No. _____

In The
Supreme Court of the United States

BOB BARR, *ET AL.*,

Petitioners,

–v.–

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

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

John Reinstein
Counsel of Record
American Civil Liberties
Union of Massachusetts
211 Congress St., Ste. 300
Boston, MA 02110
(617) 482-3170
jreinstein@aclum.org

Matthew C. Baltay
Andrew J. Palid
Foley Hoag LLP
155 Seaport Blvd.
Boston, MA 02210
(617) 832-1000
mbaltay@foleyhoag.com
apalid@foleyhoag.com

QUESTION PRESENTED

In general, minor political parties, including the Libertarian Party, gain access to the presidential ballot in Massachusetts by filing nomination papers signed by at least 10,000 Massachusetts voters. The names of a minor political party's presidential and vice-presidential candidates must be included on its nomination papers before signatures can be collected. Nomination papers become available in February of the election year and must be filed by the end of July. In contrast, major political parties, including the Democratic and Republican Parties, are granted automatic access to the presidential ballot in Massachusetts by demonstrating a certain level of support in the previous biennial election. Unlike minor political parties, major political parties have until the second Tuesday in September to notify Massachusetts of their presidential and vice-presidential candidates. The question presented is:

Is it a violation of the Equal Protection Clause of the Fourteenth Amendment for Massachusetts to deny minor political parties the right to substitute the presidential and vice-presidential candidates selected at their party conventions for those listed on their nomination papers when the effect of prohibiting such substitution is to force minor political parties to select their candidates many months before the nomination of major party candidates?

PARTIES TO THE PROCEEDING

The Petitioners are Bob Barr, Wayne A. Root, the Libertarian Party of Massachusetts and the Libertarian National Committee, Inc. They were plaintiffs in the District Court and appellees in the Court of Appeals.

The Respondent is William F. Galvin, in his Official Capacity as Secretary of the Commonwealth of Massachusetts. He was the defendant in the District Court and the appellant in the Court of Appeals.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Libertarian National Committee, Inc. by and through its attorneys, certifies as follows:

1. Libertarian National Committee, Inc. is a non-governmental corporate entity.

2. Libertarian National Committee, Inc. does not have a parent corporation.

3. No publicly-held corporation owns 10% or more of the stock of Libertarian National Committee, Inc.

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases **Page(s)**

* * * * * * *

U.S. Constitution **Page(s)**

* * * * * * *

Statutes **Page(s)**

* * * * * * *

Other Authorities: **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App., *infra*, 5a) is reported at 626 F.3d 99 (1st. Cir. 2010). The opinion of the United States Court of Appeals for the First Circuit (App., *infra*, 57a) denying rehearing is reported at 630 F.3d 250 (1st. Cir. 2010). The opinion of the United States Court of Appeals for the First Circuit (App., *infra*, 61a) denying rehearing en banc is unreported (09-2426, Dkt. 52). The opinions of the United States District Court for the District of Massachusetts are reported at 2010 U.S. Dist. LEXIS 132103 (D. Mass. Dec. 13, 2010)(acting on remand from the First Circuit Court of Appeals) (App., *infra*, 1a), 659 F. Supp. 2d 225 (D. Mass. 2009) (granting plaintiffs' motion for summary judgment) (App., *infra*, 34a) and 584 F. Supp. 2d 316 (D. Mass 2008) (granting plaintiffs' motion for preliminary injunction) (App., *infra*, 47a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals was entered on November 16, 2010. On November 29, 2010, the Court of Appeals granted appellees' motion to extend time to file a petition for

rehearing. Appellees' petition for rehearing was then timely filed on December 14, 2010 and denied on December 28, 2010. On March 18, 2011, Justice Breyer granted petitioners' application for an extension of time to file this petition for certiorari until May 27, 2011.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The relevant provisions of the Massachusetts statutes governing ballot access are reproduced at App. *infra*, 63a.

INTRODUCTION

State ballot access restrictions have been an enduring obstacle to minor political parties seeking to challenge the two major parties in national elections. In Massachusetts, minor parties are prohibited from substituting the presidential and vice-presidential candidates selected at their national conventions for those listed on their nomination papers. This restriction severely burdens minor parties as nomination papers become available in February and must be submitted, with 10,000 voter signatures, by the end of July. By prohibiting presidential and vice-presidential candidate substitution, Massachusetts effectively forces minor parties to organize their supporters, hold their national conventions, and select their candidates many months before the major parties, which have until mid-September to nominate their presidential and vice-presidential candidates. While the national effect of this state prohibition is undeniable, Massachusetts' legitimate interest in prohibiting presidential and vice-presidential candidate substitution is difficult to discern. Massachusetts, after all, permits candidate substitution for *every other office on the ballot*.

STATEMENT OF THE CASE

Petitioners challenge a state system that would keep off the ballot the Libertarian Party's nominees for President and Vice President. The Libertarian Party is the third largest political party in the United States. Since the Libertarian Party's founding in 1971, millions of Americans have voted for Libertarian candidates and scores of Libertarian candidates have been elected to public office.

At the time of the 2008 presidential election, however, the Libertarian Party was not a recognized political party in Massachusetts. (Pet. App. 8a) As a result, the Party was required to obtain and submit nomination papers bearing 10,000 voter signatures in order to have its presidential and vice-presidential candidates appear on the general election ballot in Massachusetts. (Pet. App. 9a)

In 2008, presidential and vice-presidential nomination papers became available in Massachusetts in early February and had to be submitted by the end of July. (Pet. App. 10a) Because the Libertarian national convention was scheduled for Memorial Day weekend, relatively late in the signature collection period, the Libertarians asked the Secretary of the Commonwealth of Massachusetts ("Secretary") whether they could begin collecting signatures on their nomination papers in February and then substitute the names of the presidential and vice-presidential candidates selected at their national convention at the end of May. (Pet. App. 48a-49a) The Secretary replied that

it could "prepare a form that allows members of the party to request the substitution." (Pet. App. 49a) The Secretary's response, which suggested that the Libertarians would be permitted to substitute, was consistent with the position taken by the Secretary in each of the three prior presidential elections.

Accordingly, the Libertarians began collecting signatures in February 2008 using the names of Party members George Phillies and Chris Bennett, as presidential and vice-presidential candidates, respectively. (Pet. App. 48a) However, at the Libertarian national convention held at the end of May 2008, the Party selected Bob Barr and Wayne Root as its candidates for President and Vice President, respectively. (Pet. App. 49a) The Libertarian Party, which had collected some 7,000 signatures by that point in Massachusetts, contacted the Secretary to substitute the national convention nominees, Barr and Root, for the Massachusetts candidates on their nomination papers. *Id.* In a reversal of position, the Secretary informed the Libertarians on June 5, 2008 that substitution would not be allowed. *Id.* Lacking the time and resources to abandon the 7,000 signatures already collected and start over, the Libertarians finished collecting signatures on their nomination papers and timely submitted them with the original Massachusetts candidates, not the national convention nominees, listed as the Libertarian presidential and vice-presidential candidates. (Pet. App. 48a-49a)

The Libertarians then filed the instant action in United States District Court, which had jurisdiction under 28 U.S.C. §§ 1331, 1343(a) and 42

U.S.C. § 1983, alleging that the Secretary's refusal to allow substitution was unconstitutional. On September 22, 2008, shortly before the Massachusetts presidential ballots were to be printed, the District Court granted the Libertarians' motion for a preliminary injunction and ordered the Secretary to place the names of the correct Libertarian candidates, Barr and Root, on the 2008 presidential ballot in Massachusetts. The District Court reasoned that the Massachusetts substitution scheme and the Secretary's administration thereof were unconstitutionally vague and violated the Equal Protection Clause. Barr and Root appeared on the November ballot as the Libertarian Party's presidential and vice-presidential candidates.

After the election, both sides cross-moved for summary judgment. The District Court granted summary judgment for the Libertarians, concluding the statutory scheme for substitution, as set forth in Mass. Gen Laws ch. 53, §14, was unconstitutionally vague and violative of the Equal Protection Clause. (Pet. App. 45a) The Secretary filed a notice of appeal, and the United States Court of Appeals for the First Circuit, which had jurisdiction under 28 U.S.C. § 1291, heard the case.

On November 16, 2010, the First Circuit issued its decision reversing in part, vacating in part, and remanding the case to the district court. (Pet. App. 5a) Finding that a live dispute remains because the Libertarians have "a reasonable expectation of being in a position to complain about the lack of a substitution mechanism in future Massachusetts elections," *id.* at 18a, the First Circuit

found it "unclear" whether Mass. Gen. Laws ch. 53, §14 applies to presidential elections and provides minor parties like the Libertarians with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers. *Id.* at 19a. Focusing only on the language of the statute and not addressing its disparate application by the Secretary, the court therefore declined to reach the Libertarians' vagueness claim, ruling that federal court abstention under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) was appropriate. *Id.* at 21a. The court then held that prohibiting the Libertarians from substituting the presidential and vice-presidential candidates selected at their national convention for those listed on their nomination papers did not violate the Equal Protection Clause. *Id.* at 29a. The court rejected the Libertarians' argument that prohibiting presidential and vice-presidential candidate substitution imposes significant, unequal burdens on minor parties by forcing them to organize their supporters, hold their conventions, and select their candidates as early as February, while major parties have until mid-September to finalize their presidential and vice-presidential candidates. According to the court, minor parties have an equal opportunity to take advantage of the mid-September filing deadline by qualifying as recognized political parties. *Id.* at 25a-26a. Yet the court addressed neither the fact that Massachusetts prohibits minor parties from becoming recognized political parties during an election year nor the fact that minor parties must organize more than two years before the election to

become recognized political parties. Having determined the prohibition against presidential and vice-presidential candidate substitution to be nondiscriminatory, the court found it to be justified by "the state's legitimate interest in ensuring that the candidates who appear on the statewide ballot have demonstrable support among the voting public." *Id.* at 29a. The court made no mention of the fact that Massachusetts permits candidate substitution for every statewide and national office except for President and Vice President, without any demonstration of voter support for the substituted candidates.

