COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

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.

COMPLAINT

PRELIMINARY STATEMENT

1. This case presents the question of whether Massachusetts provides minor parties that are not recognized as "political parties" under G. L. c. 50, § 1 with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers. This question has arisen in connection with each of the last four presidential elections, and it will continue to arise until a definitive answer is provided by this Court.

2. Unlike recognized political parties which have until the second Tuesday in September to select their presidential and vice-presidential nominees, minor parties are required to list their candidates on nomination papers that typically become available in early February and must be submitted by the end of July. Accordingly, without the right to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers, minor parties are forced to organize their supporters, hold their *national* conventions, and select

their presidential and vice-presidential candidates many months before the major political parties -- or risk forgoing access to the presidential ballot in Massachusetts altogether.

3. Plaintiffs Libertarian Association of Massachusetts ("LAMA")[1] and Libertarian National Committee, Inc. ("LNC") (collectively the "Libertarians") contend that G. L. c. 53, §14 provides minor parties with a means by which to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers. Plaintiffs also contend that Article 9 of the Declaration of Rights of the Constitution of the Commonwealth guarantees minor parties the right to such substitution.

4. However, according to the Secretary of the Commonwealth of Massachusetts ("Secretary"), G. L. c. 53, § 14 does not provide a mechanism for minor party candidate substitution in presidential elections; nor do minor parties have a constitutional right to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers. Rather, the Secretary permits or denies a minor party's request for presidential or vice-presidential candidate substitution at *his sole discretion.*

5. In light of the continuing dispute over the interpretation of G. L. c. 53, § 14 and the applicability of Article 9 of the Declaration of Rights of the Constitution of the Commonwealth, Plaintiffs seek to obtain a judgment declaring that either:

- G. L. c. 53, § 14 applies to presidential elections and provides political organizations and/or minor parties not recognized as "political parties" under G. L. c. 50, § 1 with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers,

or

- 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

[1] In early 2010, the Libertarian Party of Massachusetts ("LPM") changed its name to the Libertarian Association of Massachusetts ("LAMA"). Despite this change in nomenclature, the organization remains the same. Thus, there is a continuity of parties from this action and the District Court action that preceded it. *See infra* Prior History, ¶ 6.

violation of Article 9 of the Declaration of Rights of the Constitution of the Commonwealth.

PRIOR HISTORY

6. The Libertarians encountered issues with ballot access in the 2008 presidential election and filed suit in the United States District Court for the District of Massachusetts seeking an order directing the Secretary to allow them to substitute the presidential and vice-presidential candidates chosen at their national convention for those listed on their nomination papers. The District Court found the Massachusetts substitution statute (G. L. c. 53, § 14) to be unconstitutionally vague, ruled that the right to substitute is guaranteed by the Equal Protection Clause of the United States Constitution, and ordered that the names of the candidates selected at the Libertarian national convention be substituted for those listed on the party's nomination papers and placed on the 2008 Massachusetts presidential ballot. The Secretary complied.

7. On appeal after the election, the United States Court of Appeals for the First Circuit reversed in part, finding that the Equal Protection Clause of the United States Constitution does not guarantee the Libertarians a right of substitution. While the First Circuit also found the meaning of the Massachusetts substitution statute (G. L. c. 53, § 14) to be unclear, the Court abstained from interpreting G. L. c. 53, § 14 pursuant to *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) and stated that Massachusetts courts should be given the first opportunity to clarify the statutory scheme with respect to substitution.

8. Accordingly, the Libertarians now respectfully seek a ruling from this Court declaring that G. L. c. 53, § 14 allows for substitution or, if it does not, then the statutory scheme violates Article 9 of the Declaration of Rights of the Constitution of the Commonwealth. This Court should hear the matter because it presents an issue of great public importance that must be resolved

before the upcoming presidential election. Moreover, the record is fully developed, there are no disputed material facts, and a live dispute remains.

