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FROM: A. Spector AAG

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RE: Libertini Assoc. of MASS, et al v. Galvin, Sec SJ-2011-0348

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

~~NOTES/COMMENTS~~: Encl: Mo D Sec Comm. to Dismiss Complaint...

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BY HAND DELIVERY

October 27, 2011

Francis V. Kenneally, Assistant Clerk
Supreme Judicial Court for Suffolk County
John Adams Courthouse
One Pemberton Square, Suite 1300
Boston, Massachusetts 02108

Re: Libertarian Association of Massachusetts and Libertarian National Committee, Inc. v. William F. Galvin, Secretary, No. SJ-2011-0348

Dear Mr. Kenneally:

Enclosed please find the Motion of Defendant Secretary of the Commonwealth to Dismiss the Complaint for Lack of An Actual Controversy and Lack of Standing.

Very truly yours,

Amy Spector
Assistant Attorney General
(617) 963-2076

Enclosure

cc: Matthew C. Baltay, Esq. (by facsimile and mail)
John Reinstein, Esq. (by facsimile and mail)

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
NO. SJ-2011-0348

LIBERTARIAN ASSOCIATION OF MASSACHUSETTS and LIBERTARIAN NATIONAL COMMITTEE, INC.,

Plaintiffs,

v.

WILLIAM F. GALVIN, in his official capacity as SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,

Defendant.

MOTION OF DEFENDANT SECRETARY OF THE COMMONWEALTH TO DISMISS THE COMPLAINT FOR LACK OF AN ACTUAL CONTROVERSY AND LACK OF STANDING

INTRODUCTION

Under Massachusetts' ballot access statute, presidential and vice-presidential candidates who are not enrolled in a legally recognized political party in Massachusetts (i.e., "non-party candidates") must gather and file signatures of 10,000 registered voters in order to have their names placed on the ballot. G.L. c. 53, § 6. This type of "substantial support" requirement serves the State's interest in protecting "the integrity of elections by avoiding overloaded ballots and frivolous candidacies." Libertarian Party of Me. v. Diamond, 992 F.2d 365, 371 (1st Cir.), cert. denied, 510 U.S. 917 (1993).

In this action, plaintiffs (the "Libertarians") seek declaratory relief concerning the proper interpretation of an unrelated election law provision, G.L. c. 53, § 14, which provides, in part,

that '[i]f 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, and in the same manner[.]" The Libertarians seek a declaration that, under section 14, a non-party candidate for president who does not qualify for the ballot by under G.L. c. 53, § 6, by obtaining 10,000 voter signatures, may nonetheless demand "substitution" on the ballot in place of a candidate who has met the signature requirement, but who thereafter withdraws. The Libertarians also seek a declaration that section 14 is unconstitutional if it does not provide for such "substitution."

The Complaint does not, however, allege facts showing that the "substitution" scenario exists now, or that it will exist in the course of the next election. Indeed, at this early stage, the plaintiffs cannot identify what, if any, Libertarian-identified candidates will qualify for the ballot in Massachusetts and whether, or under what circumstances, any of the qualifiers would "withdraw" their candidacies in order to request that another person, who did not qualify, may seek "substitution" under section 14. In short, the question presented in the complaint is hypothetical and depends entirely upon events that may or may not occur between now and November 2012. Because plaintiffs fail to establish the existence of an actual controversy and fail to establish standing to assert their claims, the Court should dismiss the Complaint for lack of subject matter jurisdiction.

THE FEDERAL BACKDROP TO THIS CASE

In litigation initiated in federal court in August 2008, the Libertarians sought – unsuccessfully – to challenge the Commonwealth's enforcement of its ballot access provision, G.L. c. 53, § 6, in connection with the 2008 presidential election. Barr v. Galvin, 626 F.3d 99 (1st Cir. 2010). In that case, the Libertarians, who were not then (and are not now) a recognized

political party in Massachusetts, argued that the Secretary of the Commonwealth was required to place the names of "Libertarian"-affiliated candidates Bob Barr and Wayne Root on the November 2008 ballot as candidates for president and vice-president, notwithstanding that Barr and Root had not complied with the Massachusetts ballot access provision in section 6 of the statute, having failed to submit any voter signatures in support of their ballot placement. Id. at 101-03.