The Libertarians then filed a petition for panel rehearing and rehearing *en banc*. On December 28, 2010, the First Circuit denied the Libertarians' petition for rehearing. (Pet. App. 57a, 61a)

On remand, the district court stayed the claim concerning Mass. Gen. Laws ch. 53, § 14 "pending a state court interpretive clarification of the state statute." (Pet. App. 1a) In accordance with the foregoing, the Libertarians moved the district court by motion filed March 16, 2011 to certify to the Supreme Judicial Court of Massachusetts the question of whether Mass. Gen. Laws ch. 53, § 14 applies to presidential elections and provides minor parties like the Libertarians with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those

listed on their nomination papers. That motion remains pending in the district court.[1]

REASONS FOR GRANTING THE PETITION

State ballot access restrictions have been an enduring obstacle to minor political parties seeking to challenge the hegemony of the two major parties in national elections.[2] The prohibition against candidate substitution upheld by the Court of Appeals, a prohibition common to many states, is the paradigm of such a restriction.

State restrictions like Massachusetts' prohibition against presidential and vice-presidential candidate substitution have a substantial national effect because "a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). Whereas the effect of state restrictions on access to the presidential ballot is significant, "the State has a less important interest in regulating Presidential elections than statewide or local elections, because

---

[1] Due to the pendency of the Libertarians' motion to certify the question concerning the meaning of Mass. Gen. Laws ch. 53, § 14, the Libertarians have contemporaneously moved this Court to defer its consideration of the present petition.

[2] As used herein, "minor political party" or "minor party" shall refer to political organizations other than the Democratic and Republican Parties, which shall be referred to herein as "major political parties" or "major parties."

the outcome of the former will be largely determined by voters beyond the State's boundaries." *Id.*

In this case, Massachusetts' prohibition against presidential and vice-presidential candidate substitution effectively forces minor parties to organize their supporters, hold their national conventions, and select their candidates many months before the major parties. While the national effect of this state prohibition is undeniable, Massachusetts' legitimate interest in prohibiting presidential and vice-presidential candidate substitution is difficult to discern. Indeed, Massachusetts permits candidate substitution for *every other office on the ballot*. Review by this Court is appropriate because the ballot access restrictions imposed by Massachusetts affect participation in and conduct of the national presidential election.

Apart from the issue of substitution, there is at least tension, if not outright disagreement, between the circuits in their application of the *Burdick/Anderson* standard. In contrast to the First Circuit, the Sixth Circuit held in an analogous case that ballot access restrictions which "prevent a minor political party from engaging in the most fundamental of political activities - recruiting supporters, selecting a candidate, and placing that candidate on the general election ballot" impose a severe burden on the associational rights of minor parties that can only be justified by compelling state interests. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 590 (6th Cir. 2006). Review by this Court is appropriate to resolve the conflict between

the First and Sixth Circuits in their application of the *Burdick/Anderson* standard.

Finally, review by this Court is appropriate because the First Circuit's decision cannot be squared with this Court's decisions in *Williams v. Rhodes*, 393 U.S. 23 (1968) or *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

I. Massachusetts' Prohibition Against Presidential/Vice-Presidential Candidate Substitution Imposes a Severe Burden on Minor Parties and Voting Rights

The burdens imposed by Massachusetts' prohibition against presidential and vice-presidential candidate substitution fall unequally on minor parties and severely limit minor parties' ability to perform the fundamental political activities of selecting a candidate, placing the candidate on the ballot, and getting the candidate elected. The prohibition against candidate substitution also burdens the voting rights of the individuals who wish to vote for the minor party's chosen candidate.

Minor parties typically gain access to the presidential ballot in Massachusetts by filing nomination papers with the Massachusetts Secretary of State. Nomination papers become available in February of the election year and must be submitted by the end of July with the signatures of at least 10,000 Massachusetts voters. *See* Mass. Gen. Laws ch. 53, §§ 6, 7, 10. (Pet. App. 67a, 70a, 76a) Nomination papers must contain the names of

the minor party's presidential and vice-presidential candidates before being circulated for signatures. *See* Mass. Gen. Laws ch. 53, § 8. (Pet. App. 74a) In contrast, major parties, *i.e.*, Democrats and Republicans, have until mid-September to select their presidential and vice-presidential candidates. *Id.*

By prohibiting presidential and vice-presidential candidate substitution, Massachusetts effectively forces minor parties to hold their national conventions or otherwise select their presidential and vice-presidential candidates very early in the election cycle, before the electorate is fully engaged, or risk forgoing a place on the ballot in Massachusetts altogether. Allowing Massachusetts to dictate the timing of national conventions or candidate selection is inherently problematic. So too is requiring the minor parties to commit to their candidates by as early as February. As a matter of political reality, its takes many months for candidates to emerge, issues to surface and get debated, and the party faithful to become fully engaged and decide on the appropriate candidate. Nor does Massachusetts have a legitimate state interest in prohibiting presidential and vice-presidential candidate substitution. Indeed, the fact that Massachusetts freely allows substitution for every other state and national office completely undercuts any argument that there is any legitimate state interest in prohibiting the correct candidates from appearing on the ballot via substitution.

A. Minor Parties Have a Constitutional Right to Ballot Access Which Is Intertwined with the Right to Vote

Massachusetts' restrictive scheme must be examined in light of the well-established rule 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…"); *Storer v. Brown*, 415 U.S. 724, 746 (1974) ("to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot"); *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.").

The right of minor parties to access the ballot is a product of "the right 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. Because both of these underlying rights -- *i.e.*, the freedom of association and the right to vote -- rank among our most precious freedoms, *id.*, a State may only limit a minor party's access to the ballot by demonstrating a corresponding interest "sufficiently weighty" to justify the limitation. *Norman*, 502 U.S. at 288-289. Accordingly, the Court has required "severe restrictions" on minor

party ballot access "to be narrowly drawn to advance a state interest of compelling importance," *id.* at 289, while "reasonable, nondiscriminatory restrictions" may be justified by a State's "important regulatory interests." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Minor party ballot access is not only a constitutionally protected right, it has also played a "significant role . . . in the political development of the Nation." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). Political and social reforms including women's suffrage, child labor laws, the direct election of senators, and public works programs similar to the New Deal were initially championed by minor parties before being adopted by the major political parties. *See* Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. Rev. 1277, 1283-1284 (2005). Moreover, as the Court has recognized:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. * * * The absence of such voices would be a symptom of grave illness in our society.

Williams, 393 U.S. at 39 (Douglas, J., concurring) (quoting *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250-251 (1957)). Minor parties provide essential lifeblood to the American political system not only by introducing different perspectives that influence the national debate and are often adopted by major party candidates, but by offering the electorate a third choice and, at times over our country's history, replacing a previously-established party.[3]

In short, because minor parties and their candidates play such a critical role in the nation's political discourse, a state's attempt to limit minor party ballot access demands critical examination.

B. Minor Party Ballot Access in Massachusetts

Massachusetts limits minor party access to the presidential ballot by requiring minor parties seeking ballot access either to become recognized "political parties" under Mass. Gen. Laws ch. 50, § 1 or obtain and submit nomination papers containing the signatures of 10,000 Massachusetts voters. *See* Mass. Gen. Laws ch. 50, § 1 (Pet. App. 63a); Mass. Gen. Laws ch. 53, §§ 6, 8 (Pet. App. 67a, 74a).

---

[3] For example, the Republican Party was founded in 1854 by anti-slavery expansion activists and, with the election of Abraham Lincoln in 1860, replaced the Whig Party and the briefly-popular American or Know Nothing Party as a major political party in the United States. American history would surely be different if ballot access had been denied to the new Republican Party in the mid-1850s.

Nomination papers serve an important purpose in Massachusetts' statutory scheme for ballot access. If minor parties were unable to access the presidential ballot using nomination papers -- thereby making their access to the ballot dependent upon their qualification as recognized political parties -- the Massachusetts statutory scheme would surely be unconstitutional. Minor parties must, after all, be provided with a means to access the ballot during an election year (*see Williams v. Rhodes*, 393 U.S. 23 (1968) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)), and minor parties cannot become recognized political parties in Massachusetts from January 1 through December 1 of an election year. *See* Mass. Gen. Laws ch. 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.") (Pet. App. 63a). In fact, to become a recognized political party in Massachusetts, a minor 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 before the previous biennial election[4] or (2) garnering at least three percent of the vote in the previous biennial election.[5]

---

[4] *See* Mass. Gen. Laws ch. 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.") (Pet. App. 63a); Mass. Gen. Laws ch. 53, § 38A ("The board of

C. Equal Protection Requires that Minor Parties be Allowed to Substitute the Presidential/Vice-Presidential Candidates Selected at Their Conventions for Those Listed on Their Nomination Papers

As illustrated above, the constitutionality of the Massachusetts statutory scheme depends upon minor parties being allowed to access the presidential ballot by filing nomination papers, which become available in February and must be submitted by the end of July. *See* Mass. Gen. Laws ch. 53, §§ 7, 10 (Pet. App. 70a, 76a). In contrast, recognized political parties such as the Democrats and Republicans have until mid-September to select their presidential and vice-presidential candidates.

---

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...") (Pet. App. 81a); Mass. Gen. Laws ch. 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") (Pet. App. 65a); Mass. Gen. Laws ch. 53, §28 ("State primaries shall be held on the seventh Tuesday preceding biennial state elections…").

[5] *See* Mass. Gen. Laws ch. 50, § 1 ("'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…") (Pet. App. 63a).

See Mass. Gen. Laws ch. 53, § 8 (Pet. App. 74a). In light of these disparate deadlines, the Equal Protection Clause requires the safety valve of candidate substitution whereby minor parties submit their nomination papers by July but are allowed to substitute the presidential and vice-presidential candidates selected at their national conventions, whether held on Memorial Day, the Fourth of July or Labor Day, for those listed on their nomination papers.

1. Balancing Test for Ballot Access Restrictions

As set forth in *Norman v. Reed*, a State may only limit a minor party's access to the ballot by demonstrating a corresponding interest "sufficiently weighty" to justify the limitation. 502 U.S. at 288-289. The "character and magnitude" of the burden imposed by the limitation must be weighed against "the interests put forward by the State 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). While "severe restrictions" on minor party ballot access must "be narrowly drawn to advance a state interest of compelling importance," *Norman*, 502 U.S. at 289, "reasonable, nondiscriminatory restrictions" may be justified by a State's "important regulatory interests." *Burdick*, 504 U.S. at 434.

