the Secretary denied Barr's and Root's request for "substitution" of candidate names while allegedly having allowed "substitution" in previous elections, notably in the case of the Reform Party in 2000. A. 22.

As the Elections Division explained in its letter of June 5, 2008, the Secretary in 2000 allowed the "substitution" of a "Reform Party" vice presidential candidate in the "unique set of circumstances" then presented, namely, that the nominating convention did not occur until August, after the late July deadline for submission of nomination papers to local election officials, with the result that "it was not possible for the Reform Party to obtain the requisite signatures for the new [vice presidential] candidate" in advance of the July deadline. A. 182-183, 204-

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(footnote continued)
provide authority for non-party candidates to plan in advance to evade the signature requirements of Mass. G.L. c. 53, § 6. With the benefit of the fuller record presented in the context of the equal protection claim squarely presented here, the Secretary does not find Anderson persuasive or controlling.

205.[17] Thus "substitution," on the one occasion cited by appellees that this Secretary has allowed it, did not enable a candidate to avoid compliance with a then-available statutory means of obtaining ballot access.[18] In this case, in contrast, at the time that Barr and Root were selected as candidates at the "Libertarian Party" convention in May 2008, they still had a readily-available means to obtain ballot access – namely, to comply with the signature requirement by gathering 10,000 signatures in roughly two months, a valid requirement, as discussed above. The Secretary's determination here to require adherence to a

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[17] The fact that the candidate in question was one for vice president rather than president lessened the possibility of potential unfairness to voters who had signed nomination papers on behalf of the "Reform Party" candidate for president and original candidate for vice president, as the presidential candidate supported by those voters still remained on the ballot.

[18] Appellees also pointed to the case of the U.S. Taxpayers Party in 1995 and the Nader campaign in 2004, but the Secretary in fact did not allow "substitution" in either case. In 1995, the Secretary expressed a willingness to consider "substitution" in the case of the U.S. Taxpayers Party, whose convention did not occur until after the deadline for filing nomination papers, but it ultimately was not allowed. A. 54-55, 187. Appellees also suggested, incorrectly, that the Secretary expressed his approval of "substitution" on the ballot of Peter Camejo as the running mate for non-party presidential candidate Ralph Nader in 2004, but, in fact, the Secretary did not allow "substitution" of Camejo's name. A. 187, 209-210.

constitutionally valid ballot access requirement can therefore hardly be characterized as "invidious discrimination" or as "arbitrary."[19]

C. The District Court Erred in Reaching Appellees' Challenge to Mass. G.L. c. 53, § 14, on Vagueness Grounds.

Although appellees did not set forth any claim in the complaint challenging Mass. G.L. c. 53, § 14 – indeed, the complaint does not even mention that section of the statute at all – they seized on the provision in their preliminary injunction papers, asserting that section 14 was unconstitutionally vague because, they contended, it was unclear whether that provision, which governs vacancies in candidates for "state, city or town office," could be applied to presidential

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[19] In asserting that they have been denied equal protection in relation to other non-party candidates, appellees argue that the Secretary, by having allowed "substitution" in one past instance, "discriminate[ed] between parties that hold conventions prior to the deadline for submitting nominating petitions to town clerks and those that hold conventions subsequent to the deadline." A. 22. But it has become evident that the endorsement of a non-party convention does not confer any right to ballot access, even though such an endorsement may, as a practical matter, generate support for a non-party candidate. Any candidate who plans to seek the endorsement of a non-party convention is free to begin to gather signatures (with a chosen running mate) before the convention. Moreover, if non-party political organizations such as the Libertarians wish to maximize the ability of their convention-backed candidates to meet state ballot access requirements those organizations can readily determine the States' respective deadlines for filing nomination papers and schedule their conventions in advance of such deadlines. The Secretary's current view is thus that, absent extraordinary circumstances not presented to date, the only way that any non-party candidate can obtain ballot access is by complying with the signature requirement in Mass. G.L. c. 53, § 6, regardless of whether or not the candidate is endorsed by a non-party convention.

elections.[20] The district court, based on its initial, erroneous holding that "substitution" was required as a matter of equal protection, and finding no authorization for "substitution" in Mass. G.L. c. 53, § 6, went on to hold that imprecision in the statutory definition of "state officer" rendered section 14 unconstitutionally vague as applied, insofar as it was unclear whether that provision could authorize "substitution" in the case of presidential candidates. Addendum 12-13.

The district court's holding with respect to the constitutionality of Mass. G.L. c. 53, § 14, was wrong in all respects. To begin with, the court need not have even reached the constitutionality of Mass. G.L. c. 53, § 14, because, as the Secretary argued in his summary judgment memorandum, Mass. G.L. c. 53, § 6, provides a constitutionally valid means of obtaining ballot access, and appellees failed to comply with that provision. Moreover, it is plain on the face of the statute that section 14, which governs vacancies occurring after candidates for "state" office have already been nominated, was not intended to provide an alternate means of ballot access or to enable a candidate to evade the requirements of section 6.

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[20] Under section 14, "[i]f a candidate nominated for state, city or town office dies before the day of election, or withdraws his name from nomination, or is found ineligible, the vacancy . . . may be filled by the same political party or persons who made the original nomination, and in the same manner . . . ." Mass. G.L. c. 53, § 14.

1. The District Court Erred in Reaching The Appellees' Vagueness Claim.

Because the signature requirement set forth in Mass. G.L. c. 53, § 6, provides a constitutionally valid means to obtain ballot access, it is of no moment that appellees might assert that another provision of state law – concerning vacancies of candidates for state and local office after nomination – is unconstitutionally vague. So long as there exists a valid route to the ballot that does not unconstitutionally burden appellees, the possibility that an additional ballot access provision lacks precision does not burden appellees' constitutional rights. In LaRouche v. Kezer, 990 F.2d 36, 37-41 (2d Cir. 1993), for example, the court held that, because a statutory provision authorizing ballot access to candidates who obtained signatures of 1% of party's registered voters provided a constitutional means to get on a state's presidential primary ballot, the district court erred in striking down, on vagueness grounds, an alternative provision that accorded ballot access to candidates based on their media recognition.

Similarly, this Court declined to resolve definitively a challenge to a state ballot access provision where the state law also provided an alternative means of ballot access that was constitutional. Diamond, 992 F.2d at 374-75 & n.12 (declining to consider, in isolation, a challenge to Maine's requirement that party candidates gather certain number of signatures or votes from party members within district, because candidates had alternative of using petition procedure that allowed

them to run as independent candidates and gather signatures from voters of any political affiliation in district, which was constitutionally valid).

2. Mass. G.L. c. 53, § 14, Does Not Authorize a Candidate to Avoid Compliance with the Signature Requirement in Mass. G.L. c. 53, § 6.

A claim that a statute is void for vagueness is grounded in the "substantive" aspect of the Due Process Clause, and it is well established that a statutory provision will withstand a challenge based on vagueness unless "no standard of conduct is specified at all" in a statute, Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971), so that "men of common intelligence must necessarily guess" at the statute's meaning. Doyle v. Secretary of Health and Human Services, 848 F.2d 296, 301 (1st Cir. 1988) (citing Connally v. General Construction Company, 269 U.S. 385, 389 (1926)). Here, appellees' claim that the statute is imprecise does not rise to the level of constitutional concern necessary to establish a due process violation. See, e.g., United States v. Lachman, 387 F.3d 42, 56 (1st Cir. 2004) ("The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague.") The district court erred in concluding that Mass. G.L. c. 53, § 14, was unconstitutionally vague as applied to appellees.