The Libertarians claimed that although Barr and Root had failed to comply with the ballot access provision, the Secretary was required by the Equal Protection Clause to place their names on the ballot because they had been endorsed at the convention of the national Libertarian organization. Specifically, the Libertarians argued that the Secretary was required to "substitute" the names of Barr and Root on the ballot for those of George Phillies and Chris Bennett, two other self-designated Libertarian candidates, who had gathered and filed over 10,000 voter signatures in Massachusetts in favor of their own ballot placement but failed to secure the endorsement of the Libertarian convention and then sought to "transfer" their voter signatures to Barr and Root. Id. at 103, 108.

The First Circuit soundly rejected the Libertarians' claim that "substitution" was constitutionally required. As the court explained, granting the "substitution" sought by the Libertarians "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." Id. at 111. The court concluded that "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." Id.

Having lost their battle in federal court, the Libertarians now turn their attention to state court, seeking a declaration that a right of "substitution" can be found in G.L. c. 53, § 14, a provision that has nothing to do with achieving ballot access in the first instance but instead governs the procedure for filling vacancies in the unusual circumstances in which a nominated candidate dies, withdraws, or is found ineligible after nomination papers are filed. In such unusual circumstances, section 14 simply directs the party or non-party to fill the vacancy through "the same political party or persons who made the original nomination, and in the same manner."

In the earlier federal litigation, the First Circuit declined to address plaintiffs' claim that G.L. 53, § 14, was unconstitutionally vague, instead directing the district court to abstain from considering it. Id. at 106-08. Following the First Circuit's decision, and following the district court's entry of an order abstaining from consideration of the vagueness claim, see Barr v. Galvin, 755 F. Supp.2d 293 (D. Mass. 2010), the district court denied the Libertarians' request to certify, to the Massachusetts Supreme Judicial Court, the question whether "substitution" was authorized as a matter of state law under G.L. c. 53, § 14.

In now seeking declaratory relief from this Court concerning G.L. c. 53, § 14, plaintiffs suggest the hypothetical possibility that circumstances similar to those in 2008 could arise again during the 2012 election or future elections, but they fail to set forth any facts that establish the existence of an actual controversy at the present time. Although plaintiffs devote a considerable portion of their Complaint to outlining the facts that gave rise to a controversy surrounding the 2008 presidential election – when there were actual, identified candidates who claimed

Libertarian affiliation and were seeking "substitution" in an election that was about to occur – the Complaint is devoid of any facts that demonstrate a present controversy, which is not surprising given that the scenario necessary to raise the issue of "substitution" in 2012 has not yet occurred and may well never occur.

In particular, plaintiffs fail to set forth the factual allegations that would be necessary at a minimum to establish the existence of an actual controversy ripe for this Court's resolution in connection with plaintiffs' claim that section 14 permits "substitution" on the ballot of non-party candidates who have not met the signature requirements of G.L. c. 53, § 6: 1) an actual, Libertarian-identified candidate seeking placement on the ballot in the 2012 election, 2) that candidate, although having obtained the 2012 Libertarian convention endorsement, has failed to submit 10,000 voter signatures in support of his placement on the Massachusetts ballot, and 3) the candidate then invokes section 14 as a basis for his "substitution" on the ballot for another non-party candidate who qualified for ballot access and wishes to "transfer" his voter signatures to the convention-backed candidate.

In the absence of such concrete factual allegations, the Complaint fails to establish an "actual controversy" or standing, both of which are prerequisites to declaratory relief.

STATUTORY FRAMEWORK

Massachusetts recognizes, as a "political party," a political organization that either (1) had a candidate for statewide office who received at least 3% of the votes in the most recent biennial state election or (2) has enrolled at least 1% of the total number of registered voters in the Commonwealth. Mass. G.L. c. 50, § 1. Currently, the Commonwealth recognizes three political parties: Democratic, Republican, and Green-Rainbow. Plaintiff Libertarian Association of Massachusetts ("Libertarian Association") is not currently a political party in Massachusetts,

and it was not a political party at the time of the 2008 presidential election (at which time it was named the "Libertarian Party of Massachusetts"). Barr, 626 F.3d at 102; Complaint ("Compl.") ¶ 29.[1] Rather, the Libertarian Association, which plaintiffs describe as "an affiliation of Massachusetts voters," is legally known as a "political designation," Mass. G.L. c. 50, § 1, or more informally, a "non-party" or "minor party." Compl. ¶ 9; Barr v. Galvin, 626 F.3d at 102. Plaintiff Libertarian National Committee, Inc., a political committee incorporated in Washington, D.C., was not (and is not) recognized in Massachusetts as a party or a "political designation."