2. Prohibiting Presidential/Vice-Presidential Candidate Substitution Imposes a Significant, Unequal Burden on Minor Parties

The character and magnitude of the burden imposed on minor parties by prohibiting presidential/vice-presidential candidate substitution are indeed "weighty." Prohibiting such substitution forces minor parties to make the lose-lose choice of holding their conventions early in the election cycle before the electorate is interested and before the major parties have selected their candidates or holding their conventions later in the election cycle and potentially or certainly, depending on timing, forgoing a place on the ballot in Massachusetts.[6] Meanwhile, the Democrats and Republicans are free to hold their national conventions in August or September and rally voter support at this critical point before the November election. Indeed, in 2008, the Democratic Party held its national convention in late August, while the Republican Party held its national convention between September 1 and 4. As

[6] In theory, minor parties could also circulate nomination papers for every possible combination of presidential and vice-presidential candidates once nomination papers become available in February. Of course, this would exponentially increase the signature requirement (*i.e.*, the effective signature requirement would be 10,000 multiplied by the number of candidate combinations) as well as the cost and time required. Such costs would likely be prohibitive for minor parties like the Libertarians, which often have a field of over ten candidates vying for the nomination.

the 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").

Nor should a single state like Massachusetts be allowed to dictate when *national* minor parties like the Libertarians hold their conventions. *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"). Indeed, as to minor parties that decide at the national level to hold their conventions late (*i.e.*, at approximately the same time as the Republicans and Democrats), the lack of substitution in Massachusetts categorically means no ballot access as the selection of candidates in August or September necessarily causes the party to miss the July signature submission deadline. This is simply unacceptable as "several important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions during the summer." *Anderson*, 460 U.S. at 791-792.

Forcing minor parties to lock in their candidates early in the election cycle and well in advance of the major parties is burdensome for another reason as well. It deprives minor parties of the flexibility to adapt to the ever-changing political landscape as new issues arise and voter priorities shift. As the Court stated in *Anderson*:

> An early filing deadline may have a substantial impact . . . In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to the center stage and may affect voters' assessments of national problems. . . . Candidates and supporters within the major parties thus have the political advantage of continued flexibility; . . . the inflexibility imposed by [an early] filing deadline is a correlative disadvantage because of the competitive nature of the electoral process.

460 U.S. at 790-791. Worth noting is the fact that it was not until August 29, 2008, just days before the Republican National Convention, that presidential candidate John McCain announced his selection of Sarah Palin as his running mate. Similarly, Barack Obama did not announce his selection of Joe Biden as his running mate until August 22, 2008. Not only did these announcements change the face of the race,

they also provided the major parties with the opportunity to energize their supporters and attract the attention of potential voters.

Finally, unlike the First Circuit, which did not discuss the aforementioned burdens in its opinion, the Sixth Circuit has held ballot access restrictions which "prevent a minor political party from engaging in the most fundamental of political activities - recruiting supporters, selecting a candidate, and placing that candidate on the general election ballot" impose a severe burden on the associational rights of minor parties that can only be justified by compelling state interests. *Libertarian Party of Ohio*, 462 F.3d at 590.

3. Massachusetts Has No Legitimate Interest in Prohibiting Presidential/Vice-Presidential Candidate Substitution

While the prohibition against presidential/ vice-presidential candidate substitution places a heavy burden on minor parties, it is difficult to articulate a legitimate countervailing state interest in prohibiting substitution. The First Circuit found that Massachusetts may prohibit minor party candidate substitution in order to uphold its "legitimate interest in ensuring that the candidates who appear on the statewide ballot have demonstrable support among the voting public." (Pet. App. 29a) The First Circuit's analysis, however, ignores the fact that voter support is

established in favor of the minor party.[7] It also ignores the fact that Mass. Gen. Laws ch. 53, § 14 permits substitution for *every other position on the ballot*, which completely undercuts the legitimacy of any interest Massachusetts purports to have in prohibiting minor parties from substituting their presidential and vice-presidential candidates. *See* Mass. Gen. Laws ch. 53, § 14 ("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 . . . may be filled by the same political party or persons who made the original nomination…") (Pet. App. 78a). Simply put, Massachusetts cannot have a legitimate interest in disallowing substitution for national offices, while simultaneously allowing substitution for all state offices on the ballot. *See Anderson*, 460 U.S. at 795 ("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"). Lastly, the effect of not allowing minor parties to substitute

[7] In practice, the Libertarians and other minor parties fund the circulation of nomination papers upon which are listed both the candidates' and the party's names. In theory, if nomination papers did not belong to the minor party in any sense, then minor parties would only be able to access the presidential ballot in Massachusetts by becoming recognized political parties (a feat which cannot be accomplished in an election year and which requires significant efforts be taken more than two years before the election). In other words, if nomination papers did not belong to the minor party in any sense, Massachusetts' statutory scheme for ballot access would be unconstitutional.

would at times result in the wrong candidate (*i.e.*, one who did not receive the party's nomination) appearing on the ballot.

In summary, there are no sufficient, legitimate state interests to justify a prohibition on minor party candidate substitution.

4. Massachusetts Must Demonstrate a Compelling Interest in Prohibiting Presidential/Vice-Presidential Candidate Substitution

Because Massachusetts has no legitimate interest -- much less any "important regulatory interest" -- in prohibiting minor parties from substituting the presidential and vice-presidential candidates chosen at their national conventions for those listed on their nomination papers, Massachusetts certainly cannot demonstrate a more "compelling" interest in prohibiting such substitution. Yet it is a more compelling interest that Massachusetts must demonstrate because "important regulatory interests" are only sufficient to justify "reasonable, *nondiscriminatory* restrictions." *Burdick*, 504 U.S. at 434 (emphasis added). And the prohibition against presidential/vice-presidential candidate substitution is not *nondiscriminatory* as the burden of this prohibition "falls unequally" on minor parties. *See Anderson*, 460 U.S. at 793 ("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*.").

The burden imposed by the prohibition against substitution falls unequally on minor parties because minor parties must name their presidential and vice-presidential candidates on nomination papers which become available in February and must be filed in July, while major parties have until mid-September to choose their candidates for president and vice-president. *See* Mass. Gen. Laws ch. 53, §§ 7, 8, 10 (Pet. App. 70a, 74a, 76a). As a result, minor parties lose a measure of flexibility to adapt to the ever-changing political landscape as new issues arise and voter priorities shift. *See Anderson*, 460 U.S. at 790-791. Minor parties are also forced to choose between holding their national conventions early in the election cycle, before the electorate is interested, or holding their conventions later and potentially (or certainly) forgoing access to the presidential ballot in Massachusetts.

To summarize, because the burden imposed by the prohibition against presidential/vice-presidential candidate substitution falls unequally on minor parties, it does not qualify as a nondiscriminatory restriction and Massachusetts cannot justify it with an important regulatory interest.[8] Instead,

[8] According to the First Circuit, the prohibition against presidential/vice-presidential candidate substitution is nondiscriminatory because minor parties have the same opportunity as major parties to access the ballot by becoming recognized political parties under Mass. Gen. Laws ch. 50, § 1. *See* Pet. App. 25a-26a. In other words, because minor parties may obtain the benefit of the mid-September filing deadline

Massachusetts must put forward a more compelling interest, which it cannot as Massachusetts has no legitimate interest whatsoever in prohibiting presidential/vice-presidential candidate substitution by minor parties.

5. Equal Protection Requires that Minor Parties be Allowed to Substitute Presidential/Vice-Presidential Candidates

Because the prohibition against presidential/vice-presidential candidate substitution significantly and unequally burdens minor parties without advancing any proportionally "weighty" legitimate state interest, the Equal Protection Clause requires Massachusetts to afford a substitution mechanism to minor parties like the Libertarians. Fortunately,

---

available to major parties by becoming recognized political parties, the prohibition against presidential/vice-presidential candidate substitution could have the same effect on both major and minor parties and thus be nondiscriminatory. *Id.* There are at least two problems with this argument. First, the First Circuit ignores the practical reality that minor parties rarely qualify as recognized political parties and generally access the ballot in Massachusetts by submitting nomination papers. Second, as discussed above, the constitutionality of the Massachusetts statutory scheme for ballot access depends upon minor parties being allowed to access the presidential ballot by filing nomination papers. The First Circuit's reasoning would force minor parties to forgo a means of ballot access to which they are constitutionally entitled in order to transform an unconstitutional, discriminatory burden into a nondiscriminatory one. Put differently, the First Circuit's logic would require minor parties to sacrifice a constitutional right to save an otherwise unconstitutional scheme.

such a substitution mechanism is already in place for all state office candidates, as set forth in Mass. Gen. Laws ch. 53, § 14. A similar substitution mechanism must be provided for minor party presidential/vice-presidential candidates, especially in light of the fact that "[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.

CONCLUSION

The Court should grant the Libertarians' petition to correct the First Circuit's decision, to remove Massachusetts' restriction on minor party access to the presidential ballot, to resolve the conflict between the First and Sixth Circuits in the application of the *Burdick/Anderson* standard, and to affirm the long-standing American constitutional principles of Equal Protection, minor party ballot access, and voting rights.

Respectfully submitted,

Petitioners, by their Counsel,

John Reinstein
Counsel of Record
American Civil Liberties
Union of Massachusetts
211 Congress St.,
Suite 300
Boston, MA 02110
(617) 482-3170
jreinstein@aclum.org

Matthew C. Baltay
Andrew J. Palid
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
mbaltay@foleyhoag.com
apalid@foleyhoag.com

May 27, 2011

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 Secretary of the Commonwealth of Massachusetts, Defendant.	)	Civil Action No. 08-11340-NMG

MEMORANDUM & ORDER

GORTON, J.

This action is before the Court on remand from the First Circuit Court of Appeals.

I. *Background*

In September, 2008, this Court entered a preliminary injunction ordering defendant 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 election. In September, 2009, the Court allowed the plaintiffs' motion for summary judgment and entered judgment in their favor. The defendant appealed that determination to the First Circuit shortly thereafter.

