Case No. 09-2426

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BOB BARR; WAYNE A. 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 THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PETITION OF PLAINTIFFS-APPELLEES FOR PANEL REHEARING AND REHEARING *EN BANC*

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FED. R. APP. P. 35(b) STATEMENT

The Panel's opinion denies constitutional ballot access to minor political parties and thus raises a question of exceptional importance. If the Panel's decision is allowed to stand, minor parties seeking to place candidates on the presidential ballot in the Commonwealth of Massachusetts will have to hold their national conventions and select their candidates early enough to begin collecting the requisite 10,000 signatures in February of the election year, or shortly thereafter. Forcing minor parties to hold their conventions so early in the election cycle, and many months before the major parties, violates the Equal Protection Clause and constitutes impermissible state interference in national elections. The only way to avoid this Equal Protection violation is to recognize that minor parties have the right to substitute the presidential candidates chosen at their national conventions for those listed on their previously-circulated nomination papers. The Panel's refusal to do so was error.

By holding that Massachusetts need not provide minor parties with a mechanism for presidential candidate substitution, the Panel's opinion conflicts with *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and denies the Libertarian Party and other minor parties the rights guaranteed by the *First Amendment*, the *Fourteenth Amendment*, and the Equal Protection Clause. Moreover, the Panel's reasoning -- i.e., that there is no Equal

Protection violation because minor parties have an equal opportunity to become recognized "political parties" under Mass. G.L. c. 50, § 1 -- ignores the fact that minor parties may only become recognized "political parties" by garnering three percent of the vote in the *last* biennial election or enrolling at least one percent of the total electorate more than *two years before* the election. The Panel's decision also gives rise to a circuit split. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) (striking down a law that prevented minor parties from gaining ballot access *one year* before an election).

ISSUES ON REHEARING AND REHEARING *EN BANC*

1. Did the Panel err by failing to heed *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and concluding that the Equal Protection Clause does not require the Commonwealth to allow minor parties like the Libertarian Party to substitute the names of the presidential and vice-presidential candidates chosen at their national conventions for the names of the candidates listed on their nomination papers?

2. Did the Panel err by reversing the district court's determination that Mass. G.L. c. 53, § 14 is unconstitutionally vague and invoking the *Pullman* abstention doctrine?

INTRODUCTION

1. The Panel (Boudin, Ripple, and Selya, JJ.) erred as a matter of law by failing to heed *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and concluding that the Equal Protection Clause does not require the Commonwealth to afford minor parties a mechanism for candidate substitution. By the Panel's reasoning, *minor* parties must essentially become *major* recognized "political parties" under Mass. G.L. c. 50, §1 in order to gain ballot access in Massachusetts. This is problematic for two reasons. First, minor parties have a well-established, constitutional right to ballot access. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Second, minor parties cannot become recognized "political parties" from January 1 through December 1 of an election year and, indeed, may only become recognized "political parties" by garnering three percent of the vote in the *last* biennial election or enrolling at least one percent of the total electorate more than *two years before* the election. By denying ballot access to minor parties during an election year, the Panel's decision conflicts with *Williams v. Rhodes* and *Anderson v. Celebrezze* and creates a circuit split with the Sixth Circuit, which recently struck down a law preventing minor parties from gaining ballot access *one year* before an election. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006). The Panel further erred by applying a "rational basis" test and finding that the Commonwealth had a

"legitimate interest" in denying minor parties the right to substitute presidential candidates, particularly when substitution is allowed for all other offices.

2. The Panel also erred by reversing the district court's determination that Mass. G.L. c. 53, § 14 is unconstitutionally vague. By the Court's own characterization, the statute is hopelessly unclear leaving everyone to guess as to its meaning. Not finding the statute vague conflicts with *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620-22 (1976) (statute is vague if "'men of common intelligence must necessarily guess at its meaning.'") (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Given that the statute concerns ballot access for minor party candidates seeking the office of the President of the United States, the Panel should not have invoked *Pullman* abstention and instead should have confronted the issue and declared the statute unconstitutionally vague.

STATEMENT OF THE CASE

To gain ballot access in Massachusetts, minor party candidates generally have to obtain and submit nomination papers containing 10,000 signatures. In 2008, the nomination papers became available in early February and had to be submitted by the end of July. Because the Libertarian national convention was scheduled for May 22-26, 2008, the Libertarian Party asked the Secretary of the Commonwealth of Massachusetts ("Secretary") whether it could begin collecting signatures on its nomination papers in early February and then substitute the names

of the presidential and vice-presidential candidates selected at the Libertarian national convention in late May. Appendix to the Briefs ("A.") at 247. The Secretary's Election Division replied affirmatively: "[i]f the Libertarian Party seeks to substitute a candidate . . . our Office can prepare a form that allows members of the party to request the substitution." A. at 264.