Consistent with the "fact . . . that there are obvious differences in kind" between established political parties and smaller organizations that have not achieved party status, the Supreme Court has held that states may properly "recogniz[e] these differences and provid[e] different routes to the printed ballot." Jenness v. Fortson, 403 U.S. 431, 441-42 (1971). In view of these inherent differences, Massachusetts election law sets forth different procedures governing ballot access for presidential candidates of a recognized political party, on the one hand, and non-party presidential candidates, on the other hand, and the electors who support the party and non-party candidates.[2]

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[1] As a result of the November 2008 election, in which a candidate for United States Senate who identified himself as "Libertarian" received over three percent of the total votes for that office, the Libertarian Party of Massachusetts became a recognized political party. Barr, 626 F.3d at 104. The Libertarian Party of Massachusetts lost its status as a recognized party in Massachusetts as a result of the 2010 statewide election, and it (as well as its successor, the Libertarian Association of Massachusetts) therefore currently is not recognized as a political party in the Commonwealth. See "Massachusetts Directory of Political Parties and Designations," published at http://www.sec.state.ma.us/ele/elepar/paridx.htm (updated October 27, 2011. Although the Complaint in one instance refers to the "national Libertarian Party" as "the third largest political party in the United States," see Compl. ¶ 9, plaintiffs acknowledge that the Libertarians are not currently a recognized "political party" under Massachusetts law; throughout the Complaint, they refer to it as a "minor party."

[2] In the case of both recognized parties and non-parties, as a function of the electoral college system, it is the electors who actually elect the president and vice president. U.S. Const. art. II,

1. Ballot Access Provision Governing Recognized Party 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 preceding the election. Barr, 626 F.3d at 102; G.L. c. 53, § 8. The form identifies the presidential and vice- presidential candidates as well as the names and addresses of the presidential electors selected by the committee. Barr, id. "This submission, in and of itself, qualifies the candidates for listing on the ballot." Id.; G.L. c. 53, § 8.[3]

2. Ballot Access Provision Governing Non-Party Presidential Candidates

The statute provides "a different road" for presidential candidates who are not affiliated with a recognized political party. Barr, 626 F.3d at 102. In order to have their names appear on the ballot, presidential and vice presidential candidates who are not enrolled in a political party that is recognized in Massachusetts must file nomination papers signed by 10,000 registered voters supporting their placement on the ballot. Id.; G.L. c. 53, §§ 6-10. A voter may sign more than one candidate's nomination papers, G.L. c. 53, § 7, and candidates are free to use volunteers to gather signatures.

The nomination papers are required to identify the names of the non-party presidential and vice-presidential candidates, and the papers also may – but need not – identify a "political designation" "with which the candidates wish to be aligned." Barr, id. at 102; G.L. c. 53, § 8. The "political designation" identified on a presidential candidate's nomination papers may not be

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§ I, cl. 2; U.S. Const. amend. XII. Therefore, although the general election ballot contains the names of the presidential and vice presidential candidates (and not the individual names of the electors), voters are actually voting to select "Electors of President and Vice President." G.L. c. 54, § 3.

[3] The electors are required to sign their written acceptance on the form, thereby pledging to vote for the presidential and vice presidential candidates identified on the form. G.L. c. 53, § 8.

longer than three words and may not include the name of a recognized political party. G.L. c. 53, § 8.[4] "Nothing in Massachusetts law prevents two sets of candidates from appearing simultaneously with the same political designation," Barr, id. at 103.

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

Under the foregoing provisions, each non-party candidate must comply with G.L. c. 53, § 6, by filing 10,000 voter signatures in support of his or her ballot placement. "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." Barr, 626 F.3d at 102.

PROCEDURAL AND FACTUAL BACKGROUND

The Libertarians filed this action for declaratory relief in August 2011, asserting that the question of whether "substitution" is authorized "will continue to arise until a definitive answer is provided by this Court." Compl. ¶ 1. The Complaint recounts at length the facts leading up to the federal litigation in 2008 in Barr v. Galvin. Compl. ¶¶ 6-7, 29-44. Those facts, which the Secretary summarizes below because they provide a useful backdrop to understanding the present action, only serve to underscore that – unlike in 2008 – there is no actual controversy at

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

the present time.