Mass. G.L. c. 53, § 14, provides that "[i]f a candidate nominated for state, city or town office dies before the day of election, or withdraws his name from nomination, or is found ineligible, the vacancy . . . may be filled by the same

political party or persons who made the original nomination, and in the same manner . . . ." Mass. G.L. c. 53, § 14. The district court held that, based on the definition of "state officer" in Mass. G.L. c. 50, § 1, "the inclusion of the term 'state . . . office' in M.G.L. c. 53, § 14 leaves the determination of whether that statute is applicable to presidential and vice presidential nominees . . . ambiguous." Addendum 8.[21]

The district court's ruling rests on an erroneous premise: that Mass. G.L. c. 53, § 14, authorizes "substitution" as an alternative means of obtaining ballot access in the first instance, without satisfying the ballot access provision in Mass. G.L. c. 53, § 6. Whatever imprecision might be alleged in the term "state" office as used in Mass. G.L. c. 53, § 14, it is apparent on the face of the statute that section 14 is not intended to provide a means by which a candidate can plan in

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[21] Under Mass. G.L. c. 50, § 1, "state officer" is defined to include "any person . . . chosen at a state election," and "state election" is defined as "any election at which a national, state or county officer . . . is to be chosen by voters" (defined as a "registered voter," i.e., voters registered in Massachusetts). The district court characterized the foregoing definitions as "circular" insofar as "A 'state officer' is, ultimately, defined as 'a national, state or county officer,'" and thus, under the district court's view, "the category of 'state officers' is defined to be broader than itself . . . ." Addendum 8. The district court rejected the Secretary's suggestion that the statute's definition of "state election" was most reasonably read as applying only to those "national" offices selected by Massachusetts voters alone, namely, United States Senator and Representative. For the reasons set forth in the text, however, it was unnecessary for the district court to determine the scope of the term "state officer" as used in section 14, and this Court similarly should decline to reach that issue, which is unnecessary to the outcome of the appeal.

advance to obtain ballot access in place of a "stand in" candidate, in lieu of complying with the signature requirements set forth in Mass. G.L. c. 53, § 6. Rather, section 14 addresses the unusual circumstances in which a nominated candidate dies, withdraws, or is found ineligible after nomination papers are filed. In such unusual circumstances, section 14 simply directs the party or non-party to fill the vacancy through "the same political party or persons who made the original nomination, and in the same manner." Mass. G.L. c. 53, § 14.[22]

Thus there is no statutory authorization in Mass. G.L. c. 53, § 14 for the "substitution" sought by Barr and Root here, and, irrespective of whether the term "state office" could ever be applied to a presidential election – an issue the district court need not have confronted and that need not be resolved on this appeal – the district court erred in treating Mass. G.L. c. 53, § 14, as potentially providing a path to ballot access for Barr and Root.

Finally, as the Secretary argued below, to the extent that the vagueness claim at its core merely reflects appellees' disagreement with the Secretary over the proper interpretation of state law, the district court should have declined to reach it for the additional reason that any claim in federal court challenging the Secretary's

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[22] Also, a candidate's "withdrawal" as referenced in section 14 may only occur within a 72-hour period after the deadline for filing completed nomination papers. See Mass. G.L. c. 53, § 13; id. § 11; Mass. G.L.c. 55B, § 5.

interpretation of state law as erroneous would be barred by the Eleventh Amendment. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 117 (1984).[23] A similar vagueness claim was previously disposed of in Davoren, where the court declined to address a minor party's claim that ballot provisions were unconstitutionally vague, because the essence of the claim was not that the Secretary left the minor party "in the dark about how it must go about qualifying for the ballot." 378 F. Supp. at 1248-49. Rather, there, just as here, the Secretary told the minor party candidate party exactly how it must qualify for the ballot, and the non-party simply disagreed with the Secretary's interpretation of state law; as the court concluded, such a disagreement could only be resolved in the state courts. Id.

[23] On the one past occasion in which the Secretary allowed "substitution," in 2000, the Secretary did not rely on (or even mention) section 14 as a basis for doing so. A. 57.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the district court.

Respectfully submitted,

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ATTORNEY GENERAL

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Dated: February 11, 2010

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,902 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface known as 14-point Times New Roman.

/s/ Amy Spector
Amy Spector

CERTIFICATE OF SERVICE

I hereby certify that I filed this Brief through the Court's Electronic Case Filing (ECF) system on February 11, 2010, and thus copies will be served electronically on that date on Amrish Virendra Wadhera and John Reinstein, who are identified as registered participants on the Court's Notice of Docket Activity. I further certify that, on February 11, 2010, I served two copies of the Brief and two copies of the Appendix to the Briefs, by hand, on Matthew Baltay, Jennifer Behr, and Amrish Virendra, Foley Hoag LLP, 155 Seaport Boulevard, Boston, Massachusetts 02210, and on John Reinstein, American Civil Liberties Union of Massachusetts, 211 Congress Street, Third Floor, Boston, Massachusetts 02110.

/s/ Amy Spector
Amy Spector

ADDENDUM

Page

United States District Court
District of Massachusetts

BOB BARR, WAYNE A. ROOT, LIBERTARIAN PARTY OF MASSACHUSETTS, and LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiffs, v. WILLIAM F. GALVIN, as he is SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, Defendant.	**Civil Action No. 08-11340-NMG**

MEMORANDUM & ORDER

GORTON, J.

In September, 2008, the Court entered a preliminary injunction ordering the defendant in this case, William F. Galvin ("Galvin"), in his capacity as the Secretary of the Commonwealth of Massachusetts, to place the names of Bob Barr ("Barr") and Wayne A. Root ("Root") as the Libertarian candidates for president and vice president, respectively, on the Massachusetts ballot for the 2008 presidential election. The parties have now filed cross-motions for summary judgment.

I. Background

A. Factual Background

Because the Libertarian Party is not one of the recognized

Addendum 1

"political parties" in the Commonwealth of Massachusetts, its candidates may appear on an election ballot only if it submits a valid nominating petition. Such a petition must designate 12 electors, be signed by at least 10,000 voters, and be submitted within sufficient time to permit Town Clerks to prepare for the election. M.G.L. c. 53, § 6. In 2008, the deadline for filing nominating petitions was July 29.

Beginning in late July, 2007, the plaintiffs, Barr, Root, the Libertarian Party of Massachusetts and the Libertarian National Committee, Inc., began preparing for the 2008 presidential election. The nominating convention for the Libertarian Party was not held until late May, 2008, however, thus forcing the plaintiffs to make a choice between waiting until after the convention and collecting all 10,000 signatures within two months or guessing who their nominees would be and circulating petitions for candidates who might not eventually be their party's nominees. The plaintiffs chose the latter course, gathering signatures in support of Dr. George Phillies ("Phillies"), who is the Chair of the Libertarian Party of Massachusetts, for president, and Chris Bennett ("Bennett") for vice president. They eventually collected over 15,000 signatures on the Phillies-Bennett petitions.

In July, 2007, Phillies inquired of the Elections Division of the Office of the Secretary of the Commonwealth ("the

Secretary") as to whether the Libertarian Party would be allowed to substitute the names of the nominees actually chosen at its convention, in the event that they were not Phillies and Bennett. The Secretary responded, via e-mail, through one of his attorneys, Kristen Green ("Attorney Green"), on October 26, 2007, that the Libertarian Party could "prepare a form that allows members of [that] party to request the substitution of the candidate." The plaintiffs understood the response as an assurance that a substitution would be allowed and proceeded accordingly.