PARTIES

9. Plaintiff Libertarian Association of Massachusetts is an affiliation of Massachusetts voters formed for the purpose of fielding qualified candidates for public office. Behind the Democratic and Republican Parties, the national Libertarian Party is the third largest political party in the United States.

10. Plaintiff Libertarian National Committee, Inc. is a political committee incorporated in Washington, D.C., with its principal offices in Washington, D.C.

11. Defendant William F. Galvin is the Secretary of the Commonwealth of Massachusetts, in which capacity he is responsible for ensuring that officials at the Elections Division act in conformity with the laws of the Commonwealth and the United States.

JURISDICTION

12. This Court has jurisdiction pursuant to G.L. c. 231A as there exists a dispute between the parties over the interpretation and applicability of certain statutes governing the ballot access rights of political organizations and/or minor parties not recognized as "political parties" under G. L. c. 50, § 1.

13. Further, this Court has jurisdiction pursuant to G. L. c. 214, § 1.

STATUTORY FRAMEWORK

Major Party vs. Minor Party Access to the Presidential Ballot in Massachusetts

14. The procedures for gaining access to the presidential ballot in Massachusetts differ significantly for major and minor parties.

15. Massachusetts recognizes as a "political party" any political organization that either (i) enrolled no less than one percent of the total electorate (as measured by registered voters) before

the previous biennial election or (ii) had a candidate for statewide office who garnered at least three percent of the vote in the previous biennial election. G. L c. 50, § 1.

16. Political parties recognized under G. L. c. 50, § 1 (i.e., major parties) identify their presidential and vice-presidential candidates on a form which must be submitted to the Secretary by the second Tuesday in September preceding the election. This submission, in and of itself, qualifies the candidates for listing on the ballot. G. L c. 53, § 8.

17. Political parties *not* recognized under G. L. c. 50, § 1 (i.e., minor parties) must file nomination papers naming their presidential and vice-presidential candidates. G. L. c. 53, §§ 6, 8. Nomination papers, which must be signed by at least 10,000 Massachusetts voters, become available in February of the election year and must be submitted to local canvassing officials twenty-eight days before the last Tuesday in August. G. L. c. 53, §§ 6, 7, 10.

Massachusetts' Statutory Framework is Unclear as to Presidential Candidate Substitution

18. Massachusetts General Laws Chapter 53, Section 14 allows for candidate substitution for those nominated for "state, city or town office" when candidates die, withdraw, or are declared ineligible following nomination.

19. Massachusetts General Laws Chapter 50, Section 1 defines "state officer" as "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."

20. Massachusetts General Laws Chapter 50, Section 1 defines "state election" as "any election at which a national, state, or county officer . . . is to be chosen by the voters."

21. Thus, Massachusetts General Laws Chapter 53, Section 14 allows for candidate substitution for any state, city or town office, including for the office of United States senator and

representative in Congress, but it is unclear whether the statute allows a right of substitution for candidates running for president and vice president of the United States.

The Need for Substitution Presents a Recurring Issue

22. The lack of clear guidance with respect to whether minor parties may substitute the presidential and vice-presidential candidates chosen at their national convention for those listed on state nomination papers causes a real issue in every election cycle. The problem arises because minor parties often begin collecting signatures for the presidential and vice-presidential positions on nomination papers in early February of the election year in order to maximize the amount of time they have to collect the requisite signatures and minimize the cost of doing so. Yet minor parties often do not hold their national conventions until the late spring or summer of the election year when voters are more focused on the election. Substitution is essential to allow the minor parties ballot access.

23. The Secretary, the United States District Court for the District of Massachusetts, and the United States Court of Appeals for the First Circuit have all agreed that the issue of minor party candidate substitution is likely to continue to arise in presidential elections in Massachusetts until the statutory scheme is clarified. *See, e.g., Barr v. Galvin*, 626 F.3d 99, 106 (1st Cir. 2010) ("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.")