At the Libertarian national convention on May 25, 2008, Bob Barr and Wayne Root were selected as the party's national candidates for president and vice-president, respectively. The Libertarian Party, which had collected some 7,000 signatures by that point in Massachusetts, then contacted the Secretary to substitute the proper candidates on its nomination papers. A. at 249. In an about-face, however, the Secretary declared that substitution would not be allowed. *Id.* The uncontroverted evidence is that the Libertarians lacked the time and resources to abandon the 7,000 signatures and start over at that point. A. at 250.

Accordingly, the Libertarians then filed the instant action, alleging that the Secretary's refusal to allow substitution was unconstitutional. The district court (Gorton, J.) granted the Libertarians' motion for a preliminary injunction and ordered the Secretary to place the names of the Libertarian candidates, Barr and Root, on the 2008 ballot. *Barr v. Galvin*, 584 F. Supp. 2d 316, 322 (D. Mass. 2008). After the national election, the court granted summary judgment for the Libertarians, concluding the statutory scheme for substitution, as set forth in Mass.

G.L. c. 53, §14, was void for vagueness and "a right to substitute is guaranteed by the Equal Protection Clause of the Constitution." *Barr v. Galvin*, 659 F. Supp. 2d 225, 230 (D. Mass. 2009). On October 16, 2009, the Secretary filed a notice of appeal, and on November 16, 2010, the Panel issued its decision reversing in part, vacating in part, and remanding the case to the district court.

ARGUMENT

I. The Panel's Decision Conflicts With *Williams v. Rhodes* and *Anderson v. Celebrezze* And Denies Plaintiffs-Appellees And Other Minor Parties The Rights Guaranteed By The *First* and *Fourteenth Amendments* And The Equal Protection Clause of the Constitution

A. Under The *First* And *Fourteenth Amendments*, Minor Parties Have A Constitutional Right To Ballot Access

It is well-established that minor parties have a constitutional right to ballot access. *See, e.g., Norman v. Reed*, 502 U.S. 279, 288-289 (1992) ("To the degree that a State would . . . limit[] the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation…"); *Lubin v. Panish*, 415 U.S. 709, 716 (1974) ("The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters."); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot…").

B. The Panel Erred In Concluding The Libertarian Party May Only Access The Ballot By Becoming A Recognized "Political Party" Under Mass. G.L. c. 50, § 1

According to the Panel's opinion, the Libertarian Party may only access the ballot in Massachusetts by becoming a recognized "political party" under Mass. G.L. c. 50, § 1. Slip op. at 22-23. Although individual candidates may also access the ballot using "Libertarian" as their "political designation," the Panel's decision declares that such candidates gain access to the ballot as *individuals*, not as representatives of a minor party. *Id.* at 4-5.[1] Thus, according to the Panel, the Libertarian Party has only one means to access the ballot in Massachusetts -- by becoming a recognized "political party" under Mass. G.L. c. 50, § 1.

Such a restriction on the right to ballot access is unconstitutional as the Libertarian Party cannot become a recognized "political party" from January 1 through December 1 of any given election year. *See* Mass. G.L. c. 50, § 1 ("Any such request [to qualify as a political party] filed before December first in the year of a biennial state election shall not be effective until said December first."). In

[1] Of course, allowing *individuals* to access the ballot under whatever "political designation" they choose is much different than granting ballot access to minor parties. After all, ballot access for *individuals* places control in the hands of *individuals*, while ballot access for minor parties leaves control with the minor parties. If minor party ballot access means anything, it must at least mean the ability to select the candidates which run under the party's banner. *See Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections").

fact, to become a recognized "political party," the Libertarian Party must take action more than two years before the election in which it desires ballot access. This is because there are only two paths to becoming a recognized "political party" in Massachusetts -- (1) enrolling at least one percent of the total electorate or (2) garnering at least three percent of the vote in the last biennial election. *See* Mass. G.L. c. 50, § 1. As the deadline for enrolling one percent of the total electorate is "the first count submitted under section thirty-eight A of chapter fifty-three" and this count is tallied before biennial state elections, this would require the Libertarian Party to enroll one percent of the electorate as "Libertarians" more than two years before the election at issue.[2] The other path to becoming a recognized "political party" -- garnering at least three percent of the vote in the *last* biennial