The 2008 Federal Litigation

In early 2008, George Phillies began to circulate nomination papers identifying himself as a presidential candidate and Chris Bennett as a vice-presidential candidate. Barr, 626 F.3d at 103; Compl. ¶ 33. The papers identified Phillies and Bennett as "Libertarian" in the space for signifying a political designation. Id. Phillies and Bennett competed unsuccessfully for the endorsement of the Libertarian national convention in May 2008; the convention instead endorsed candidates Barr and Root. Barr, id. at 103; Compl. ¶ 34. On May 29, 2008, Phillies and Bennett, who by then had gathered approximately 7,000 signatures in support of their ballot placement, inquired of the Secretary as to whether they could "transfer" their signatures to Barr and Root, who had received the convention's endorsement. Barr, id. at 103; Compl. ¶ 35.

The Secretary responded on June 5, 2008, that such "substitution" was not allowed but that Barr and Root still had almost two months before the July 28 deadline for the submission of signatures in support of their own ballot placement. Barr, id. at 102-03; Compl. ¶ 36.[5]

[5] In their Complaint here, as in the federal litigation, plaintiffs place much weight on an earlier communication in October 2007 between Phillies and a staff attorney in the Secretary's office. Compl. ¶¶ 31-32. Specifically, in an e-mail, Mr. Phillies, chair of the Libertarian Party of Massachusetts, had asked whether, if the presidential and vice-presidential candidates identified on nomination papers were not later endorsed at the national Libertarian convention in May 2008, the names of the convention-endorsed candidates could be "substituted" on the ballot. Compl. ¶ 31; Barr, id. at 103. In an e-mail in October 2007, the Secretary's aide responded that the Secretary's office could "prepare a form that allows members of the party to request the substitution of the candidate." Compl. ¶ 32; Barr, id. The district court rejected the Libertarians' assertion that the Secretary was thereby "estopped" from later refusing to allow "substitution"; the court held that the aide's communication "made no promise that the request for substitution would be granted." Barr v. Galvin, 584 F.Supp.2d 316, 320 (D. Mass. 2008) (preliminary injunction ruling). On appeal from the district court's subsequent summary judgment decision, the First Circuit held that the estoppel issue was moot, insofar as the Secretary in the course of the litigation had made "crystal clear" his position that "substitution" was not allowed in the circumstances presented and that "there is no reasonable likelihood of recurrence" of the facts upon which the Libertarians based their "estoppel" claim. Barr, 626 F.3d at 111-12.

In spite of the Secretary's clearly stated position, Phillies continued to circulate nomination papers in support of a Phillies/Bennett candidacy. Barr, id.; Compl. ¶ 37. He ultimately submitted nomination papers with over 10,000 voter signatures to the Secretary in a timely manner, thereby qualifying for ballot access. Barr, id. at 103; Compl. ¶ 38. "In contrast, Barr and Root did not submit any nominating papers, did not provide any evidence that they had secured the necessary signatures, and did not identify any presidential electors." Barr, id.

Thereafter, in August 2008, candidates Barr and Root, together with the Libertarians, initiated an action in federal court, challenging the Secretary's refusal to place Barr and Root on the then-upcoming November 2008 ballot, and asserting claims based on plaintiffs' right to free speech, freedom of association, and equal protection. Barr, id. at 103; Compl. ¶ 39. The district court (Gorton, J.) issued a preliminary injunction in September 2008, directing the Secretary to place the names of Barr and Root on the ballot, and the district court subsequently granted summary judgment in favor of the Libertarians, holding that the Secretary was required, as a matter of equal protection, to allow candidate "substitution" in the manner sought by the Libertarians. Barr, id. at 103-04 (describing district court proceedings); Compl. ¶¶ 39-41. The district court further "speculated that section 14 [i.e., G.L. c. 53, § 14, governing the manner for filling vacancies that occur when candidates for "state" and "local" office withdraw, die, or are found ineligible] might provide a mechanism for substitution but declared that section unconstitutionally vague because it was unclear as to whether the reference to ' state . . . officer' encompassed the presidency, the vice-presidency, and/or presidential electors." Barr, id. at 104 (describing district court proceedings).[6]

[6] The Libertarians' primary constitutional claim in the federal litigation was that "substitution" was required as a matter of equal protection under the federal Constitution. In the course of preliminary injunction proceedings in district court, the Libertarians asserted an additional claim

The First Circuit reversed the district court's ruling on the equal protection issue, holding that the Secretary's refusal to "substitute" Barr and Root on the ballot did not violate equal protection, because "[t]he Massachusetts ballot access provisions at issue here are nondiscriminatory." Id. at 109. The court further found that the roughly 60-day period between the "Libertarian" convention and the deadline for filing nomination papers did not impose an "unreasonable burden" on Barr and Root to gather the required 10,000 signatures. Id. at 109-10. As the First Circuit further explained, "[i]t 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," and that 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." Id. at 111.