In November, 2010, the First Circuit issued a Judgment, in which it: 1) found that a live dispute remains, 2) concluded that the Equal Protection Clause does not require the Commonwealth of Massachusetts to afford a substitution mechanism applicable to non-party candidates and 3) determined that the relevant statute is not unconstitutionally vague but does require interpretive clarification. The First Circuit held that the Massachusetts courts should be afforded the opportunity, in the first instance, to effect that interpretation, pursuant to principles of *Pullman* abstention, which is warranted where 1) substantial uncertainty exists over the meaning of the state law in question and 2) settling the question of state law may obviate the need to resolve a significant federal constitutional question.

Although the First Circuit acknowledged the lack of a pending state court proceeding, it referenced "the anticipated state-court action" and repeatedly noted that the next presidential election is not for another two years, providing ample time to litigate the question in state courts. In sum, the First Circuit's Order to this Court states:

> The decision of the district court on the equal protection claim is reversed, its decision and

judgment in all other respects is vacated, and the matter is remanded to the district court with instructions to abstain on the "void for vagueness" claim and dismiss what remains of the action without prejudice.

II. *Analysis*

The First Circuit has ordered this Court to abstain on the "void for vagueness" claim pursuant to the *Pullman* abstention doctrine. Although an order "to abstain" would ordinarily result in the dismissal of the case before the Court rather than deferral to the state proceedings, here, in the context of the Pullman doctrine, the Court finds deferral to be suitable. *See Growe* v. *Emison*, 507 U.S. 25, 32 & n.1 (1993) (noting that "to bring out more clearly, however, the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of *Pullman* 'deferral'").

When *Pullman* abstention is exercised, the district court retains jurisdiction over the federal claim but stays, rather than dismisses, the federal suit pending determination of state-law questions in state court. *See Harris Cnty. Comm'rs Court* v. *Moore*, 420 U.S. 77, 83 (1975) (citing *R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 501 (1961)). Once the state court has ruled on the state-law question, the parties may return to the district court for a determination of any remaining federal constitutional questions. *See Muskegon Theatres, Inc.* v. *City of Muskegon*, 507 F.2d 199, 200 (6th Cir.

1974) (holding district court had power to abstain from exercising jurisdiction but should have retained jurisdiction pending state court proceedings).

Accordingly, this Court will effect *Pullman* abstention by staying the "void for vagueness" claim pending determination in a Massachusetts court with respect to the question of the statute's application to non-party presidential and vice-presidential candidates. In the meantime, this Court retains jurisdiction over the corresponding federal claim but dismisses all other claims without prejudice, pursuant to the mandate of the First Circuit Court of Appeals.

ORDER

In accordance with the foregoing, this Court hereby:

1) abstains on the "void for vagueness" claim, thereby staying that claim pending a state court interpretive clarification of the state statute; and

2) dismisses all other claims without prejudice.

So ordered.

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

Dated December 13, 2010

United States Court of Appeals
For the First Circuit

No. 09-2426

BOB BARR ET AL.,

Plaintiffs, Appellees,

v.

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

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, *U.S. District Judge*]

Before

Boudin, Ripple,* and Selya, *Circuit Judges*.

Amy Spector, Assistant Attorney General, with whom *Martha Coakley*, Attorney General, and *Timothy Casey* and *Julie Goldman*, Assistant Attorneys General, were on brief, for appellant.

Matthew C. Baltay, with whom *Jennifer S. Behr*, *Amrish V. Wadhera*, *Foley Hoag LLP*, and *John Reinstein*, American Civil Liberties Union of Massachusetts, were on brief, for appellees.

November 16, 2010

---

* Of the Seventh Circuit, sitting by designation.

SELYA, *Circuit Judge*. In this appeal, the Secretary of State, on behalf of the Commonwealth of Massachusetts, challenges the district court's determination that Bob Barr and Wayne A. Root, the Libertarian Party's candidates for president and vice-president in the 2008 general election, were entitled to have their names placed on the statewide ballot even though they had not submitted nomination papers as required by state law. While the particular election that gave rise to this controversy is over, the Secretary also challenges the district court's related determinations that (i) the Equal Protection Clause of the United States Constitution, U.S. Const. amend. XIV, § 1, affords a right of substitution in the circumstances of this case and (ii) Mass. Gen. Laws ch. 53, § 14, which governs the substitution of certain classes of candidates on the ballot, is unconstitutionally vague as applied to the substitution of non-party candidates for President and Vice President of the United States.[1] Barr, Root, and the other appellees defend the district court's resolution of these issues and, in doing so, argue that the result reached below was compelled by principles of constitutional law, statutory construction, and estoppel.

After careful consideration, we find that a live dispute remains. With respect to that dispute, we conclude that the Equal Protection Clause does not

---

[1] Throughout this opinion, we use the term "non-party candidates" as a shorthand for candidates.who are not affiliated with a political party that is recognized as such under Massachusetts law. *See* Mass. Gen. Laws ch. 50, § 1.

require the Commonwealth to afford a substitution mechanism applicable to non-party candidates. We further conclude that the relevant statute, while not unconstitutionally vague, is in need of interpretive clarification. Pursuant to principles of *Pullman* abstention, that interpretation should be effected by the Massachusetts courts. In light of this determination, the appellees' claims concerning the Secretary's prior pronouncements (including their estoppel claim) are either moot or likely to be rendered moot by the state courts' interpretation of the statutory scheme. Accordingly, we reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

We start by rehearsing the relevant factual and procedural background.

Massachusetts recognizes as a "political party" any political organization that either (i) had a candidate for statewide office who garnered at least three percent of the vote in the most recent biennial election or (ii) has enrolled no less than one percent of the total electorate (as measured by registered voters). Mass. Gen. Laws ch. 50, § 1. At the time of the November 2008 general election, the Libertarian Party of Massachusetts (LPM) did not satisfy either furculum of this test and, thus, the Commonwealth did not recognize it as a political party. Rather, the Commonwealth, in accordance with state law, *see id.*, permitted the use of the Libertarian label as a "political designation." The Libertarian National Committee was not then and is not now recognized

as a political party or political designation in Massachusetts.

Massachusetts law delineates procedures governing ballot access for presidential and vice-presidential candidates affiliated with recognized political parties. These procedures differ significantly from those that apply to other candidates. With respect to the presidential and vice-presidential candidates of a recognized political party, the party's state committee may choose its candidates and submit a form to the Secretary by the second Tuesday in September next preceding the election. That form identifies the candidates and sets out the names of the presidential electors selected by the committee. *Id.* ch. 53, § 8. This submission, in and of itself, qualifies the candidates for listing on the ballot. *See id.*

Other presidential and vice-presidential candidates must travel a different road: they must file nomination papers signed by at least 10,000 registered voters. *Id.* §§ 6-10. The papers must include the names of the presidential and vice-presidential candidates, and may also – but need not – identify a "political designation" with which the candidates wish to be aligned. *Id.* 8. In all events, the nomination papers must contain the names of a slate of presidential electors, whose signatures on the papers signify their support for the denominated candidates. *Id.* The fact that non-party presidential and vice-presidential candidates may receive an endorsement from a national political entity does not confer any special ballot access rights.

As a matter of procedure, signed non-party nomination papers for presidential and vice-presidential candidates are to be submitted to local canvassing officials. Those officials then certify the signatures, confirming that they belong to registered voters. *Id.* § 7. In 2008, the deadline for submitting such nomination papers to local canvassing boards was July 29. *See id.* In turn, the deadline for transmitting them to the Secretary was August 26. *See id.* § 10.[2]

In July of 2007, George Phillies, acting in his capacity as the chair of the LPM, sent an e-mail inquiry to the Secretary. In it, Phillies inquired as to whether, if the presidential and vice-presidential candidates identified on nomination papers circulated in Massachusetts were not selected at the national Libertarian nominating convention the following May, the names of the actual nominees could be substituted on the ballot. In October of 2007, an aide to the Secretary responded that the Secretary's office could "prepare a form that allows members of the party to request the substitution of the candidate."

In early 2008, Phillies began to circulate nomination papers identifying himself as a presidential candidate and Chris Bennett as a vice-presidential candidate. These papers named the

---

[2] Those who wish to obtain a global picture of how these dates intersect may consult the so-called "Election Schedule" for the 2008 general election, published by the Secretary and available at http : //www . sec . state . ma. us/ele/elepdf/schedule_08 pdf.

requisite twelve electors. The word "Libertarian" appeared in the space available for signifying a political designation.

The Libertarian National Committee held its convention in late May of 2008. Phillies and Bennett competed unsuccessfully for the convention's endorsement as the Libertarian nominees for president and vice-president, respectively. The convention endorsed Barr and Root for those offices.

Phillies and Bennett had gathered about 7,000 signatures from Massachusetts voters on nomination papers in support of their anticipated candidacies. On May 29, 2008, Phillies e-mailed the Secretary's office, inquiring as to whether he and Bennett, should they qualify for the ballot, could be replaced by Barr and Root. The Secretary responded that such "substitution" was not permissible, but that Barr and Root still had nearly two months during which to secure the necessary signatures on their own behalf. The Secretary likewise notified the Libertarian National Committee that the requested substitution was not authorized, but that the usual statutory process of circulating and filing nomination papers was available as a means of getting Barr's and Root's names on the statewide ballot.

Despite the Secretary's declared position, Phillies continued to circulate nomination papers for a Phillies/Bennett ticket. He submitted these papers, which contained well over 10,000 valid signatures, in a timely manner. In contrast, Barr and Root did not submit any nomination papers, did not provide any

evidence that they had secured the necessary signatures, and did not identify any presidential electors. Although Phillies and Bennett had met the requirements and were entitled to appear on the statewide ballot, nothing in Massachusetts law prevented two sets of candidates from appearing simultaneously with the same political designation.

On August 6, 2008, Barr, Root, the LPM, and the Libertarian National Committee (collectively, the appellees) filed suit in the United States District Court for the District of Massachusetts, challenging the Secretary's refusal to include Barr and Root on the statewide ballot. They sought a mandatory injunction compelling the Secretary to substitute Barr and Root for Phillies and Bennett and a declaration that the Secretary's refusal to allow the substitution infringed upon their constitutional rights to, among other things, free speech, freedom of association, and equal protection of the law.