Barr and Root ultimately defeated Phillies and Bennett and won the Libertarian Party's nomination. Immediately thereafter, on May 29, 2008, the plaintiffs reestablished contact with the Secretary and sought to substitute the nominees' names on the petitions they had gathered. On June 5, 2008, however, the Secretary informed the plaintiffs that no substitution would be permitted because he viewed Phillies and Bennett as having been mere "stand-ins" who were not actually seeking their party's nomination. By that time, the plaintiffs had collected approximately 7,000 signatures on behalf of Phillies and Bennett. They determined that it would be impossible for them to abandon those signatures and the resources that had been devoted to collecting them to start afresh. The plaintiffs chose, instead, to continue gathering signatures on the original petition and to

Addendum 3

challenge in court the Secretary's refusal to allow substitution.

B. Procedural History

On August 6, 2008, the plaintiffs filed suit alleging that Galvin was in violation of 1) the First Amendment of the United States Constitution by impairing their rights to free speech, to cast their votes effectively and to develop a new political party and 2) the Equal Protection Clause of the Fourteenth Amendment of the Constitution by discriminating between a) major and minor political parties and b) parties that hold their nominating conventions before the deadline for submitting nomination petitions and those that hold their conventions after the deadline. The plaintiffs sought declaratory judgment as well as injunctive relief to require Galvin to place the names of Barr and Root as the Libertarian candidates on the Massachusetts ballot for the 2008 presidential election.

On September 22, 2008, shortly before the Massachusetts presidential ballots were to be printed, the Court allowed the requested preliminary injunction ("the September, 2008, Order").[1] See Barr v. Galvin, 584 F. Supp. 2d 316, 322 (D. Mass. 2008). Galvin appealed that order but he later voluntarily dismissed the appeal. On March 31, 2009, the parties filed cross-motions for

[1] Barr and Root obtained 13,189 votes (about 0.4% of all votes cast) in Massachusetts in the 2008 election. See Fed. Election Comm'n, 2008 Official Presidential General Election Results 1 (Jan. 22, 2009), available at http://www.fec.gov/pubrec/fe2008/2008presgeresults.pdf.

summary judgment which were timely opposed and are currently pending before the Court.

II. Legal Analysis

A. Justiciability

The Court notes at the outset that both parties agree that this case is not moot despite the long-past occurrence of the 2008 presidential election because the controversy is "capable of repetition, yet evading review." See Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) (citation omitted).

B. Legal Standard for Summary Judgment

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991), quoting Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990). The burden is upon the moving party to show, based upon the pleadings, discovery and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When cross-motions are filed, the Court must apply that standard and determine which party, if either, deserves summary judgment. Adria Int'l Group, Inc. v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).

C. Application

1. Law of the Case Doctrine

As the Court explained in the September, 2008, Order, the constitutionality of state action affecting ballot access is reviewed using a sliding scale such that, to pass muster, voting regulations imposing "severe burdens" must be narrowly tailored to a "compelling state interest" but "reasonable, nondiscriminatory restrictions" must be justified by only "important regulatory interests." McClure v. Galvin, 386 F.3d 36, 41 (1st Cir. 2004), citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); see Barr, 584 F. Supp. 2d at 320. When it entered a preliminary injunction against Galvin, the Court determined that, for reasons described below, M.G.L. c. 53, § 14 was ambiguous with respect to whether it applied to presidential nominees and "[s]urely there can be no state interest that would justify" the burden imposed by such ambiguity. Barr, 584 F. Supp. 2d at 320-21.

Barr argues that the Court should enter summary judgment purely on the basis of that ruling pursuant to the law of the case doctrine which provides that, once a court decides a rule of law in a case, its decisions in later stages of the case should comport with that rule. See Naser Jewelers, Inc. v. City of Concord, 538 F.3d 17, 20 (1st Cir. 2008). That doctrine is inapplicable here, however, because in its September, 2008,

Order, the Court ultimately ruled that § 14 was only "likely [to] fail constitutional scrutiny," Barr, 584 F. Supp. 2d at 321 (emphasis added), and, therefore, no absolute rule of law governs this case. As the First Circuit Court of Appeals made clear in Naser Jewelers, an initial ruling that "was designed to be preliminary" constitutes an exception to the law of the case doctrine. 538 F.3d at 20; c.f. id. (applying the law of the case doctrine to decide a motion for summary judgment where the court had previously held that an ordinance was unequivocally constitutional when it denied a motion for a preliminary injunction).

2. Constitutionality of Chapter 53, Section 14

Accordingly, the Court will re-consider the constitutionality of § 14. That statute sets forth the procedure for filling the vacancy created when "a candidate nominated for a state, city or town office dies before the day of election, or withdraws his name from nomination, or is found ineligible." M.G.L. c. 53, § 14 (emphasis added). Thus, on its face, § 14 does not appear to apply to candidates for the offices of President and Vice-President of the United States.

Another statute, M.G.L. c. 50, § 1, however, defines the term "state officer" so as to render the term "state ... office" in § 14 applicable to presidential and vice-presidential nominees. Chapter 50, § 1 mandates that "state officer"

> shall apply to, and include, any person to be nominated at a state primary or chosen at a state election and shall include United States senator and representative in Congress.

M.G.L. c. 50, § 1 (emphasis added). The same statute also defines "state election" as applying

> to any election at which a national, state, or county officer or a regional district school committee member elected district-wide is to be chosen by the voters.

Id. (emphasis added). As this Court previously concluded, under § 1,

> A "state officer" is, ultimately, defined as "a national, state or county officer." Thus, the category of "state officers" is defined to be broader than itself, a nonsensical conclusion.

Barr, 584 F. Supp. 2d at 320. Based upon the circular definitions set forth in § 1, the inclusion of the term "state ... office" in M.G.L. c. 53, § 14 leaves the determination of whether that statute is applicable to presidential and vice-presidential nominees positively ambiguous. Id.

Where, as here, the meaning of a statute is unclear, it may be found to be void for vagueness. See Duke v. Connell, 790 F. Supp. 50, 53-54 (D.R.I. 1992). A vague statute can be justified by no legitimate state interest. See id. Accordingly, the Court concludes, as it preliminarily determined in the September, 2008, Order, that § 14 fails to pass constitutional muster as it applies to this case.

3. Counter-Arguments

a. "Voters"

The Court is not dissuaded from its earlier reasoning by Galvin's arguments to the contrary. Galvin first contends that § 14 cannot apply to presidential elections because that statute clearly refers to officers selected by Massachusetts voters alone. He notes that 1) § 14 applies to "state officers" who, under the definitions of that term and of "state election," are "chosen by the voters" and 2) the term "voter" is elsewhere defined as "a registered voter." See M.G.L. c. 50, § 1.

Galvin argues that "a registered voter" refers only to a voter registered in Massachusetts and, therefore, "state officers" are those "chosen" by only voters registered in Massachusetts. Because the president and vice-president are chosen by voters nationwide, Galvin suggests that they cannot be deemed "state officers" and, hence, are not subject to § 14. The term "voter" is not, however, and cannot logically be expanded to mean "a registered voter in the Commonwealth," and Galvin provides no explanation as to why it should be so restricted.

b. Omission of "President" in the Definition of "State Officer"

Galvin also points out that the definition of "state officer" as set forth in M.G.L. c. 50, § 1 explicitly includes United States senators and representatives but is silent with respect to the president. He suggests, therefore, that that term

cannot refer to the president (and, by extension, § 14 cannot apply to the president).

In effect, he invokes the canon of statutory interpretation "expressio unius est exclusio alterius" pursuant to which the express mention of one thing in a statute implies the exclusion of another. That rule is "only a guide," United States v. Vonn, 535 U.S. 55, 65 (2002), and only applies when it resonates with legislative intent favoring exclusion, see Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 80 (2002) (refusing to apply the canon to a statute containing the phrase "may include"). Galvin's argument is, therefore, not altogether conclusive.