The First Circuit vacated the district court's decision that G.L. c. 53, § 14, was unconstitutionally vague, remanding the matter to the district court with instructions to abstain from ruling on that claim. Id. at 113. The Libertarians unsuccessfully sought rehearing by the First Circuit and unsuccessfully sought certiorari review by the United States Supreme Court.[7]

Following remand by the First Circuit, the district court issued a decision abstaining on

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not mentioned in the Complaint; they contended that G.L. c. 53, § 14 could be read to authorize candidate "substitution" but that the statute was unconstitutionally vague. Barr v. Galvin, 659 F. Supp.2d 225, 227-28 (D. Mass. 2009); Barr, 626 F.3d at 103-04. The Secretary argued that the district court need not reach the vagueness claim because, whatever imprecision might be alleged in the term "state office" as used in G.L. c. 53, § 14, it is plain on the face of the statute that section 14 is not intended to provide a means by which a candidate can plan in advance to obtain ballot access in lieu of complying with the signature requirement set forth in G.L. c. 53, § 6. As noted below, the First Circuit vacated that portion of the district court's decision holding that section 14 was unconstitutionally vague. Barr, 626 F.3d at 113.

[7] See Barr v. Galvin, 630 F.3d 250 (1st Cir. 2010) (denying panel rehearing); Barr v. Galvin, U.S. Court of Appeals for the First Circuit, No. 09-2426, Order dated December 28, 2010 (denying rehearing en banc); Barr v. Galvin, United States Supreme Court, No. 10-1456, Order dated October 3, 2011 (denying petition for writ of certiorari).

the vagueness claim, staying that claim "pending a state court interpretive clarification of the state statute," and dismissing the remaining claims. Barr, 755 F.Supp.2d at 295. Thereafter, in March 2011, the Libertarians filed a motion requesting that the district court certify, to the Massachusetts Supreme Judicial Court, the question whether "substitution" was authorized under G.L. c. 53, § 14. The district court denied the motion. Barr, U.S. District Court, D. Mass., No. 08-11340, Memorandum & Order, dated June 14, 2011.

The Instant Action in the Supreme Judicial Court for Suffolk County

On August 27, 2011, the Libertarians filed the instant action in this Court, seeking a declaration either that 1) G.L. c. 53, § 14, applies to presidential elections and provides entities that are not recognized political parties (i.e., "non-parties" or "minor parties") "with a means to substitute the presidential and vice-presidential candidates chosen at their conventions" for other candidates identified on nomination papers, or 2) in the alternative, that if G.L. c. 53, § 14, does not provide "a right of substitution for minor party presidential and vice-presidential candidates, then the statutory scheme is in violation of" Article 9 of the Massachusetts Declaration of Rights (providing for free elections and equal rights of inhabitants to elect officials). Compl. ¶ 5.

The Libertarians allege that non-parties "must be provided a mechanism to substitute" their convention-backed candidates for other non-party candidates identified on nomination papers, and they contend that G.L. c. 53, § 14, "can be interpreted" to provide such a mechanism. Compl. ¶ 52-53. They further assert that the Secretary does not share their view. Compl. ¶¶ 46-47. Based on this disagreement, plaintiffs allege that "there exists a controversy which cannot be eliminated without the intervention of the Court" and that their disagreement with the Secretary presents a "live dispute." Compl. ¶¶ 8, 51. They assert that the Court "should hear the matter because it presents an issue of great importance that must be resolved before the upcoming

presidential election." Compl. ¶ 8. However, the Complaint does not identify any actual candidates who may seek to obtain placement on the Massachusetts ballot through a claimed statutory right of "substitution."