FACTS

The facts set forth below are primarily derived from the decision of the United States Court of Appeals for the First Circuit as set forth in the related proceeding at *Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010), attached as Exhibit A. The facts not addressed in the First Circuit's decision are derived from the Plaintiffs' Statement of Undisputed Facts, attached as Exhibit B,

and the Secretary's response thereto, attached as Exhibit C, which were filed with the United States District Court for the District of Massachusetts in connection with summary judgment briefing that took place in the related proceeding.

Massachusetts Has Allowed Substitution in the Past

24. Because of the need for minor party candidate substitution and given the uncertainty in the Massachusetts statute, the Secretary has taken it upon himself to allow minor party candidate substitution in nearly every presidential election in recent history. *See infra*, ¶¶ 25-28.

25. In 1996, the U.S. Taxpayers Party informed the Secretary's Office that it would hold its presidential nominating convention in August 1996, subsequent to the deadline for submitting nomination papers. The U.S. Taxpayers Party sought advice on whether it would be allowed to substitute the presidential and vice-presidential candidates selected at its national convention in August for those listed on its nomination papers. The Secretary, through the Elections Division, stated that:

> Massachusetts law does not clearly provide a procedure for this. The statute governing withdrawals and filling vacancies caused by withdrawals applies only to candidates nominated at state, city or town elections. Generally, vacancies created after the withdrawal of independent candidates are not filled. G.L. ch. 53, § 14. However, to avoid an interpretation of the election laws which burdens the constitutional rights of independent and minor party candidates for President to obtain ballot access, this office has permitted substitution before, and will continue to permit substitution.

See Plaintiffs' Statement of Undisputed Facts at ¶ 15 and Secretary's Response.

26. During the 2000 presidential election, the Secretary's Office was informed that the Reform Party would hold its presidential nominating convention in August 2000, subsequent to the deadline for submitting nomination papers. The Secretary, through the Elections Division, informed the Reform Party that: "In the event the Reform Party obtains ballot access for an individual, and the party subsequently elects a different individual as its presidential candidate at

the party's August 2000 national convention, the Commonwealth will allow the Reform Party to place the successful nominee on the ballot based on such exigent circumstances." *See* Plaintiffs' Statement of Undisputed Facts at ¶ 16 and Secretary's Response.

27. In 2004, Ralph Nader was running as an independent candidate for president and attempting to collect the required number of signatures to appear on the general election ballot. On or about June 25, 2004, approximately one month before the deadline for filing nomination papers, Ralph Nader chose Peter Camejo as his running mate. Camejo's name had not been listed on the nomination papers on which Nader had been collecting signatures. The Secretary was quoted in the *Boston Globe* as saying: "We would find some way, if Nader were to be certified, to substitute Camejo's name. The substitution is not their problem." *See* Plaintiffs' Statement of Undisputed Facts at ¶ 17 and Secretary's Response.

28. The Secretary later told the Nader campaign that substitution of the vice-presidential candidate would not be allowed and a form to request substitution would not be provided. The Secretary stated that the form developed in 2000, when the Reform Party was allowed substitution, would not be applicable to Nader because "the Reform Party was a national party that conducted a national convention at which delegates conducted a nominating process. In Mr. Nader's situation, he is not affiliated with any political party or designation and therefore the form that was previously developed could not be utilized." *See* Plaintiffs' Statement of Undisputed Facts at ¶ 18 and Secretary's Response.

The 2008 Election

29. At the time of the November 2008 general election, neither the Libertarian Party of Massachusetts (LPM)[2] nor the Libertarian National Committee, Inc. (LNC) was recognized as a major "political party" under G. L. c. 50, § 1. *Barr*, 626 F.3d at 102.