On September 22, 2008, the district court granted the motion for a preliminary injunction. *Barr* v. *Galvin* (*Barr I*), 584 F. Supp. 2d 316, 322 (D. Mass. 2008). It concluded that the appellees would suffer irreparable harm were it to withhold relief. *Id.* at 321. Even though the initial complaint acknowledged that Massachusetts had no statutory mechanism specific to the kind of substitution that had been requested, the court concluded that section 14, which limns the process for filling vacancies for "state, city or town office" when candidates die, withdraw, or are declared ineligible following nomination, was "[t]he most relevant statute." *Id.* at 320. That provision, the court said, would "likely fail

constitutional scrutiny" as applied to these facts. *Id.* at 321. Acting on these conclusions, the court ordered the Secretary to place the names of Barr and Root on the November 2008 ballot, in lieu of Phillies and Bennett, as candidates for president and vice-president. *Id.* at 318, 322.

The court did not enter a final judgment at that time, and the case remained pending throughout the 2008 election cycle. Barr and Root received less than one percent of the vote. That showing fell short of the three percent threshold needed to qualify the LPM for recognition as a political party in future elections. *See* Mass. Gen. Laws ch. 50, § 1. Nevertheless, a Libertarian candidate for United States Senator from Massachusetts received over three percent of the total votes for that office. Thus, beginning in November of 2008, the LPM became a recognized political party in Massachusetts, with all the accouterments (including ballot access) that such recognition entails.

In the spring of 2009, the parties cross-moved for summary judgment. The district court denied the Secretary's motion and granted the cross-motion. *Barr* v. *Galvin* (*Barr II*), 659 F. Supp. 2d 225, 230 (D. Mass. 2009). In rendering this judgment, the court accepted without explicit discussion the parties' agreement that their dispute was still live. *Id.* at 227.

On the merits, the district court held that a right to substitute was guaranteed by the Equal Protection Clause "to ensure that the names of the

actual candidates appear on the ballot." *Id.* at 230. Additionally, the court speculated that section 14 might provide -a mechanism for substitution but declared that section unconstitutionally vague because it was unclear as to whether the reference to "state . . . office" encompassed the presidency, the vice-presidency, and/or presidential electors. *Id.* at 229-30. This timely appeal followed.

II. ANALYSIS

We deal first with a threshold concern - mootness - and then turn to the substance of the parties' dispute.

A. *Mootness.*

The Constitution "confines the jurisdiction of the federal courts to actual cases and controversies." *ConnectU LLC* v. *Zuckerberq*, 522 F.3d 82, 88 (1st Cir. 2008) (citing U.S. Const. art. III, § 2, cl. 1). This means, of course, that federal courts lack constitutional authority to decide moot questions. *North Carolina* v. *Rice*, 404 U.S. 244, 245-46 (1971) (per curiam); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). A case is not shielded from this proscription simply because a live controversy existed when it was brought. *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). The rule is that "when an intervening event strips the parties of any legally cognizable interest in the outcome," a case, once live, is rendered moot (and, thus, non-justiciable). *ConnectU*, 522 F.3d at 88.

Litigants cannot confer jurisdiction over a moot case by acquiescence or consent. *See Overseas Mil. Sales Corp.* v. *Giralt-Armada*, 503 F.3d 12, 16 (1st Cir. 2007). If an appellate court finds that the issues presented have become moot, it must dismiss the appeal. *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992); *Cruz v. Farquharson*, 252 F.3d 530, 533 (1st Cir. 2001); *R.I. Ass'n of Realtors* v. *Whitehouse*, 199 F.3d 26, 34 (1st Cir. 1999). Thus, even though all the parties share the view that their dispute survived the 2008 general election, we are duty bound to inquire into mootness before proceeding further. *See Overseas Mil. Sales*, 503 F.3d at 16; *see also City of Erie* v. *Pap's A. M.*, 529 U.S. 277, 287 (2000).

Although the 2008 election is now a fait accompli, the mootness inquiry is more nuanced than it might appear at first blush. The Secretary, with the support of the appellees, seeks to avoid the mootness bar through a claim that the issues in this case are "capable of repetition, yet evading review." *S. Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). This is a well-established exception to general principles of mootness, but it is a narrow one. *Cruz*, 252 F.3d at 534. And although the exception has been applied frequently in election-related cases, *see*, *e.g.*, *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), not every election case fits within its four corners.

The Supreme Court has described the scope of the exception, explaining that it applies where: "(1) the challenged action is in its duration too short to

be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC* v. *Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998)). With respect to the second prong of this analysis, a party arguing against mootness must show either "a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Id.* at 463 (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam)); *accord CMM Cable Rep., Inc.* v. *Ocean Coast Props., Inc.*, 48 F.3d 618, 622 (1st Cir. 1995).

The second prong usually demands that it be the same party who is likely to face a similar conflict in the future. To be sure, the case law admits of some imprecision on this point. The main reason for this imprecision is that the "same complaining party" requirement, though satisfied, is not always explicitly stated. *See Cruz*, 252 F.3d at 534 n.4 (making this observation). The Supreme Court sometimes has addressed the same complaining party requirement without specifically flagging its significance to the mootness inquiry, *see*, *e.g.*, *Intl Org. of Masters, Mates & Pilots* v. *Brown*, 498 U.S. 466, 473 (1991) (noting complaining party "has run for office before and may well do so again"), and in some instances, this requirement has been disregarded or diluted on the ground that the case was brought as a class action, *see*, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330, 331, 333 n.2 (1972); *see also Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975) (explaining that certification of case as class action

"significantly affects the mootness determination"); *Pallazola* v. *Rucker*, 797 F.2d 1116, 1129 (1st Cir. 1986) (noting that "[i]n the absence of a class action," the exception applies only where the same complaining party is likely to face the same situation again).

Despite this imprecision, the language of the Court's recent election-related cases indicates that the "capable of repetition, yet evading review" exception depends in part upon a "same complaining party" showing. *See*, *e.g.*, *Davis* v. *FEC*, 128 S. Ct. 2759, 2769-70 (2008); *Wis. Right to Life*, 551 U.S. at 462; *see also Norman* v. *Reed*, 502 U.S. 279, 287-88 (1992). We therefore abide by the "same complaining party" requirement here.

The facts of this case plainly satisfy the "evading review" prong of the exception. Disputes concerning ballot access procedures are often time-sensitive, and the temporal parameters are sometimes too short to allow the issues to be fully litigated within a single election cycle. *See*, *e.g.*, *Ill. State Bd. of Elections* v. *Socialist Workers Party*, 440. U.S. 173, 187 (1979); *Moore*, 394 U.S. at 816. This case comes within that taxonomy.

The "capable of repetition" prong presents a more imposing barrier, but we believe that barrier has been surmounted. The LPM, though currently a recognized political party under Massachusetts law, had no candidate for Governor or United States Senator on the November 2010 statewide ballot in Massachusetts and, thus, may very well lose its status as a recognized political party. While there

are other means of maintaining or obtaining recognized party status, *see* Mass. Gen. Laws ch. 50, § 1, the LPM has never been able to secure party recognition through the use of such alternative means. Given this history, we see no likelihood that the party will prove able to do so in the near future. The LPM, then, has a reasonable expectation of being in a position to complain about the lack of a substitution mechanism in future Massachusetts elections. At any rate, we think that the parties – all of whom implore us to find that the case is not moot – should be given the benefit of the doubt.

In sum, we find that the appellees have shown a sufficient probability that the core events at issue in this case may recur and may again involve the LPM and/or the Libertarian National Committee. Because we find that most aspects of this case satisfy both prongs of the "capable of repetition, yet evading review" exception, we conclude that a live dispute remains with respect to the constitutional questions at issue in this case.

B. *The Merits*.

We review an appeal from the entry of summary judgment de novo. *Gastronomical Workers Union Local 610 & Metro. Hotel Assoc. Pension Fund* v. *Dorado Beach Hotel Corp.*, 617 F.3d 54, 60 (1st Cir. 2010); *Osediacz* v. *City of Cranston*, 414 F.3d 136, 139 (1st Cir. 2005). In so doing, we assay the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Borges ex rel. S.M.B.W.* v. *Serrano-Isern*, 605 F.3d 1, 4 (1st Cir. 2010). "We will affirm only if the record

reveals 'no genuine issue as to any material fact' and 'the movant is entitled to judgment as a matter of law.'" *Vineberg* v. *Bissonnette*, 548 F.3d 50, 55 (1st Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). With this standard of review in mind, we turn to the merits of the disputed claims.

1. ***Vagueness.*** The appellees argue that "[t]he vagueness of the substitution statutory framework allows the Secretary to exert unconstitutional, unfettered discretion to allow or prohibit substitution during any given election." Because this broad interpretive discretion has allowed the Secretary to take inconsistent positions regarding the availability of substitution, their thesis runs, non-party candidates and unrecognized political organizations are left without adequate guidance. This plaint about excessive discretion boils down to an assertion that, with respect to substitution, the statutory scheme is void for vagueness. The district court so held. *Barr II*, 659 F. Supp. 2d at 229-30.

Section 14 admittedly is unclear as to whether it applies to the kind of substitution requested by the appellees. The statutory text contains two types of imprecision. First, it refers to candidates seeking "state, city or town office," but provides no further elaboration as to the specific offices that are encompassed within that rubric.This, in turn, leaves open to question whether candidates for presidential electors (who are, in one sense, candidates for a state office) and, by reference, presidential and vice-presidential candidates, come within its sweep. Second, section 14 explains that vacancies "may be filled by the same political party or persons who

made the original nomination." In the period leading up to the 2008 election, the LPM did not qualify for recognition as a political party under Massachusetts law. Still, the reference to "persons who made the original nomination" arguably could apply to the LPM or, alternatively, to the individuals who signed the nomination papers qualifying Phillies and Bennett for inclusion on the ballot. The text is opaque on this point.

Viewed against this backdrop, the appellees' complaint that the procedures governing substitution of candidates for president and vice-president are unclear strikes a responsive chord. We are not convinced, however, that the lack of definition in the statutory text necessarily invalidates the statute on vagueness grounds. *See IMS Health Inc.* v. *Ayotte*, 550 F.3d 42, 61 (1st Cir. 2008) ("[S]tatutes do not need to be precise to the point of pedantry, and the fact that a statute requires some interpretation does not perforce render it unconstitutionally vague."); *Ridley* v. *MBTA*, 390 F.3d 65, 93 (1st Cir. 2004) (similar). Whatever its semantic shortcomings, section 14 seems susceptible to clarification by judicial interpretation.