[2] *See* Mass. G.L. c. 50, § 1 ("'Political party' shall apply to a party . . . 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."); Mass. G.L. c. 53, § 38A ("The board of registrars of voters of every city or town shall submit to the state secretary a count for each precinct of the number of voters enrolled in each political party and each political designation and the number of unenrolled voters. The count shall be correct as of the last day to register voters under section twenty-six of chapter fifty-one before every regular state and presidential primary and biennial state election..."); Mass. G.L. c. 53, §28 ("State primaries shall be held on the seventh Tuesday preceding biennial state elections…"); Mass. G.L. c. 51, § 26 ("registration for the next election shall take place no later than eight o'clock in the evening on the twentieth day preceding such election").

election -- would also require the Libertarian Party to take action more than two years prior to the relevant election.

In both *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Supreme Court discussed the life tempo of the election cycle and held that requiring minor political parties and independent candidates to organize much earlier in the election cycle, before the populace is involved and well before their Republican and Democrat counterparts, is unconstitutional. In *Williams*, the Court struck down an Ohio law which required minor parties to submit ballot access petitions approximately nine months before the election, 393 U.S. at 27, 34, and in *Anderson*, the Court overturned a law requiring independent candidates to file petitions for ballot access seven months prior to the election. 460 U.S. at 805-806. More recently, the Sixth Circuit struck down an Ohio law that required minor parties to secure a place on the ballot a full twelve months before the election. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006).

Because minor parties must be allowed ballot access during an election year, the Panel erred in concluding that the Libertarian Party may only access the ballot by becoming a recognized "political party." Moreover, contrary to the Panel's conclusion, the statutory scheme allows minor parties a third avenue for ballot access – i.e., by obtaining and submitting 10,000 signatures on nomination papers. Indeed, a fair reading of the election laws requires that minor parties be allowed to

do so. After all, one of the ways by which a minor party may become a major recognized party is by placing a candidate on the ballot via nomination papers and having that candidate garner three percent of the vote. *See* Mass. G. L. c. 50 § 1. *See also Baird v. Davoren*, 346 F. Supp. 515, 521 (D. Mass. 1972) (recounting Massachusetts election law history and concluding that Mass. G.L. c. 53, § 6 applies to "all parties" including "minor parties").

C. The Panel Erred In Applying The "Rational Basis" Test

The Panel also erred in concluding that the "rational basis" test applies. Slip op. at 22, 25. Pursuant to Supreme Court precedent, the Panel should not have mechanically applied the rational basis but rather should have weighed the "character and magnitude" of the burden imposed by the prohibition against "the interests put forward by the [Commonwealth] as justifications for the burden." *Anderson*, 460 U.S. at 789; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

The character and magnitude of the burden imposed on minor parties by the lack of substitution are indeed weighty. Moreover, the burden imposed by the prohibition against substitution "falls unequally" on minor parties by forcing them to select their candidates well before the major parties or forego ballot access

altogether in Massachusetts.[3] As the Supreme Court has repeatedly recognized, requiring minor parties to organize their campaigns and finalize their candidates early in the election cycle and well before the major parties poses a significant burden. *See Anderson*, 460 U.S. at 792 ("When the primary campaigns are far in the future and the election itself is even more remote . . . [v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign."); *see also Williams*, 393 U.S. at 33 ("requiring extensive organization and other election activities by a very early date, operate to prevent [minor parties] from ever getting on the ballot"). Further, as to parties that decide at the national level to hold their conventions late, at approximately the same time as the Republicans and Democrats, the lack of substitution in Massachusetts will categorically mean no ballot access as the selection of candidates in August will necessarily cause the party to miss the July signature submission cutoff date.

Accordingly, the Panel's decision forces the *national* Libertarian Party to schedule its *national* convention early enough to meet the *Massachusetts* filing

[3] The Panel's observation that the lack of substitution is non-discriminatory misses the mark. Under *Anderson v. Celebrezze*, "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the *First Amendment*." 460 U.S. at 793. *See also Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike…").

deadline or risk being left off of the ballot in Massachusetts. *Cf. Anderson*, 460 U.S. at 795 ("in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond the State's boundaries"). Simply put, the national Libertarian Party is faced with the lose-lose choice of holding its national convention early in the election cycle before the electorate is interested and before the major parties have selected their candidates or holding its convention later in the election cycle and potentially or certainly, depending on timing, forgoing a place on the ballot in Massachusetts.