30. In 2008, nomination papers became available to minor parties in early February, thereby allowing minor parties to begin collecting the required 10,000 signatures needed to qualify their presidential and vice-presidential candidates for the national ballot. The deadline for submitting signed nomination papers to local canvassing boards was July 29, 2008. *Id.*

31. The Libertarians had scheduled their 2008 national convention for Memorial Day weekend. The Libertarians therefore contacted the Secretary in late 2007 to inquire as to whether they could begin collecting signatures on nomination papers in February and then substitute in the names of the candidates selected at their national convention at the end of May, in the event that the candidates selected at their national convention differed from the candidates listed on their nomination papers. *Id.* at 103.

32. On October 26, 2007, the Elections Division replied: "[i]f the Libertarian Party seeks to substitute a candidate for President who they already got signatures for on nomination papers, our Office can prepare a form that allows members of the party to request the substitution of the candidate." *Id.* at 103 (partial quotation); *see also* Plaintiffs' Statement of Undisputed Facts at ¶ 20 and Secretary's Response (full quotation).

33. In early 2008, the Libertarians began circulating nomination papers listing George Phillies and Chris Bennett, who were actively seeking the Libertarian Party's nomination, as the Libertarian Party's presidential and vice-presidential candidates, respectively. *Id.* at 103.

[2] Plaintiff Libertarian Association of Massachusetts ("LAMA") was known as the Libertarian Party of Massachusetts in 2008 and until early 2010.

34. In late May 2008, at the Libertarian National Convention, Bob Barr and Wayne A. Root were nominated as the Libertarian Party's general election candidates for president and vice president, respectively. Phillies and Bennett competed unsuccessfully for the convention's endorsement. *Id.* at 103.

35. On May 29, 2008, the Libertarians contacted the Secretary to request the substitution form referenced in the Secretary's earlier correspondence. *Id.* at 103.

36. The Secretary replied that it would not permit the substitution of Barr and Root's names for Phillies and Bennett's names on the upcoming general election ballot. *Id.* at 103.

37. When the Libertarians received this decision, they had already collected around 7,000 signatures on the nomination papers listing Phillies and Bennett as the general election candidates. *Id.* at 103. Accordingly, the Libertarians continued to collect signatures on the nomination papers listing Phillies and Bennett as the Libertarian presidential and vice-presidential candidates, while requesting that the Elections Division reconsider its latest position on substitution. *See* Plaintiffs' Statement of Undisputed Facts at ¶ 30. and Secretary's Response.

38. On July 29, 2008, the Libertarians submitted nomination papers with the required number of signatures to the various town clerks, with George Phillies and Chris Bennett listed as the Libertarian candidates. These papers were then certified and submitted to the Secretary, meaning that they met the requirements to list the candidates on the general election ballot. *Barr*, 626 F.3d at 103.

39. On August 6, 2008, Plaintiffs filed suit in the United States District Court for the District of Massachusetts seeking declaratory judgment and injunctive relief to require the Secretary to place the names of Barr and Root as the Libertarian candidates on the Massachusetts

ballot for the 2008 presidential election, which relief was granted. *Barr et al. v. Galvin*, No. 08-cv-11340, Memorandum and Order, at pg. 11 (September 22, 2008).

40. After the November 2008 election and in order to bring the case to closure, the parties filed cross-motions for summary judgment. *Barr*, 626 F.3d at 104.

41. The District Court granted the Libertarians' motion for summary judgment, holding that the Massachusetts substitution statute, G. L. c. 53, § 14, is unconstitutionally vague and violative of the Equal Protection Clause. *Barr et al. v. Galvin*, No. 08-cv-11340, Memorandum and Order, at pg. 8 (September 17, 2009).

42. The Secretary appealed and the First Circuit reversed in part, vacated in part, and remanded the case to the District Court. *Barr*, 626 F.3d 112-113.

43. Although the First Circuit vacated the District Court's decision that G. L. c. 53, § 14 is unconstitutionally vague, the court nonetheless found the statute to be unclear:

> [G. L. c. 53,] 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." . . . [T]he 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.