This does not mean, however, that a federal court should undertake the task of parsing the statutory text to determine its applicability to the substitution of non-party presidential and vice-presidential candidates. Especially given the lack of urgency – the next presidential election is almost two full years away – we think that the needed interpretation is a task for which the state courts, as

the ultimate arbiters of state-law questions, are better suited. *See Acadia Ins. Co.* v. *McNeil*, 116 F.3d 599, 604 (1st Cir. 1997) (explaining that state supreme court is "final arbiter of the meaning of a statute of that state").

Although we recognize that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," *Colo. River Water Conserv. Dist.* v. *United States*, 424 U.S. 800, 813 (1976), we are also mindful of the Supreme Court's sage counsel that "[a]mong the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute the meaning of which is unclear under state law," *Harris Cnty. Comm'rs Court* v. *Moore*, 420 U.S. 77, 84 (1975); *accord Baggett* v. *Bullitt*, 377 U.S. 360, 377-78 (1964). We believe that *Pullman* abstention is appropriate in this case.

Pullman abstention was conceived by the Supreme Court in a case bearing the Pullman name. *See R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 499-502 (1941). Pullman abstention "is warranted where (1) substantial uncertainty exists over the meaning of the state law in question, and (2) settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question." *Batterman* v. *Leahy*, 544 F.3d 370, 373 (1st Cir. 2008); *see also Babbitt* v. *United Farm Workers Nat. Union*, 442 U.S. 289, 307-08 (1979) (noting that 'abstention may be appropriate in cases where "it is evident that the [state] statute is reasonably susceptible of constructions that might undercut or modify

appellees' vagueness attack . . . [and] that an authoritative construction of the . . provision may significantly alter the constitutional questions requiring resolution"); *Zwickler* v. *Koota*, 389 U.S. 241, 251 (1967) (emphasizing that *Pullman* abstention is appropriate when a state statute, never interpreted by a state court, is "fairly subject to an interpretation which will avoid or modify the federal constitutional question").

In the case at hand, an "uncertain issue of state law [turns] upon a choice between one or several alternative meanings of [the] state statute." *Babbitt*, 442 U.S. at 308 (quoting *Baggett*, 377 U.S. at 378). The Massachusetts courts should therefore be afforded the opportunity to address, in the first instance, the question of the statute's application to non-party presidential and vice-presidential candidates. *See*, *e.g.*, *Harris Cnty.*, 420 U.S. at 84.

The district court premised its conclusion that section 14 is void for vagueness on the fact that it "leaves the determination of whether that statute is applicable to presidential and vice-presidential nominees positively ambiguous," *Barr II*, 659 F. Supp. 2d at 229, and went on to state that where the meaning of a statute is unclear, that statute may be found unconstitutionally vague. *Id.* That statement goes too far. The mere fact that a statute requires interpretation does not necessarily render it void for vagueness. Once the state courts clarify section 14's relevance (if any) to substitution of presidential and vice-presidential candidates, such a clarification, however it comes out, would end the "void for vagueness" argument. Thus, both of the

preconditions for *Pullman* abstention are satisfied in this case.[3]

2. *Equal Protection*. Beyond their claim regarding the uncertainty of the Massachusetts statutory scheme, the basic thrust of the appellees' case is that substitution of non-party candidates for president and vice-president is required as a matter of equal protection. Indeed, they succeeded in persuading the district court that they were entitled to this substitution even if no provision of Massachusetts law explicitly authorized it. *Id.* at 230. In the appellees' words, "the Secretary discriminates arbitrarily" between recognized political parties and non-parties by refusing to allow substitution of non-party candidates for president and vice-president.

We freely acknowledge that the right to vote is central to the operation of a democratic society. Consequently, "any restrictions on that right strike at the heart of representative government." *Werme* v. *Merrill*, 84 F.3d 479, 483 (1st Cir. 1996) (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)). Some substantial regulation of elections is necessary,

---

[3] Though the existence of a pending state court action is sometimes considered as a factor in favor of abstention, the lack of such pending proceedings does not necessarily prevent abstention by a federal court. *Duncan* v. *Poythress*, 657 F.2d 691, 697 (1st Cir. 1981). As noted above, the next presidential election is nearly two years distant, and thus we find that any delay in obtaining relief pending state court adjudication would impose no onerous burden upon the parties. *See Bonas* v. *Town of N. Smithfield*, 265 F.3d 69, 76 n.5 (1st Cir. 2001).

however, to ensure that they are fair, honest, and orderly. *See*, *e.g.*, *id.* (citing *Storer*, 415 U.S. at 730).

To be sure, the fact that states have considerable discretion in establishing the procedures that govern ballot access does not mean that every restriction on ballot access is permissible under the Constitution. Ballot access restrictions that fall unequally on similarly situated candidates or parties may threaten the right to equal protection of the laws guaranteed by the Fourteenth Amendment. *Libertarian Party of Me.* v. *Diamond*, 992 F.2d 365, 370 (1st Cir. 1993).

A mere demonstration that a state provision distinguishes among groups (such as candidates affiliated with a recognized political party and those not so aligned) is insufficient by itself to establish an equal protection violation. Rather, a claim of unconstitutionality must be grounded in a showing of substantial discrimination. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Am. Party of Tex.* v. *White*, 415 U.S. 767, 781 (1974) (quoting *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963)); *see also Clements* v. *Fashing*, 457 U.S. 957, 967 (1982) ("Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution." (citing *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955))).

In recognition of the competing interests at stake where ballot access regulations are concerned,

the Supreme Court has developed a flexible "sliding scale" approach for assessing the constitutionality of such restrictions. *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick* v. *Takushi*, 504 U.S. 428, 432-34 (1992). Under this approach, when the burden imposed by a ballot access regulation is heavy, the provision must be narrowly tailored to promote a compelling state interest. *Timmons*, 520 U.S. at 358. Reasonable, nondiscriminatory restrictions, however, need be justified only by legitimate regulatory interests. *Id.* A court evaluating a challenge to a state ballot access regulation must, therefore, conduct its inquiry by weighing "the character and magnitude of the asserted injury" to the complaining party's constitutional rights and "evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed." *Werme*, 84 F.3d at 483 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983)); *see also Libertarian Party of Me.*, 992 F.2d at 370.

The Massachusetts ballot access provisions at issue here are nondiscriminatory. They do not specifically differentiate among Democrats, Republicans,Libertarians, Mugwumps, or candidates affiliated with any other political organization. In other words, all political organizations are subject to the same criteria for determining whether they qualify for recognition as political parties and, thus, for the array of rights indigenous to recognized political parties under Massachusetts law. *See* Mass Gen. Laws ch. 50, § 1. These criteria are, essentially, twofold.

One avenue to recognition depends on a demonstration of a proven ability to attract votes. Under the statutory scheme, the LPM has essentially the same opportunity as any other party to field attractive candidates, promote their candidates, and convince voters to get on board. Distinguishing among political organizations on the basis of success in past elections "is not per se invidiously discriminatory." *Werme*, 84 F.3d at 484 (citing *Am. Party of Tex.*, 415 U.S. at 781). The LPM had the same chance as any other political organization to qualify as a recognized political party in this way and, in fact, did so in the 2008 election.

The second avenue for qualification as a recognized political party under Massachusetts law is through enrollment of at least one percent of the voters registered in Massachusetts. Where, as here, the necessary number of enrolled voters required to achieve party recognition is reasonable,[4] that methodology constitutes an appropriate screen. *Cf. Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971) (approving provision requiring prospective candidate to obtain signatures from five percent of eligible voters).

We add that the Massachusetts voter enrollment provision is essentially an alternate means by which the state can ascertain whether a political organization has demonstrated sufficient

---

[4] The appellees do not challenge the reasonableness of the number bf enrolled voters required under Massachusetts law.

support to warrant official recognition as a party. *See*, *e.g.*, *Libertarian Party of Me.*, 992 F.2d at 372. Nothing prevented registered Massachusetts voters from aligning themselves with the LPM, and, thus, the LPM had a full and fair chance to avail itself of this avenue for becoming a recognized political party.

To sum up, equality of opportunity exists here. And as we said in *Werme*, 84 F.3d at 485, "equality of opportunity – not equality of outcomes – is the linchpin of what the Constitution requires in this type of situation."

It is also important to note that the time available to Barr and Root when they were directed by the Secretary (and, for that matter, by state law) to procure the signatures necessary to comply with section 6 was not so short as to impose an unreasonable burden. Barr and Root had approximately 60 days after the national convention and before the filing deadline during which to secure the 10,000 required signatures, and the Supreme Court has approved analogous time frames for collecting signatures as not unduly burdensome. *See*, *e.g.*, *Am. Party of Tex.*, 415 U.S. at 786 (finding that period of 55 days was not "an unduly short time for circulating . . . petitions" and noting that time frame would have required that signatures be collected at a rate of no more than 400 per day to satisfy the statutory requirement prior to the deadline).

The modest nature of the burden is confirmed by the fact that, during the same time period, Phillies and Bennett were able to secure

approximately 8,000 signatures on their own nomination papers, ultimately submitting many more than the 10,000 signatures needed to qualify for the ballot. While a state "may not act to maintain the 'status quo' by making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates," *Clements*, 457 U.S. at 965, the regime challenged here clearly had no such effect.

Having evaluated the nature of the ballot access restrictions at issue here and the extent of the burdens imposed, we have no doubt as to the appropriate level of scrutiny to be applied. We conclude that there need be only a rational basis undergirding the regulation in order for it to pass constitutional muster. *See*, *e.g.*, *Timmons*, 520 U.S. at 358-59.