In any event, his interpretation of "state officer" (as including United States senators and representatives but not the president) does not remedy the inconsistent definitions of that term and "state election." As suggested above, a "state officer," as defined in § 1, is someone elected at a "state election," in which "national, state or county officers" are chosen. Thus, the president, undeniably a "national ... officer[]," could, for these purposes, be considered to fall within the ambit of "state officers." In any event, the statutory term is vague and ambiguous.

c. Presidential Electors

In the alternative, Galvin suggests that, if § 14 applies to presidential elections at all, it must only apply to presidential

electors who are the persons actually "chosen at a state election" and, hence, it is the electors who must be considered to be "state officers." In that context, Galvin argues that the statutory prerequisites for filling vacancies, as set forth in § 14, were not met in this case because none of the 12 electors who accepted nomination to support Phillies and Bennett died, withdrew or was found ineligible.

The plaintiffs respond that their complaint is with the Secretary's refusal to allow any substitution, whether for presidential nominees or for presidential electors. Indeed, their ultimate goal was to substitute the names of Barr and Root in place of Phillies and Bennett on the ballot, regardless of how that was accomplished. Moreover, the ambiguity with respect to whether § 14 applies to presidential nominees is equally applicable to presidential electors. Galvin's argument concerning presidential electors is, therefore, unavailing.

d. Chapter 53, Section 6

Finally, Galvin devotes a major portion of the memorandum in support of his motion for summary judgment to defending the constitutionality of M.G.L. c. 53, § 6, even though the plaintiffs do not challenge it. That statute provides that, in order to have their names appear on the ballot, candidates for president and vice president representing a political designation must obtain nomination papers (nominating 12 electors who have

pledged to vote for the presidential and vice-presidential candidates) signed by 10,000 voters and submitted to election officials on or before a certain date. Galvin contends that it is irrelevant whether § 14 is constitutional so long as § 6 provides valid access to the ballot.

Section 6 does not, however, provide a means for substituting names on a ballot in the event that a candidate withdraws, dies or is found to be ineligible. Such a right to substitute is guaranteed by the Equal Protection Clause of the Constitution to ensure that the names of the actual candidates appear on the ballot. See Anderson v. Firestone, 499 F. Supp. 1027, 1230-31 (D.C. Fla. 1980) (holding that substitution of the name of the proper vice-presidential candidate on the ballot was constitutionally required when the presidential candidate had ultimately selected a running mate different from the one listed on nomination petitions). In this case, § 6 did not provide a remedy for substituting the names of Barr and Root on the ballot when Phillies and Bennett had previously secured a spot but wished to cede it to the legitimate Libertarian nominees.

Thus, that statute did not protect ballot access for the candidates actually selected to represent the Libertarian Party or Massachusetts voters' right to vote for those candidates. The lack of a substitution procedure does not serve the state interest in protecting ballot integrity or, indeed, any other

state interest and, accordingly, the presumed constitutionality of § 6 does not mitigate the constitutional infirmity of § 14.

ORDER

In accordance with the foregoing, the plaintiffs' motion for summary judgment (Docket No. 37) is **ALLOWED** and, conversely, the defendant's motion for summary judgment (Docket No. 32) is **DENIED.**

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated September 17, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Bob Barr et al
Plaintiffs

V.

William F. Galvin
Defendant

CIVIL ACTION

NO. 08-cv-11340-NMG

JUDGMENT

GORTON, D. J.

In accordance with the Court's Memorandum and Order dated 9/17/09 granting Plaintiffs' motion for summary judgment (Docket No. 44) in the above-entitled action, it is hereby ORDERED:

Judgment for the Plaintiffs

By the Court,

9/21/2009
Date

/s/ Diep Duong
Deputy Clerk

*20254 M.G.L.A. 50 § 1

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I. ADMINISTRATION OF THE GOVERNMENT (CH. 1-182)
TITLE VIII. ELECTIONS (CH. 50-57)
CHAPTER 50. GENERAL PROVISIONS RELATIVE TO PRIMARIES, CAUCUSES AND ELECTIONS

Current through Chapter 174 of the 2009 1st Annual Sess.

§ 1. Definitions

Terms used in chapters fifty to fifty-seven, inclusive, shall be construed as follows, unless a contrary intention clearly appears:

"Aldermen" or "board of aldermen" shall include the board of election commissioners or election commission of any city having such a board or commission, as to all matters coming within the scope of their powers and duties, and as to such matters shall not apply to the city council of such city.

"Ballot labels" shall mean printed strips of cardboard or paper for use on voting machines, containing the names and addresses of candidates for each office and the questions submitted to the voters at the election except such questions as shall appear on separate ballots, as determined by the state secretary under section thirty-five A of chapter fifty-four.

"Caucus" shall apply to any public meeting of the voters of a precinct, ward or town, held under the laws relating to caucuses.

"Caucus officers" shall apply to chairmen, wardens, secretaries, clerks and inspectors, and, when on duty, to additional officers appointed or elected, or elected to fill a vacancy, and taking part in the conduct of caucuses.

"City clerk" shall include the board of election commissioners or election commission of any city having such a board or commission, with reference to all matters coming within the scope of their powers and duties, and as to such matters shall not apply to the city clerk of such city.

"City election" shall apply to any election held in a city at which a city officer is to be chosen by the voters, whether for a full term or for the filling of a vacancy, or at which any question to be voted upon at a city election is to be submitted to the voters.

"Convention" shall apply only to a meeting of delegates duly chosen in primaries or caucuses, representing two or more subdivisions of the district for which the convention is held.

"Direct plurality vote" shall mean the highest total vote, determined according to section two, received for a nomination at the primaries or caucuses in an entire electoral district.

*20255 "Election" shall apply to the choice by the voters of any public officer and to the taking of a vote upon any question by law submitted to the voters.

"Election officer" shall apply to wardens, clerks, inspectors and ballot clerks, and to their deputies when on duty, and also to selectmen, town clerks, moderators and tellers when taking part in the conduct of elections.

"Family member", a spouse or person residing in the same household, in-laws, father, mother, sister or brother of the whole or half blood, son, daughter, adopting parent or adopted child, stepparent or stepchild, uncle, aunt, niece, nephew, grandparent or grandchild.

"Federal act", the National Voter Registration Act of 1993, 42 USC 1973 gg to 1973 gg-10, inclusive, as may be amended from time to time.

"Listing board", a board established by special law in a particular city or town to prepare lists of

persons of voting age resident in the city or town and perform certain other duties in connection with said lists.

"Majority", with reference to a question on the ballot, shall mean more than one half of those voting upon the question.

"Mayor" or "mayor and aldermen" shall include the board of election commissioners or election commission of any city having such a board or commission, with reference to all matters coming within the scope of their powers and duties, and as to such matters shall not apply to the mayor or city council of such city.

"Municipal party" shall apply to a party, not a political party as to state elections or state primaries, which at the preceding city or town election polled for mayor or a selectman at least three per cent of the entire vote cast in the city or town for that office, or, in a city, which files with the city clerk, at least sixty days before the annual or biennial municipal election, a petition to be allowed to place nominations of such party on the official ballot, signed in person by a number of registered voters of the city equal at least to three per cent of the entire vote polled in the city for mayor at the preceding election.

"Official ballot" shall mean a ballot prepared for any primary, caucus or election by public authority and at public expense, and where voting machines are used shall include ballot labels.