ARGUMENT

I. THERE IS NO "ACTUAL CONTROVERSY."

Under the Declaratory Judgment Act, a court may grant declaratory relief only where an "actual controversy has arisen" and the plaintiff demonstrates legal standing. G.L. c. 231A, § 1; Massachusetts Ass'n of Independent Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 292 (1977). An actual controversy is "a real dispute" between adverse parties each with a "definite interest in the subject matter," such that "unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation." Bunker Hill Distributing Inc. v. District Attorney for the Suffolk District, 376 Mass. 142, 144 (1978) (internal citation omitted); Gay & Lesbian Advocates & Defenders v. Attorney General, 436 Mass. 132, 134 (2002) (quoting Bunker Hill). Declaratory judgment proceedings "are concerned with the resolution of real, not hypothetical, controversies," and thus relief is appropriate under G.L. c. 231A only where a declaration would "have an immediate impact on the rights of the parties." Massachusetts Assn. of Indep. Ins. Agents & Brokers, 373 Mass. at 292. See also Villages Development Co. v. Secretary of the Exec. Office of Environmental Affairs, 410 Mass. 100, 105-06 (1991) (treating existence of "actual controversy" as a jurisdictional issue).

Here, the Complaint is devoid of any facts establishing the existence of an actual controversy concerning the proper interpretation of G.L. c. 53, § 14. The Complaint alleges only that the issue of "substitution" has arisen in past presidential elections such as the 2008 election and asserts, in purely conclusory fashion, that the issue "will continue to arise" in future

elections. Compl. ¶ 1.[8] In addition, plaintiffs contend that "[d]isputes like this one 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." Compl. ¶ 48 (citing Barr, 626 F.3d at 104-05).

The foregoing allegations do not establish an actual controversy. The Complaint does not establish – or even allege – that the "substitution" scenario that occurred in 2008 will occur again in 2012. To begin with, as the Libertarians acknowledge, nomination papers for the 2012 presidential election are not yet even available; they will become available in February 2012 and must be submitted to local officials, with 10,000 voter signatures, by July 31, 2012. Compl. ¶ 45. In advance of the July 2012 deadline for submission of nomination papers to local officials (and the August 2012 deadline for submission of the papers to the Secretary), it is impossible to predict which, if any, Libertarian-affiliated candidates will satisfy the ballot access requirement. Likewise, plaintiffs do not – and cannot – know in advance of the 2012 Libertarian convention which candidate will receive that convention's endorsement.[9] The Complaint is silent even as to the date of the 2012 "Libertarian" convention, alleging only in general terms that "minor parties often do not hold their national conventions until the late spring or summer of the election year." Compl. ¶ 22.

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[8] In addition to pointing to the 2008 presidential election, plaintiffs allege that the Secretary allowed "substitution" in 1996, 2000, and 2004. Compl. ¶¶ 24-28. However, the examples of prior "substitution" cited by the Libertarians here involved circumstances that the First Circuit found readily distinguishable, leading the First Circuit to find "unconvincing" the Libertarians' contention that the Secretary had acted inconsistently in refusing to "substitute" Barr and Root on the ballot while having "allowed" substitution in the past. Barr, 626 F.3d at 112.

[9] And, if the convention-endorsed candidate obtains the voter signatures necessary for ballot access, there will be no need for "substitution." There could also be no context for a "substitution" claim in the event that the non-endorsed candidate obtained signatures for ballot access but did not want to cede his position on the ballot to the endorsed candidate.

Thus, although plaintiffs assert that there is a "continuing dispute over the interpretation of" the statute, they fail to set forth any facts establishing that, at present, an actual controversy exists. The fact that plaintiffs disagree with the Secretary as to whether "substitution" is authorized under G.L. c. 53, § 14, does not suffice to establish an actual controversy. See Bonan v. Boston, 398 Mass. 315, 320 (1986) (under Declaratory Judgment Act, "[i]t is not sufficient for purposes of establishing an actual controversy for a plaintiff simply to find a defendant who disagrees on some point of law."). An abstract declaration affirming the Libertarians' position that a statutory right of "substitution" exists would not have any immediate impact on plaintiffs' rights. Bonan, id. ("A plaintiff must have standing, a definite interest in contention in the sense that his rights will be significantly affected by a resolution of the contested point.").

Similarly, the Complaint fails to establish that, in the absence of relief, litigation between the Libertarians and the Secretary will necessarily ensue. That the issue might conceivably arise again at some future point does not establish the existence of an actual controversy now. Likewise, the fact that the Libertarians might desire a judicial determination as to the correctness of their position does not establish an actual controversy. Bonan, id.