That threshold is satisfied. In defense of his refusal to grant substitution to non-party presidential and vice-presidential candidates, the Secretary points to the state's interests in using "substantial support" requirements as a means of protecting "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, . and may ultimately discourage voter participation in the electoral process." *Libertarian Party of Me.*, 992 F.2d at 371. This, in itself, justifies the regulations at issue here. It is settled beyond hope of contradiction that states have a legitimate interest in ensuring that a candidate makes a preliminary showing of a substantial measure of support as a

prerequisite to appearing on the ballot. *See*, *e.g.*, *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 193 (1986); *Anderson*, 460 U.S. at 788-89; *Am. Party of Tex.*, 415 U.S. at 782; *Jenness*, 403 U.S. at 442. Logically, this interest is advanced by the Secretary's refusal to grant to non-party candidates the right to substitution in circumvention of the state's signature requirements. Granting such substitution would effectuate an end-run around the signature requirement – a requirement that allows the state to ascertain whether a given candidate has enough support to warrant inclusion on the ballot.

In light of the state's legitimate interest in ensuring that the candidates who appear on the statewide ballot have demonstrable support among the voting public, the modest burden imposed upon non-party candidates by requiring them to secure signatures, rather than piggy-backing upon signatures collected for other candidates, is not so onerous as to present an equal. protection problem vis-à-vis candidates affiliated with recognized political parties. *Cf. Jenness*, 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 [to appearing on the ballot], neither of which can be assumed to be inherently more burdensome than the other."). The appellees' equal protection challenge therefore fails.

3. Other Claims. The distance we have travelled to this point does not end our odyssey. The parties joust over a final set of claims, which implicate alleged inconsistencies in the Secretary's

position regarding the availability of substitution. We need not linger long over any of these claims.

First, the appellees argue that the Secretary should be estopped from declaring that substitution of non-party presidential and vice-presidential candidates is not the policy of his office. To ground this argument, they rely on a communication received from the Secretary's office in 2007, which informed them that the Secretary could provide a form through which substitution could be requested.

It is far from clear that the Secretary has adopted inconsistent positions. After all, a statement that a party would be permitted to *request* substitution in certain circumstances falls short of an assurance that substitution would be *allowed* if requested. Here, however, we need not decide whether or not the Secretary heretofore has taken inconsistent positions.

In the course of this litigation, the Secretary has made his current position crystal clear: substitution is not available in the circumstances presented by the appellees. That position, as we have pointed out, depends on the interpretation of state law. There is no election on the horizon, and the appellees have ample time to litigate the validity of the Secretary's position in the state courts. In light of these circumstances and the Secretary's plainly articulated position, the appellees cannot reasonably continue to rely on any earlier inconsistency.

In any event, a definitive state-court interpretation of the meaning of the statutory scheme will provide non-party candidates with concrete guidance on the availability vel non of substitution. There is plenty of time in which to obtain such an interpretation: the run-up to the next presidential election has barely begun. Accordingly, because there is no reasonable likelihood of recurrence, the estoppel claim is moot. *Cf. Spencer*, 523 U.S. at 18 (finding claim moot because petitioner had not "demonstrated a reasonable likelihood that he will once again be paroled and have that parole revoked"); *Oakville Dev. Corp.* v. *FDIC*, 986 F.2d 611, 615 (1st Cir. 1993) (finding claim moot because it is "highly unlikely that appellant will again secure a mortgage with a federally insured bank that then fails, prompting FDIC involvement and ensuing foreclosure").

Second, and relatedly, the appellees complain that the ambiguities in the statutory scheme have allowed the Secretary to grant a right of substitution to non-party candidates in prior elections, yet deny such a right to the appellees in 2008. The appellees suggest that this erratic behavior creates an equal protection problem vis-a-vis other "unrecognized" political parties and/or non-party candidates.

The premise on which this suggestion rests is unconvincing. We have examined the examples proffered by the appellees and believe that none of

the affected parties and/or candidates appears to be situated similarly to the appellees.[5]

Regardless, any historical variations in treatment will be rendered irrelevant once the Massachusetts courts have clarified the way in which state law operates. Such clarification will help to define the bounds of the Secretary's discretion to permit or deny substitution, limiting his capacity to adopt arguably haphazard policies across multiple election cycles. Because state-court construction of the statutory scheme is likely to eliminate the kinds of variations on which this equal protection claim is premised, we think it prudent to forgo evaluation of it pending resolution of the anticipated state-court action. *See Bath Mem'l Hosp.* v. *Me. Health Care Fin. Comm'n*, 853 F.2d 1007, 1016 (1st Cir. 1988) (finding that *Pullman* abstention may be appropriate in respect to claim that state commission's lack of decision-making standards created equal protection problem, where state court might read state law as importing standards, in which case claim would be significantly altered or mooted); *cf. El Dia, Inc.* v. *Hernandez Colon*, 963 F.2d 488, 494 (1st Cir. 1992) ("[D]eclaratory judgments concerning the constitutionality of government conduct will almost always be inappropriate when the constitutional

---

[5] These prior instances involved the substitution of a vice-presidential candidate only (with the written consent of the slate of electors) and the substitution of candidates who could not otherwise have gotten on the ballot because their party's nominating convention did not take place until after the deadline had passed for submitting nominating papers.

issues are freighted with uncertainty and the underlying grievance can be remedied for the time being without gratuitous exploration of uncharted constitutional terrain.").

III. CONCLUSION

We need go no further. For the reasons elucidated above, we reverse the decision of the district court on the equal protection claim, vacate its decision and judgment in all other respects, and *remand* to the district court with instructions to *abstain* on the "void for vagueness" claim and *dismiss* what remains of the action without prejudice. All parties shall bear their own costs.

Reversed in part; vacated in part; and remanded.

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 "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 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 summary judgment

---

[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.

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

MEMORANDUM & ORDER

GORTON, J.

Plaintiffs Bob Barr ("Barr") and Wayne A. Root ("Root") are the nominees of the Libertarian Party for the offices of President and Vice President of the United States, respectively. They, together with the remaining plaintiffs in this case, i.e. the Libertarian Party of Massachusetts and the Libertarian National Committee, Inc., seek a preliminary injunction that would order the defendant to place the names of Barr and Root on the Massachusetts ballot for the 2008 presidential election.

I. *Background*

A. Factual Background

Because the Libertarian Party is not one of the recognized "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 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 Division") 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 Division responded, via e-mail, through one of its 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 reponse 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 Division and sought to substitute the nominees' names on the petitions they had gathered. On June 5, 2008, however, the Division informed the plaintiffs that no substitution would be permitted because it 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 challenge in court the Commonwealth's refusal to allow substitution.

The basis for this lawsuit, and for this motion for injunctive relief, is twofold. First, the plaintiffs allege that the Commonwealth is estopped from opposing the motion, or denying substitution, by the statements made by Attorney Green to Phillies in October, 2007. They argue further that the statutory scheme governing substitution is unconstitutionally vague and that, as implemented by the defendant, it places unconstitutional, unfettered discretion in the hands of government officials.

Before this Court is the plaintiffs' motion for a preliminary injunction enjoining the defendant from printing ballots for the 2008 presidential election without the names of Barr and Root as the candidates of the Libertarian Party.

B. Procedural History

On August 6, 2008, the plaintiffs filed a complaint alleging violations of their rights to freedom of speech, voting and association and to equal protection of the laws under the First and Fourteenth Amendments of the United States Constitution. The plaintiffs filed the pending motion for preliminary injunction on August 15, 2008, and defendant William F. Galvin, Secretary of the Commonwealth of Massachusetts, filed his opposition on August 29, 2008. A hearing on this matter was held on September 12, 2008.

II. *Analysis*

A. Legal Standard

To obtain preliminary injunctive relief under Fed. R. Civ. P. 65, a movant must demonstrate

> (1) a substantial likelihood of success on the merits, (2) a significant risk of irreparable harm if the injunction is withheld, (3) a favorable balance of hardships, and (4) a fit (or lack of friction) between the injunction and the public interest.

Nieves-Marauez v. *Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003) (citation omitted). Likelihood of success on the merits is the critical factor in the analysis. *Weaver* v. *Henderson*, 984 F.2d 11, 12 (1st Cir. 1993) (citations omitted).

B. Application

Plaintiffs have met their burden of proving all four elements required to obtain a preliminary injunction, as hereinafter described.

1. Likelihood of Success on the Merits

a. Estoppel

As an initial matter, it is noted that "estoppel against the government if it exists at all is hen's-teeth rare." *Costa* v. *INS*, 233 F.3d 31, 38 (1st Cir. 2000). In addition to the traditional elements of estoppel, a party pressing such a claim against the government must demonstrate "affirmative misconduct" on the part of the government. *Dantran, Inc.* v. *U.S. Dep't of Labor*, 171 F.3d 58, 67 (1st Cir. 1999). No such showing has been made here. At

worst, Attorney Green's email to Phillies, suggesting that her office would prepare a form on which the plaintiffs could request substitution, was vague. It made no promise that the request for substitution would be granted. The plaintiffs have offered no evidence whatsoever that Attorney Green mis-stated government policy, much less that she did so deliberately or maliciously. The government will not be estopped from opposing this motion or from defending the underlying lawsuit.

b. The Constitutionality of the Substitution Process with Respect to Presidential Nominees on Election Ballots

The first question that must be addressed in evaluating the plaintiffs' constitutional claims is what standard of review applies. Actions of the state with implications on ballot access are subject to a sliding scale, with more searching review applied to more burdensome regulations. *McClure* v. *Galvin*, 386 F.3d 36, 41 (1st Cir. 2004). Voting regulations imposing "severe burdens" must be narrowly tailored to a compelling state interest, but "reasonable, nondiscriminatory restrictions" will usually be justified by "important regulatory interests." *Id.*, citing *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

In this case, the plaintiffs challenge the constitutionality of the Massachusetts statutory scheme for the substitution of presidential nominees. The most relevant statute, M.G.L. c. 53, §14, refers

to candidates "nominated for a state, city or town office." On its face, that category does not appear to encompass candidates for the office of President of the United States. Another statute, M.G.L. c. 50, §1, however, defines a "state officer" as "any person...chosen at a state election" and a "state election" as "any election at which a national, state or county officer...is to be chosen by voters." That language has the effect of incorporating statewide elections for federal offices within the purview of state election law.