"Political committee" shall apply only to a committee elected as provided in chapter fifty-two, except that in chapter fifty-five it shall also apply, subject to the exception contained in section twenty-nine thereof, to every other committee or combination of five or more voters of the commonwealth who shall aid or promote the success or defeat of a candidate at a primary or election or the success or defeat of a political party or principle in a public election or shall favor or oppose the adoption or rejection of a question submitted to the voters.

***20256** "Political designation" shall apply to any designation required in section 8 of chapter 53, expressed in not more than three words, which a candidate for nomination under section 6 of chapter 53 represents, and to any designation expressed in not more than three words to qualify a political party under this section, filed by fifty registered voters with the secretary of state on a form provided by him or her, requesting that such voters, and any others wishing to do so, may change their registration to such designation, provided however, that the designation "Independent" shall not be used. Certificates showing that each of the signers of said request is a registered voter at the stated address, signed by the city or town clerk shall accompany the petition. Any such request filed before December first in the year of a biennial state election shall not be effective until said December first.

"Political party" shall apply to a party which at the preceding biennial state election polled for any office to be filled by all the voters of the commonwealth at least three percent of the entire vote cast in the commonwealth for such office, or which shall have enrolled, according to the first count submitted under section thirty-eight A of chapter fifty-three, a number of voters with its political designation equal to or greater than one percent of the entire number of voters registered in the commonwealth according to said count. Such parties shall be eligible to conduct primary elections at the next following biennial state election. With reference to municipal elections and primaries and caucuses for the nomination of city and town officers, "political party" shall include a municipal party.

"Presiding officer" shall apply to the warden or chairman at a caucus, to the warden, chairman of the selectmen, moderator, temporary moderator or town clerk in charge of a polling place at a primary or election, or to a justice of the peace acting as moderator at a town meeting, or, in the absence of any such officer, to the deputy warden or the clerk or senior inspector or senior selectman present who shall have charge of a polling place.

"Primary" shall apply to a joint meeting of

political or municipal parties held under the laws relating to primaries.

"Registrars" or "registrars of voters" shall mean the board of registrars of voters of a city or town, and shall include the board of election commissioners or election commission of any city having such a board or commission, with reference to all matters coming within the scope of their powers and duties. "Registrar" shall, when applicable, mean a member of any of said boards.

"Registration agency", a location where eligible citizens may register as voters, including city or town clerk's offices, military recruitment offices, offices of the registry of motor vehicles and of all state agencies that provide public assistance or assistance to people with disabilities, offices that provide state-funded programs primarily engaged in providing services to people with disabilities, and any other offices which the state secretary shall designate by regulation.

"Specially qualified voter", a person (a) who is otherwise eligible to register as a voter; and (b) (1) whose present domicile is outside the United States and whose last domicile in the United States was Massachusetts; or (2) whose present domicile is Massachusetts and who is:

***20257** (i) absent from the city or town of residence and in the active service of the armed forces or in the merchant marine of the United States, or a spouse or dependent of such person;

(ii) absent from the commonwealth; or

(iii) confined in a correctional facility or a jail, except if by reason of a felony conviction.

"State election" shall apply to any election at which a national, state, or county officer or a regional district school committee member elected district-wide is to be chosen by the voters, whether for a full term or for the filling of a vacancy.

"State officer" shall apply to, and include, any person to be nominated at a state primary or chosen at a state election and shall include United States senator and representative in Congress.

"Town" shall not include city.

"Town officer" shall apply to and include town meeting members.

"Two leading political parties" shall apply to the political parties which elected the highest and next highest number of members of the general court at the preceding biennial state election.

"Voter" shall mean a registered voter.

"Written acceptance" shall mean acceptance signed personally or by attorney duly authorized in writing.

CREDIT(S)

Amended by St.1941, c. 511, §§ 1, 2; St.1943, c. 318, § 5; St.1943, c. 453,§§ 6 to 8; St.1951, c. 805, § 4; St.1954, c. 224; St.1988, c. 10, § 1; St.1990, c. 269, §§ 3, 4; St.1991, c. 483, §§ 1, 2; St.1993, c. 475, §§ 1, 2; St.2001, c. 150, § 1.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

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St.1888, c. 436, § 1.
St.1889, c. 413, § 1.
St.1890, c. 423, § 1.
St.1892, c. 351, § 1.
St.1892, c. 416, § 6.
St.1893, c. 231.
St.1893, c. 417, §§ 2, 231.
St.1894, c. 504, § 1.
St.1895, c. 449, § 3.
St.1895, c. 489, § 2.
St.1895, c. 507, § 1.
St.1897, c. 530, § 1.

*20533 M.G.L.A. 53 § 6

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I. ADMINISTRATION OF THE GOVERNMENT (CH. 1-182)
TITLE VIII. ELECTIONS (CH. 50-57)
CHAPTER 53. NOMINATIONS, QUESTIONS TO BE SUBMITTED TO THE VOTERS, PRIMARIES AND CAUCUSES

Current through Chapter 174 of the 2009 1st Annual Sess.

§ 6. Nomination papers; contents; number of signatures; unenrolled candidates

Nominations of candidates for any offices to be filled at a state election may be made by nomination papers, stating the facts required by section eight and signed in the aggregate by not less than the following number of voters: for governor and lieutenant governor, attorney general, United States senator, and presidential electors, ten thousand; for state secretary, state treasurer, and state auditor, five thousand; for representative in congress, two thousand; for state senator, three hundred; for state representative, one hundred and fifty; for councillor, district attorney, clerk of courts, register of probate, register of deeds, county commissioner, sheriff, and county treasurer, one thousand, except for clerk of courts, register of probate, register of deeds, county commissioner, sheriff, and county treasurer, in Barnstable, Berkshire, Franklin, and Hampshire counties, five hundred, and for any such offices in Dukes and Nantucket counties, twenty-five. In the case of the offices of governor and lieutenant governor, only nomination papers containing the names and addresses of candidates for both offices shall be valid. Nominations of candidates for offices to be filled at a city or town election, except where city charters or general or special laws provide otherwise and nominations of candidates for the office of regional district school committee members elected district-wide, may be made by like nomination papers, signed in the aggregate by not less than such number of voters as will equal one percent of the entire vote cast for governor at the preceding biennial state election in the electoral district or division for which the officers are to be elected, but in no event by less than twenty voters in the case of an office to be filled at a town election or election to a regional district school committee elected district-wide; provided, however, that no more than fifty signatures of voters shall be required on nomination papers for such town office or regional district school committee elected district-wide. At a first election to be held in a newly established ward, the number of signatures of voters upon a nomination paper of a candidate who is to be voted for only in such ward shall be at least fifty.

*20534 The name of a candidate for election to any office who is nominated otherwise than by a political party, generally referred to as an "Unenrolled" candidate, shall not be printed on the ballot at a state election, or on the ballot at any city or town election following a city or town primary, unless a certificate from the registrars of voters of the city or town wherein such person is a registered voter, certifying that he is not enrolled as a member of any political party, is filed with the state secretary or city or town clerk on or before the last day provided in section ten for filing nomination papers. Said registrars shall issue each certificate forthwith upon request of any such candidate who is not a member of a political party or his authorized representative. No such certificate shall be issued to any such candidate who shall have been an enrolled member of any political party during the time prior to the last day for filing nomination papers as provided in section ten, and on or after the day by which a primary candidate is required by section forty-eight to establish enrollment in a political party.

Sections six and ten shall not apply to primary

candidates nominated under sections twenty-three to seventy I, inclusive, except as expressly provided otherwise.