The Court accordingly should dismiss the claim for declaratory relief for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Gay & Lesbian Advocates & Defenders, 436 Mass. at 133 (remanding the case to the county court for dismissal of the case "[b]ecause there is no actual controversy"); Bonan, id. at 317-318 (where plaintiffs failed to establish existence of an actual controversy on their claim for declaratory relief, trial court should have allowed defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6)).

In alleging that a "live dispute" exists, the Libertarians place undue reliance on the First

Circuit's holding in Barr that the constitutional issues presented there were not moot notwithstanding that the 2008 election had passed by the time the appeal was heard. Compl. ¶ 49; Barr, 626 F.3d at 104-06. As a threshold matter, and unlike here, candidates Barr and Root had standing, and asserted a live controversy, when they sued in August 2008. Accordingly, when the case reached the First Circuit after the November election, the Secretary argued that a strong public interest supported review because the Secretary was otherwise bound, in future elections, by the incorrect decision of the district court. The First Circuit reasoned that the dispute concerning a constitutional right to "substitution" fell within the "capable of repetition yet evading review" exception to the mootness doctrine that is at times recognized where live pre-election controversies become moot before they reach an appellate court. Id. at 104-06. In so ruling, the court found that the Libertarians, although having gained recognized party status as a result of the 2008 election, could well lose that status in the following election, inasmuch as they did not have a candidate on the November 2010 ballot[10]; and the court further found that the issues raised in the case concerning "substitution" thus "may recur and may again involve the LPM [Libertarian Party of Massachusetts] and/or the Libertarian National Committee." Id. at 106.

As discussed above, the First Circuit then went on to resolve the primary constitutional issue presented – the equal protection issue – in favor of the Secretary. And the First Circuit directed the district court to abstain on the other constitutional issue presented, namely, the Libertarians' claim that G.L. c. 53, § 14, was unconstitutionally vague. In so doing, the court expressed its view that the statute, "while not unconstitutionally vague," would benefit from "interpretive clarification," id. at 101, further emphasizing that the proper interpretation of G.L.

[10] Indeed, the Libertarian Party of Massachusetts lost its status a recognized political party as a result of the November 2010 statewide election, as noted above, see supra pages 5-6 and n.1.

c. 53, § 14, "is a task for which the state courts, as the ultimate arbiters of state-law questions, are better suited." Id. at 107. While the First Circuit thus suggested the possibility of state-court litigation at some point in the future, nothing in the court's decision suggested that state court interpretation of G.L. c. 53, § 14, should occur in a factual vacuum or that a state court should provide interpretive guidance in the absence of an actual controversy.

Significantly, the First Circuit did not certify the state-law question raised in the current complaint to the Supreme Judicial Court, nor did it direct the district court to do so, presumably because there were no federal questions remaining as to which a state law interpretation would have been "determinative." See Supreme Judicial Court Rule 1:03, section 1 (authorizing Supreme Judicial Court to answer questions certified to it by federal courts in cases involving questions of Massachusetts law that "may be determinative of the cause then pending in the certifying court" and as to which there is no controlling SJC precedent).[11] And the district court subsequently denied the Libertarians' motion seeking certification of the state-law question.

Moreover, the practical considerations underlying the First Circuit's determination to reach the constitutional questions – namely, that all of the parties urged the court to reach the merits, see Barr, id. at 106, and more significantly that the district court had determined the Secretary's constitutional obligations in a manner that would bind the Secretary absent an appellate decision – are absent here. At this juncture, in the context of a whole new election cycle, there is no indication that the "substitution" issue will arise in 2012. Thus, the Libertarians' interest in having the "substitution" issue resolved under the state statute does not establish that in the absence of declaratory relief the issue will "almost immediately and

[11] Contrast In re Hundley, 603 F.3d 95, 98-99 (1st Cir. 2010) (certifying state law question to Massachusetts Supreme Judicial Court); Romero v. Colegio de Abogados de Puerto Rico, 204 F.3d 291, 305-06 (1st Cir. 2000) (remanding matter to district court with directions to certify question to Supreme Court of Puerto Rico).

inevitably lead to litigation," Bunker Hill, 376 Mass. at 144, since it is impossible to even identify the "Libertarian" convention-backed candidate at the present time much less to determine now whether any Libertarian-affiliated candidate will satisfy the ballot access requirement in the 2012 election and then seek "substitution" of the convention-backed candidate.