In light of the fact that constitutional ballot access for minor parties is at issue, mechanical application of the rational basis test was error.

D. The Panel Erred In Concluding That Lack Of Substitution Promotes A Legitimate State Interest

The Panel also erred in finding Massachusetts has a legitimate state interest in denying minor party presidential candidates the right to substitution while allowing it for all other state and local offices. Although the Panel asserted the Commonwealth has a "legitimate interest in ensuring that the candidates who appear on the statewide ballot have demonstrable support among the voting public," (slip op. at 26), this is belied by the fact that Mass. G.L. c. 53, § 14 allows substitution for *every other position on the ballot*. And, of course, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters

beyond the State's boundaries." *Anderson*, 460 U.S. at 795. Also, the Libertarian candidates demonstrated support by having the party collect 10,000 signatures.

E. The Panel Erred In Concluding That Substitution For Minor Parties Is Not Required By The Equal Protection Clause

Because the prohibition against substitution significantly burdens minor parties without advancing any equally "weighty" legitimate state interest, the Panel erred in concluding that the Equal Protection Clause does not require the Commonwealth to afford a substitution mechanism to minor parties like the Libertarians. As stressed by the Supreme Court, "[t]he right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or candidates are 'clamoring for a place on the ballot.'" *Anderson*, 460 U.S. at 787; *see also Anderson v. Firestone*, 499 F. Supp. 1027 (N.D. Fla. 1980) (applying *Williams v. Rhodes* and holding that a minor party must be allowed to substitute its vice-presidential candidate).

II. The Panel Erred In Reversing The District Court's Finding That Mass. G.L. c. 53, § 14 Is Unconstitutionally Vague

A. Mass. G.L. c. 53, § 14 Is Unconstitutionally Vague

The Panel erred in concluding that the Massachusetts substitution statute is not unconstitutionally vague. The Panel applied the wrong standard, or no standard, on the vagueness challenge. Pursuant to Supreme Court precedent, a statute is unconstitutionally vague if "'men of common intelligence must necessarily guess at its meaning.'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620-

22 (1976) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Indeed, the Secretary who is charged with enforcement of the election laws is uncertain of the workings of the substitution statute, changing course in each of the last four presidential elections. A. at 252-271. The learned district court judge found the statute "positively ambiguous" while the Panel agreed that it is "admittedly unclear as to whether it applies to the kind of substitution requested by the appellees." Slip op. at 15. Notwithstanding the Supreme Court test set down in *Hynes v. Mayor of Oradell*, and the positive ambiguity in the statutory scheme, the Panel downplayed matters noting that "'statutes do not need to be precise to the point of pedantry.'" Slip op. at 16 (quoting *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 61 (1st Cir. 2008)). The problem with the Massachusetts statutory scheme is not that it is not so precise to the point of pedantry but rather that it is entirely unclear leaving the Secretary, out of necessity, to make ad hoc determinations each time he is asked about substitution.

B. The Panel Should Not Have Invoked *Pullman* Abstention

The Panel should not have invoked *Pullman* abstention. *Pullman* abstention provides but a rare exception to the federal court's mandate to exercise the jurisdiction granted it. *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 813 (1976); *see also Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943) ("it has from the first been deemed to be the duty of the federal courts, if

their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."). The Panel's suggestion that what is at issue is but a state law better left to the state authorities ignores the fact that the statute concerns ballot access for candidacy for the office of the President of the United States, hardly a backwater state law matter. Indeed, allowing the statute to stand without a right to substitute will cause the problems inherent in the Massachusetts ballot access statutory scheme to be arbitrarily imposed upon the entire nation -- forcing minor parties to hold their national conventions early enough to have a clear candidate by the time Massachusetts opens its 10,000 signature collection period in February, or shortly thereafter.

A vague ballot access law serves no legitimate state function, *Duke v. Connell*, 790 F. Supp. 50, 53-54 (D.R.I. 1992), and *Pullman* abstention is not appropriate where "[t]he issue is simply referred to another forum." *Hobbs v. Thompson*, 448 F.2d 456, 463 (5th Cir. 1971).

CONCLUSION

For the forgoing reasons, Plaintiffs-Appellees' petition should be granted.

Respectfully submitted,

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Dated: December 14, 2010

CERTIFICATE OF SERVICE

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/s/Matthew C. Baltay