CREDIT(S)

Amended by St.1936, c. 101; St.1939, c. 191; St.1941, c. 266; St.1943, c. 50; St.1943, c. 334, § 2; St.1960, c. 224; St.1972, c. 51; St.1972, c. 400,§ 1; St.1973, c. 849; St.1976, c. 234, § 1; St.1977, c. 546, § 3; St.1979, c. 745, § 1; St.1988, c. 10, § 3; St.1989, c. 676, § 1; St.1990, c. 269, § 1; St.1990, c. 526, § 19; St.1991, c. 483, § 6.

<General Materials (GM) - References, Annotations, or Tables>

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St.1888, c. 436, § 4.
St.1889, c. 413, § 4.
St.1890, c. 386, § 4.
St.1893, c. 417, § 77.
St.1898, c. 548, § 140.
R.L.1902, c. 11, § 143.
St.1902, c. 573, § 3.
St.1906, c. 444, § 4.
St.1907, c. 429, § 6.
St.1907, c. 560, §§ 172, 456.
St.1909, c. 486, § 53.
St.1913, c. 835, §§ 198, 503.
St.1919, c. 269, § 1.
St.1924, c. 201.

St.1936, c. 101, approved Feb. 28, 1936, in the third sentence, substituted "one hundred" for "fifty".

St.1939, c. 191, rewrote the section, which prior thereto read:

"Nominations of candidates for any offices to be filled by all the voters of the commonwealth may be made by nomination papers, stating the facts required by section eight and signed in the aggregate by not less than one thousand voters. Nominations of all other candidates for offices to be filled at a state election, and of all candidates for offices to be filled at a city election except where city charters provide otherwise, may be made by like nomination papers, signed in the aggregate by two voters, in the case of offices to be filled at a state election, and one voter, in the case of offices to be filled at a city election, for every one hundred votes cast for governor at the preceding biennial state election in the electoral district or division for which the officers are to be elected, but in no event by less than fifty nor more than one thousand in the case of offices to be filled at a state election, or by less than fifty nor more than two hundred and fifty in the case of offices to be filled at a city election. Nominations of candidates for offices to be filled at a town election may be made by nomination papers signed in the aggregate by at least one voter for every one hundred votes polled for governor at the preceding biennial state election in such town, but in no case by less than twenty voters. At a first election to be held in a newly established ward, the number of voters upon a nomination paper of a candidate who is to be voted for only in such ward need not exceed fifty; and at a first election in a town the number for the nomination of a candidate who is to be voted for only in such town need not exceed twenty."

***20541 M.G.L.A. 53 § 7**

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I. ADMINISTRATION OF THE GOVERNMENT (CH. 1-182)
TITLE VIII. ELECTIONS (CH. 50-57)
CHAPTER 53. NOMINATIONS, QUESTIONS TO BE SUBMITTED TO THE VOTERS, PRIMARIES AND CAUCUSES

Current through Chapter 174 of the 2009 1st Annual Sess.

§ 7. Nomination papers; signatures; addresses; submission; deadlines; correction procedures; certification and checking; special elections

Every voter signing a nomination paper shall sign in person as registered or substantially as registered, and shall state the address where he or she is currently registered, but any voter who is prevented by physical disability from writing may authorize some person to write his or her name and residence in his or her presence.

Every nomination paper of a candidate for a city or town office shall be submitted to the registrars of the city or town where the signers appear to be voters on or before five o'clock post meridian of the fourteenth day preceding the day on which it must be filed with the city or town clerk. Every nomination paper of a candidate for a state office shall be submitted to the registrars of the city or town where the signers appear to be voters on or before five o'clock post meridian of the twenty-eighth day preceding the day on which it must be filed with the state secretary; and certification of nomination papers of candidates for state office shall be completed no later than the seventh day before the final day for filing said papers with the state secretary.

The registrars shall inform the candidate submitting such papers if the designation of the district only in which he seeks office is incorrect, and shall give said candidate the opportunity to insert the correct designation on such papers before the signatures are certified. The registrars shall, if the candidate so desires, allow a change of district on the nomination papers, in the presence of the candidate whose name appears on the nomination papers, and the registrar and the candidate shall both initial the change of district so made and further shall in writing explain the change of district causing three copies to be made, one of each for the registrar and candidate and one to be attached to the nomination papers. If the correct district designation is not so inserted, the nomination papers shall not be approved. In no case may a correction be made to change the office for which such candidate is nominated.

***20542** Every initiative, referendum or other ballot question petition paper, except an application for a public policy question under sections nineteen to twenty-two, inclusive, shall be submitted to the registrars of the city or town where the signers appear to be voters on or before five o'clock post meridian of the fourteenth day preceding the day on which it must be filed with the state secretary; and certification of such papers shall be completed no later than the second day before the final day for filing said papers with the state secretary. In the case of special elections, every nomination paper shall be submitted to the registrars of the city or town where the signers appear to be voters on or before five o'clock post meridian in the afternoon of the seventh day preceding the day on which it must be filed with the state secretary; and certification of nomination papers of candidates shall be completed no later than the twenty-four hours before the final hour for filing said papers with the state secretary, except that, for special elections for senator or representative in congress, every nomination paper shall be submitted to the registrars of the city or town where the signers appear to be voters at or before

5:00 p.m. of the fourteenth day preceding the day on which it must be filed with the state secretary, and certification of nomination papers of candidates shall be completed no later than the 72 weekday hours before the final hour for filing those papers with the state secretary.

Each nomination paper shall be marked with the date and time it was submitted and such papers shall be certified in order of submission. In each case the registrars shall check each name to be certified by them on the nomination paper and shall forthwith certify thereon the number of signatures so checked which are names of voters both in the city or town and in the district for which the nomination is made, and only names so checked shall be deemed to be names of qualified voters for the purposes of nomination. The registrars shall place next to each name not checked symbols designated by the state secretary indicating the reason that name was disqualified. The registrars shall certify a number of names that are required to make a nomination, increased by two fifths thereof, if they are submitted in a timely manner for a certification.

The state secretary need not receive nomination papers for a candidate after receiving such papers containing a sufficient number of certified names to make a nomination, increased by two fifths thereof.

For the purposes of this section a registered voter who in signing his name to a nomination paper inserts a middle name or initial in, or omits a middle name or initial from, his name as registered shall be deemed to have signed his name substantially as registered. If the registrars can reasonably determine from the form of the signature the identity of the duly registered voter, the name shall be deemed to have been signed substantially as registered. The provisions of this section shall apply in all cases where any statute, special act, or home rule charter requires the certification of the signature of a voter by boards of registrars of voters. Signatures shall not be certified on nomination papers or initiative and referendum petitions from more than one city or town per sheet.

The state secretary shall promulgate regulations designed to achieve and maintain accuracy, uniformity, and security from forgery and fraud in the procedures for certifying nomination papers and petitions for ballot questions and names thereon pursuant to this section, and to ensure proper delivery of certified nomination papers and petitions by registrars to the person or organization who submitted such papers or petitions.

CREDIT(S)

Amended by St.1933, c. 254, § 16; St.1936, c. 2, § 2; St.1936, c. 4, § 1; St.1937, c. 25, § 1; St.1938, c. 341, § 5; St.1943, c. 334, § 3; St.1954, c. 183, § 2; St.1963, c. 210; St.1968, c. 112; St.1968, c. 114; St.1968, c. 488; St.1971, c. 512, §§ 1, 2; St.1974, c. 63; St.1974, c. 169; St.1974, c. 200, § 1; St.1976, c. 306; St.1977, c. 927, § 2; St.1980, c. 134, §§ 1, 2; St.1982, c. 283, § 1; St.1985, c. 477, §§ 14, 15; St.1987, c. 128; St.1990, c. 269, § 8; St.1991, c. 483, § 7; St.2004, c. 236, § 1, eff. Oct. 28, 2004.