Of course, if the presidential candidate endorsed by the 2012 Libertarian convention does not obtain the signatures necessary for Massachusetts ballot access, and then desires to demand "substitution" (assuming that another Libertarian candidate who has obtained ballot access under section 6 is willing to "withdraw"), the endorsed candidate could seek to raise the question of the interpretation of G.L. c. 53, § 14, at that time. The fact that Barr and Root were able to obtain relief during the 2008 election cycle, by initiating litigation in federal court in August 2008 and obtaining an injunction prior to the printing of the 2008 ballot, demonstrates that candidates are not without recourse to obtain judicial relief should an actual controversy arise. The state courts have entertained such actions on an expedited basis in the past. See, e.g., Delahunt v. Johnston et al., 423 Mass. 731 (1996) (affirming, on direct appellate review, Superior Court decision ordering Secretary to print plaintiff candidate's name on November general election ballot, in an action that was commenced in Superior Court on October 2, 1996, following September primary election; Superior Court issued a judgment on October 4, 1996; and Supreme Judicial Court heard argument on October 7 and entered an order on October 8, 1996, affirming the judgment).

But absent the concrete facts necessary to establish an actual controversy, this Court lacks jurisdiction and should decline to entertain the Libertarians' request for declaratory relief, particularly insofar as their alternate claim for relief would necessitate the Court resolving a

constitutional issue.[12] See, e.g., Commonwealth v. Bartlett, 374 Mass. 744, 749 ("A court will ordinarily 'not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of . . . .'") (internal citation omitted).

II. THE LIBERTARIANS LACK STANDING.

In addition to the lack of an actual controversy, the Libertarians lack standing to assert their claim seeking declaratory relief concerning the interpretation of G.L. c. 53, § 14, where, as here, they have not even identified an actual candidate who is seeking "substitution" under the statute. See, e.g., Miyazawa v. City of Cincinnati, 45 F.3d 126 (6th Cir. 1995) (plaintiff voter did not have standing to challenge city charter provision restricting term limits for city council members, where plaintiff "only alleges that sometime in the future she may want to vote for an unidentified candidate who may not meet the requirements of the subject legislation"; court contrasted other cases in which plaintiff/voter had a personal stake in the outcome of the election either because the plaintiff was a potential candidate or was "unable to vote for his specific candidate of choice due to the subject law"); compare Davis v. Federal Election Commission, 554 U.S. 724, 732-35 (2008) (self-financed candidate for Congressional seat had standing to challenge federal provisions governing disclosure of campaign expenditures and campaign financing limits, where plaintiff had already declared his candidacy; he had already been subject to the requirement that he disclose his intent to spend a certain level of personal funds on his

[12] In Counts I and II of the Complaint, the Libertarians seek a declaration that "substitution" is authorized under G.L. c. 53, § 14, or in the alternative that, if the statute does not authorize "substitution," it violates Article 9 of the Massachusetts Declaration of Rights. Compl. ¶¶ 5, 55, 57. The Libertarians further assert, as a third count, that if the Court is "unable to determine the meaning of G.L. c 53, § 14," then the statute is unconstitutionally vague as it purportedly gives the Secretary "unreviewable discretion" in determining whether to allow "substitution," which allegedly violates the Libertarians' associational rights and allegedly gives rise to a claim under 42 U.S.C. § 1983. Compl. ¶¶ 59-60. To the extent that the allegations in Count III constitute a further request for declaratory relief, they suffer from the same flaw as Counts I and II, namely, they fail to establish the existence of an actual controversy.

campaign; and he faced a "realistic and impending threat of direct injury" from the provision governing financing limits, which would allow his opponent to receive contributions on more favorable terms).

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court dismiss the Complaint in its entirety.

Respectfully submitted,

SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,

By his attorneys,

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October 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that I served the above Motion on the parties this 27th day of October, 2011, by sending a copy of the motion by facsimile and by first class mail, postage pre-paid, to plaintiffs' counsel of record, Matthew C. Baltay, Foley Hoag LLP, Seaport West, 155 Seaport Boulevard, Boston, Massachusetts 02210, and John Reinstein, American Civil Liberties Union of Massachusetts, 211 Congress Street, Suite 300, Boston, Massachusetts 02110.

Amy Spector