It is evident, nonetheless, that the terms "state officer" and "state office" have been used without precision. 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. It is, therefore, ambiguous whether the substitution process set forth in §14 applies to presidential nominees. If it does not, interested parties are left with no statutory guidance on the issue. Such ambiguity in the law is evidenced by the actions of the Election Division itself, which suggested, via Attorney Green in October, 2007, a method for substitution of a political nominee but took a different stance in June, 2008, when it refused to entertain the specific substitution of Barr-Root for Phillies-Bennett.

As such, a minor political party, desiring to substitute its presidential nominee on the ballot in Massachusetts is left to guess how, if at all; to do so in compliance with the law. Surely there can be no state interest that would justify such a burden. Therefore, M.G.L. c. 53, §14 will likely fail constitutional

scrutiny as applied to the plaintiffs under the *McClure* test, even without specifically determining whether the statute is void for vagueness or grants unfettered discretion to the Commonwealth. 386 F.3d at 41; *see also Anderson* v. *Firestone*, 499 F. Supp. 1027, 1030 (D.C. Fla. 1980) (finding that independent candidates for president and vice president were denied equal protection of the laws by the state's failure to allow for substitution of the vice-presidential candidate listed on the petitions). For this reason, there is a substantial likelihood that the plaintiffs in this case will prevail on the merits of their constitutional claims.

2. Irreparable Harm, Balance of Harms and the Public Interest

The remaining factors to be considered with respect to the imposition of a preliminary injunction weigh overwhelmingly in favor of the plaintiffs. The plaintiffs will undoubtedly suffer irreparable harm if this injunction is denied because the ballots will be printed without the names of the candidates actually chosen to represent the Libertarian Party in the 2008 presidential election. No damages or other legal remedy can compensate for a missed election. *See Duke* v. *Connell*, 790 F. Supp. 50, 52-53 (D.R.I. 1992) (finding irreparable harm where, if a motion for a preliminary injunction were denied, ballots would be printed without the name of a major party candidate in the Rhode Island primary).

With respect to the balancing of the harms, the deprivation of ballot access to the plaintiffs is a harm at least as great as, and probably greater than,

any potential harm to the government's responsibility to ensure an orderly election. *See Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968) (lamenting that ballot access restrictions burden the right to free assocation and the right to vote, both of which, "of course, rank among our most precious freedoms"); *Strahan* v. *Frazier*, 156 F. Supp. 2d 80, 93¬94 (D. Mass. 2001), quoting *Batchelder* v. *Allied Stores International, Inc.*, 388 Mass. 83, 91 (1983) ("Ballot access is of fundamental importance in our form of government because through the ballot the people can control their government."). Moreover, any such harm to the government is minimized by the fact that the plaintiffs in this case clearly were not attempting to circumvent the election laws, nor have they circumvented them.

In the absence of an injunction, Phillies and Bennett will remain on the ballot, even when no one disputes that Barr and Root are the Libertarian nominees for president and vice president. No public interest is served in having the wrong nominees on the ballot. Indeed, conversely, the public interest is advanced by including the right nominees on the ballot to avoid voter confusion. The Secretary asserts an interest in protecting the integrity of the election process but that interest is not threatened here, where the evidence indicates that the plaintiffs have made a good faith effort to comply with the law.[1] *C.f.*

---

[1] The fact that the signators of the plaintiffs' petitions were expressing sponsorship of the Libertarian Party electors who, in turn, were pledged to the original Libertarian candidates is indicative of the fact that no disenfranchisement will be wrought on those signators (nor deception on the electorate) by

In re The Substitute Nomination Certificate of Bob Barr as the Libertarian Candidate for President of the United States, No. 414 M.D. 2008, slip op. at 6 (Pa. Commw. Ct. Sept. 5, 2008) (finding that the substitution of Barr for the Libertarian candidate listed on the nomination papers before the Libertarian National Convention was not intended to mislead Pennsylvanian voters). For these reasons, the Court finds that the public interest would be ill-served by the denial of a preliminary injunction here.

ORDER

In accordance with the foregoing, the plaintiffs' motion for a preliminary injunction (Docket No. 6) is **ALLOWED**, and a preliminary injunction in the form annexed hereto will enter.

So ordered.

Nathaniel M. Gorton
United States District Judge

Dated September 22, 2008

---

allowing the substitution on the ballot of the actual nominees of the Libertarian Party or, in the case of the one elector who has expressed an unwillingness to be pledged to Barr and Root, to allow the substitution of a new elector who will be so pledged. In any event, there is no question that for whomever signators were signing, i.e. the electors, the candidates or the party, all three favor substitution.

United States Court of Appeals
For the First Circuit

No. 09-2426

BOB BARR ET AL.,

Plaintiffs, Appellees,

v.

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

Defendant, Appellant.

Before
Boudin, Ripple,* and Selya, *Circuit Judges*.

ORDER OF COURT
Entered: December 28, 2010

The appellees' petition for panel rehearing is denied. The petition largely rehashes arguments that were made to, and rejected by, the panel in its earlier opinion.

---

* Of the Seventh Circuit, sitting by designation.

One aspect of the petition does require comment. The appellees assert that the panel opinion gives rise to a circuit split in light of the decision in *Libertarian Party of Ohio* v. *Blackwell*, 462 F.3d 579 (6th Cir. 2006). That is plainly incorrect: nothing in the panel opinion is inconsistent or irreconcilable with *Libertarian Party of Ohio*. The timing constraints imposed by the respective state ballot-access schemes are sufficiently distinct that the panel's conclusion as to the constitutionality of the Massachusetts scheme is not at odds with the Sixth Circuit's determination as to the constitutionality of the Ohio scheme.

There, the Sixth Circuit reviewed a state statutory ballot-access scheme that, pertinently, (i) demanded that all parties nominate their candidates in the state's March primary in order to appear on the ballot in the election held the following November and (ii) required any party that did not receive at least five percent of the vote for its candidate for governor or president in the previous election to file a petition, bearing the number of signatures equal to one percent of the total votes cast in the previous election, 120 days in advance of the March primary in order to qualify to participate in it. *See id.* at 586. Ohio law permitted candidates the alternative route of filing a nominating petition 75 days prior to the general election. *Id.* at 592. Candidates who qualified for the ballot in this alternate way were not listed with any party affiliation but, rather, were denominated "independent" or "other party" candidates. *Id.* (citing Ohio Rev. Code § 3513.257).

The Massachusetts scheme at issue in this case is materially different. It allows candidates to ally themselves with a "political designation" of their choosing even where they access the ballot through the state's alternative petition mechanism. Massachusetts requires that such petitions be submitted to local canvassing officials in late July. Rather than requiring that a minor party necessarily designate its candidates a full year prior to the upcoming presidential election, as was the case under the Ohio statute if a candidate wished to appear on the ballot with a party designation of any sort, the Massachusetts scheme demands that such a candidate file papers less than four months in advance of the election.

Seen in this light, the panel opinion does not, as the appellees now for the first time argue, lead to the conclusion that "minor parties must essentially become major recognized 'political parties' . . . in order to gain ballot access." Candidates affiliated with minor parties remain entirely free to submit nominating petitions bearing the requisite number of signatures up until the late-July filing deadline. Political organizations not formally recognized as "political parties" in Massachusetts therefore have the opportunity to appear on the ballot if a candidate aligned with their organization submits the papers through this procedure.

The petition for panel rehearing is *denied*.

By the Court:
/s/ Margaret Carter, Clerk

cc: Hon. Nathaniel M. Gorton, Ms. Sarah Thornton, Clerk, United States District Court for the District of Massachusetts, Ms. Spector, Mr. Baltay, Mr. Casey, Mr. Reinstein, Ms. Behr, Ms. Goldman, Ms. Wadhera & Mr. Bialas.

United States Court of Appeals
For the First Circuit

No. 09-2426

BOB BARR ET AL.,

Plaintiffs, Appellees,

v.

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

Defendant, Appellant.

Before

Lynch, *Chief Judge*,

Torruella, Boudin, Lipez

Howard and Thompson, *Circuit Judges*.

ORDER OF COURT
Entered: December 28, 2010

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been

submitted to the active judges of this court and a majority of' the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:
/s/ Margaret Carter, Clerk

cc: Hon. Nathaniel M. Gorton, Ms. Sarah Thornton, Clerk, United States District Court for the District of Massachusetts, Ms. Spector, Mr. Baltay, Mr. Casey, Mr. Reinstein, Ms. Behr, Ms. Goldman, Ms. Wadhera & Mr. Bialas.

Mass. Gen. Laws ch. 50, § 1

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

. . .

"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.

. . .

"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.

. . .

Mass. Gen. Laws ch. 51, § 26

As used in this section and section forty-two H, "election" shall include every state, city or town primary, preliminary election, election, or town meeting. The registrars, for the purpose of registering voters, shall hold such day and evening sessions as the town, by by-law, or the city, by ordinance, shall prescribe and such other sessions at locations as they deem necessary to allow voters to register and they may for such purposes, use mobile registration units; provided, however, that except as provided in sections thirty-four and fifty, registration for the next election shall take place no later than eight o'clock in the evening on the twentieth day preceding such election and no later than eight o'clock in the evening on the tenth day preceding a special town meeting. Mailed affidavits of registration postmarked before midnight on the final day to register for an election shall be effective for such election, as provided in section forty-two G. If a postmark is unclear or illegible, a mailed affidavit shall be accepted until the fifth day after the final day to register. In any city or town in which the annual city or town election is held on the first Monday in March, in a year when the presidential primary is held, the registration sessions held by the election commissioners or registrars of voters in preparation for the city or town election shall also serve as registration sessions for the primary. If any person applies for registration during a period prior to a regular or special preliminary, primary or election when registration to qualify as a voter in such preliminary, primary or election is prohibited by the provisions of this section, such person, if otherwise

qualified, shall be registered and his name shall be placed on the voting lists as a registered voter for all later preliminaries, primaries or elections.

Mass. Gen. Laws ch. 53, § 6

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.

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.

Mass. Gen. Laws ch. 53, § 7

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.

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.

Mass. Gen. Laws ch. 53, § 8

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.

Mass. Gen. Laws ch. 53, § 10

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.

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.

Mass. Gen. Laws ch. 53, § 14

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.

Mass. Gen. Laws ch. 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, and in an even-numbered year in which no presidential primary is held, also as of February first. The secretary shall receive the count in writing not later than ten days after each such date, and shall issue a report thereof.