<General Materials (GM) - References, Annotations, or Tables>

***20554 M.G.L.A. 53 § 8**

MASSACHUSETTS GENERAL LAWS ANNOTATED PART I. ADMINISTRATION OF THE GOVERNMENT (CH. 1-182) TITLE VIII. ELECTIONS (CH. 50-57) CHAPTER 53. NOMINATIONS, QUESTIONS TO BE SUBMITTED TO THE VOTERS, PRIMARIES AND CAUCUSES

Current through Chapter 174 of the 2009 1st Annual Sess.

§ 8. Certificates of nomination and nomination papers; contents; party designation

All certificates of nomination and nomination papers shall, in addition to the names of candidates, specify as to each, (1) his residence, with street and number, if any, (2) the office for which he is nominated, and (3) except as otherwise provided in this section and except for elections which are not preceded by primaries or political party caucuses, the political designation, if any, which he represents, expressed in not more than three words. This information, in addition to the district name or number, if any, shall be specified on the nomination paper before any signature of a purported registered voter is obtained and the circulation of nomination papers without such information is prohibited. Certificates of nomination made by convention or caucus shall also state what provision, if any, was made for filling vacancies caused by the death, withdrawal or ineligibility of candidates. The state committees of the respective political parties at a meeting called for the purpose shall nominate the presidential electors. The surnames of the candidates for president and vice president of the United States shall be added to the party or political designation of the candidates for presidential electors. Such surnames and a list of the persons nominated for presidential electors, together with an acceptance in writing signed by each candidate for presidential elector on a form to be provided by the state secretary, shall be filed by the state chairmen of the respective political parties not later than the second Tuesday of September. Said acceptance form shall include a pledge by the presidential elector to vote for the candidate named in the filing. To the name of each candidate for alderman at large shall be added the number of the ward in which he resides. To the name of a candidate for a town office who is an elected incumbent thereof there may be added the words "Candidate for Re-election".

If a candidate is nominated otherwise than by a political party the name of a political party shall not be used in his political designation nor shall the name of any organization which has been adjudicated subversive under section eighteen of chapter two hundred and sixty-four be used in his political designation. Certificates of nomination and nomination papers for city or town offices need not include a designation of the party which the candidate represents. Except in the case of nomination papers of candidates for offices to be filled by all the voters of the commonwealth, or of candidates for town offices and the office of regional district school committee member elected district-wide, no nomination papers shall contain the name of more than one candidate. Such nomination papers for candidates for governor and lieutenant governor shall contain provision for the names and addresses of members of a committee of five registered voters who shall fill any vacancy caused by death, withdrawal, ineligibility or disqualification of either candidate. Such nomination papers for town offices may contain the names of candidates for any or all of the offices to be filled at the town election, but the number of names of candidates on such paper for any one office shall not exceed the number to be elected thereto.

***20555**

CREDIT(S)

Amended by St.1932, c. 135, § 4; St.1933, c. 35, § 1;

St.1938, c. 473, § 6; St.1943, c. 334, § 4; St.1951, c. 805, § 5; St.1955, c. 288, § 2; St.1957, c. 14; St.1957, c. 278, § 1; St.1963, c. 307; St.1970, c. 869, § 1; St.1971, c. 202; St.1972, c. 400, § 2; St.1977, c. 329, § 1; St.1979, c. 745, § 2; St.1985, c. 477, § 17; St.1988, c. 10, §§ 4, 5; St.1990, c. 526, § 20.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

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St.1888, c. 436, § 5.
St.1889, c. 413, § 5.
St.1890, c. 386, § 5.
St.1890, c. 436, § 2.
St.1891, c. 269.
St.1893, c. 417, § 79.
St.1896, c. 469, § 6.
St.1898, c. 548, § 143.
R.L.1902, c. 11, § 146.
St.1907, c. 429, § 7.
St.1907, c. 560, §§ 175, 456.
St.1908, c. 425.
St.1909, c. 486, § 53.
St.1913, c. 835, §§ 201, 503.
St.1917, c. 250, § 1.

St.1932, c. 135, § 4, approved April 5, 1932, in the first paragraph, in the third sentence, substituted "surnames" for "names" and "shall" for "may".

St.1933, c. 35, § 1, an emergency act, approved Feb. 23, 1933, in the first paragraph, added the fifth sentence.

St.1938, c. 473, § 6, an emergency act, approved June 29, 1938, in the first paragraph, in the first sentence, inserted ", if any,".

St.1943, c. 334, § 4, approved May 26, 1943, in the second paragraph, in the second sentence, inserted "city or" and added the third and fourth sentences.

St.1951, c. 805, § 5, an emergency act, approved Nov. 17, 1951, in the second paragraph, in the first sentence, added "nor shall the name of any organization which has been adjudicated subversive under section eighteen of chapter two hundred and sixty-four be used in his political designation".

Section 6 of St.1951, c. 805, provides:

"If any provision, phrase or clause of this chapter, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions, phrases or clauses or applications of this chapter which can be given effect without the invalid provision, phrase or clause or application, and to this end the provisions, phrases and clauses of this chapter are declared to be severable."

***20563 M.G.L.A. 53 § 10**

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I. ADMINISTRATION OF THE GOVERNMENT (CH. 1-182)
TITLE VIII. ELECTIONS (CH. 50-57)
CHAPTER 53. NOMINATIONS, QUESTIONS TO BE SUBMITTED TO THE VOTERS, PRIMARIES AND CAUCUSES

Current through Chapter 174 of the 2009 1st Annual Sess.

§ 10. Certificates of nomination and nomination papers; time for filing

All certificates of nomination and nomination papers of candidates for the office of state representative, state senator, executive council, or county office shall be filed with the state secretary on or before the last Tuesday in May of the year in which a state election is to be held. Certificates of nomination or nomination papers for the office of senator in congress, representative in congress, governor, lieutenant governor, attorney general, treasurer and receiver-general, state auditor and state secretary, shall be filed on or before the last Tuesday in August of the year in which a state election is to be held. If there is a special election to fill the office of senator or representative in congress, all certificates of nomination and nomination papers shall be filed on or before the sixth Tuesday preceding the day of such election. If there is a special election to fill any other state office, all certificates of nomination and nomination papers shall be filed on or before the ninth Tuesday preceding the day of such election. Nomination papers for presidential elector shall be filed on or before the last Tuesday in August of the year in which a presidential election is to be held.

In any city, except Boston, certificates of nomination and nomination papers for any city election shall be filed on or before the thirty-fifth day preceding such city election. In any city, except Boston, the time for presenting nomination papers for certification to the registrars of voters, and for certifying the same, shall be governed by section seven, notwithstanding any contrary provision in any special law. In any city where primaries are held, under authority of general or special law, for the nomination of candidates for city offices, certificates of nomination and nomination papers shall be filed not later than the last day fixed for the filing of nomination papers for such primaries. In any city where preliminary elections for the nomination of candidates for a city office are held, nomination or other like papers required to be filed by such candidates shall be filed on or before the thirty-fifth day preceding the day of the preliminary election, notwithstanding any contrary provision in any special law.

***20564** Any provision of general or special law to the contrary notwithstanding, the last day for filing with the town clerk certificates of nomination or nomination papers for the nomination of town offices shall be the thirty-fifth day preceding the date of the election. In any town, the time for presenting nomination papers for certification to the registrars of voters, and for certifying the same, shall be governed by section seven, notwithstanding any contrary provision in any special law.

Any incumbent town meeting member may become a candidate for election by giving written notice thereof to the town clerk not later than twenty-one days prior to the last day and hour for filing nomination papers notwithstanding any contrary provision in any special law.

Certificates of nomination and nomination papers shall be filed before five o'clock in the afternoon of the last day fixed therefor.

CREDIT(S)

Amended by St.1933, c. 313, § 2; St.1934, c. 111; St.1937, c. 45, § 2; St.1937, c. 77, § 2; St.1938, c. 373, §

4; St.1941, c. 278; St.1941, c. 472,§ 4; St.1943, c. 229, § 3; St.1943, c. 334, § 5; St.1946, c. 20, § 2; St.1947, c. 74; St.1948, c. 63; St.1954, c. 114; St.1963, c. 236, § 1; St.1968, c. 762, §§ 1, 2; St.1971, c. 920, §§ 1A, 2; St.1977, c. 927, § 3; St.1980, c. 134, § 3; St.1985, c. 477, § 18; St.1989, c. 601; St.1989, c. 676, § 2; St.1990, c. 526, § 21; St.2004, c. 236, § 2, eff. Oct. 28, 2004.

<General Materials (GM) - References, Annotations, or Tables>

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St.1889, c. 413, § 6.
St.1890, c. 386, § 6.
St.1890, c. 436, § 3.
St.1891, c. 74, § 2.
St.1891, c. 305.
St.1893, c. 417, §§ 82, 83.
St.1895, c. 244.
St.1897, c. 91.
St.1898, c. 548, § 145.
St.1901, c. 124.
R.L.1902, c. 11, § 148.
St.1907, c. 560, §§ 177, 456.
St.1909, c. 149.
St.1912, c. 446.
St.1913, c. 835, §§ 203, 503.
St.1918, c. 293, § 33.
St.1919, c. 289, § 21.
St.1921, c. 387.
St.1930, c. 114.

St.1933, c. 313, § 2, approved July 7, 1933, rewrote the second paragraph, which prior thereto read:

"In cities, except in Boston and where city charters provide otherwise, certificates of nomination for city offices shall be filed on or before the third Monday, and nomination papers on or before the second Wednesday, preceding the day of the election."

***20578 M.G.L.A. 53 § 14**

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I. ADMINISTRATION OF THE GOVERNMENT (CH. 1-182)
TITLE VIII. ELECTIONS (CH. 50-57)
CHAPTER 53. NOMINATIONS, QUESTIONS TO BE SUBMITTED TO THE VOTERS, PRIMARIES AND CAUCUSES

Current through Chapter 174 of the 2009 1st Annual Sess.

§ 14. Death, withdrawal or ineligibility of nominated candidates; filling vacancies; objections

If a candidate nominated for a state, city or town office dies before the day of election, or withdraws his name from nomination, or is found ineligible, the vacancy, except for city offices where city charters provide otherwise, may be filled by the same political party or persons who made the original nomination, and in the same manner; or, if the time is insufficient therefor, the vacancy may be filled, if the nomination was made by a convention or caucus, in such manner as the convention or caucus may have prescribed, or, if no such provision has been made, by a regularly elected general or executive committee representing the political party or persons who held such convention or caucus. In the event of the death, withdrawal, ineligibility or disqualification of a candidate for governor or lieutenant governor who has been nominated by election nomination papers, except disqualification for insufficient signatures, the vacancy shall be filled by majority vote of the committee of five members whose names were placed upon said papers for the purpose before the signatures of voters were obtained thereon.

In the event of the withdrawal, death or ineligibility of any candidate of a political party nominated by direct nomination for any office, the vacancy may be filled by a regularly elected general or executive committee representing the election district in which such vacancy occurs, or, if no such committee exists by the members of the town committee in any town comprising such district, by the members of the ward committee or committees in the ward or wards comprising such district if within the limits of a single city, or by delegates chosen as hereinafter provided by and from the members of the ward and town committees in the wards and towns comprising such district if within the limits of more than one municipality, at a meeting to be called by such a member or delegate, as the case may be, designated by the chairman of the state committee, and such member or delegate shall preside until a chairman of such meeting is elected. Each ward and town committee in the wards and towns compromising such a district within the limits of more than one municipality shall, as occasions arise, choose from its members delegates to fill vacancies as hereinbefore provided, in such manner as it may determine by its rules and regulations, to a number not exceeding one for each five hundred votes, or fraction thereof, cast in its ward or town for the candidate of the party for governor at the last state election, and shall forthwith notify the state secretary of the delegates so chosen. Notwithstanding any of the foregoing, when a vacancy occurs, by reason of withdrawal, death or ineligibility in a district comprised of portions of wards of a city or not all precincts of a town, then each ward and town committee which includes the precincts which are part of the district shall choose delegates as hereinabove provided to fill vacancies in such number not exceeding one for each five hundred votes or fractions thereof cast in that portion of the ward or town included in the district for the candidate of that party for governor at the last state election, provided further that said delegate so chosen shall reside in the district where the vacancy occurs. In cities and towns where candidates are nominated by nomination papers, such papers may contain the names of members of a committee of not more than five registered

voters who may fill any vacancy caused by the death or physical disability of the candidate whose name appears upon such nomination paper. If a vacancy is caused by withdrawal, certificates of nomination made otherwise than in the original manner shall be filed within seventy-two week day hours in the case of state offices, or within forty-eight week day hours in the case of city or town offices, succeeding five o'clock in the afternoon of the last day for filing withdrawals. They shall be open to objections in the same manner, so far as practicable, as other certificates of nomination. No vacancy caused by withdrawal shall be filled before the withdrawal has been filed.
***20579**

CREDIT(S)

Amended by St.1943, c. 334, § 8; St.1972, c. 400, § 3; St.1988, c. 296, § 12; St.1992, c. 133, § 378.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

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St.1890, c. 436, § 4.
St.1891, c. 278.
St.1893, c. 417, § 87.
St.1895, c. 253, § 2.
St.1896, c. 469, § 7.
St.1898, c. 548, § 149.
R.L.1902, c. 11, § 152.
St.1903, c. 454, § 16.
St.1905, c. 386, §§ 5, 10, 16.
St.1907, c. 560, §§ 181, 456.
St.1913, c. 835, §§ 207, 503.
St.1929, c. 283.

St.1943, c. 334, § 8, approved May 26, 1943, inserted the fourth sentence.

St.1972, c. 400, § 3, approved June 8, 1972, inserted the second sentence.

St.1988, c. 296, § 12, in the third sentence, substituted ", death or ineligibility" for "or death".

St.1988, c. 296, was approved Nov. 25, 1988. Emergency declaration by the Governor was filed Dec. 7, 1988.

St.1992, c. 133, § 378, approved July 20, 1992, and by § 599 made effective as of July 1, 1992, inserted the fifth sentence.

REFERENCES

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Elections ⚿147.
Westlaw Topic No. 144.
C.J.S. Elections §§ 93, 136, 162.

REFERENCES

RESEARCH REFERENCES

Treatises and Practice Aids

18C Mass. Prac. Series § 38.23, Filling Nomination Vacancies.

ANNOTATIONS

NOTES OF DECISIONS

Construction and application 1/2
Ineligibility 1

1/2 . Construction and application

State statute setting out process for substituting political nominees' names on ballots was ambiguous in that it gave no statutory guidance as to whether it applied to presidential nominees, and thus Libertarian Party would likely succeed on its claim that such statute was unconstitutionally vague, for purposes of its motion for preliminary injunction to substitute its presidential and vice presidential nominees' names on ballot. Barr v. Galvin, D.Mass.2008, 2008 WL 4761855. Injunction ⚿138.51