Id. at 107. Instead of clarifying the meaning of G. L. c. 53, § 14, however, the First Circuit abstained under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) and stated that Massachusetts courts should be given the first opportunity to interpret the statute. *Id.*

44. Plaintiffs then filed a petition for a writ of certiorari with the United States Supreme Court challenging the First Circuit's decision that the Equal Protection Clause of the Fourteenth

Amendment does not require Massachusetts to allow minor parties to substitute the presidential and vice-presidential candidates selected at their conventions for those listed on their nomination papers. Plaintiffs simultaneously filed a motion to defer consideration of their petition pending resolution of the state statutory interpretation question. To expedite matters, Plaintiffs also filed in the United States District Court a Motion to Certify Question to the Massachusetts Supreme Judicial Court Regarding the Interpretation of Mass. Gen. Laws ch. 53, § 14. The District Court denied that motion.

A Live Dispute Remains

45. Nomination papers for the 2012 presidential election become available on February 14, 2012 and must be submitted, with the signatures of 10,000 Massachusetts voters, by July 31, 2012.

46. Plaintiffs maintain that G. L. c. 53, § 14 provides minor parties not recognized as "political parties" under G.L. 50, § 1 with a mechanism to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers.

47. The Secretary maintains that G. L. c. 53, § 14 does not provide minor parties not recognized as "political parties" under G.L. 50, § 1 with a mechanism to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers.

48. Disputes 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. *Barr*, 626 F.3d at 104-105.

49. As the First Circuit concluded, the issues raised by this matter are "capable of repetition" and a live dispute remains with respect to the meaning of the Massachusetts substitution statute and the constitutional questions at issue in this case. *Id.* at 105.

COUNT I

DECLARATORY RELIEF

50. Plaintiffs restate, reallege and incorporate by reference the allegations contained in paragraphs 1 through 49 of the complaint as fully set forth herein.

51. Plaintiffs assert that there exists a controversy which cannot be eliminated without the intervention of the Court to establish and declare the respective rights of the parties.

52. Plaintiffs assert that political organizations and/or minor parties not recognized as "political parties" under Mass. Gen. Laws ch. 50, § 1 must be provided a mechanism to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers.

53. Plaintiffs assert that G. L. c. 53, § 14 can be interpreted to provide such a mechanism.

54. A declaratory judgment is necessary to remove, and to afford relief from, uncertainty and insecurity with respect to the rights, duties, status and legal relations of political organizations and/or minor parties not recognized as "political parties" under Mass. Gen. Laws ch. 50, § 1, including the Libertarian Association of Massachusetts and the Libertarian National Committee, Inc.

55. This Court should issue a declaratory judgment that G. L. c. 53, § 14 applies to presidential elections and provides political organizations and/or minor parties not recognized as "political parties" under G. L. c. 50, § 1 with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers.

COUNT II

VIOLATION OF ARTICLE 9 OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS

56. Plaintiffs restate, reallege and incorporate by reference the allegations contained in paragraphs 1 through 55 of the complaint as fully set forth herein.

57. Plaintiffs further assert that if this Court finds that G. L. c. 53, § 14 does not provide minor parties not recognized as "political parties" under G. L. c. 50, § 1 with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers, then the Massachusetts statutory scheme addressing the ballot access rights of such minor parties violates Article 9 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

COUNT III

GENERAL LAWS CHAPTER 53, SECTION 14 IS UNCONSTITUTIONALLY VAGUE

58. Plaintiffs restate, reallege and incorporate by reference the allegations contained in paragraphs 1 through 57 of the complaint as fully set forth herein.

59. Should the Court be unable to determine the meaning of G.L. c. 53, § 14, Plaintiffs assert that G. L. c. 53, § 14 is unconstitutionally vague as the statute allows Defendant to exercise unreviewable discretion in determining whether to permit or deny a minor party's request to substitute the presidential and vice-presidential candidates chosen at its convention for those listed on its nomination papers.

60. Plaintiffs further state a claim under 42 U.S.C. § 1983 in that Defendant's discretionary determinations, under color of G. L. c. 53, § 14, impair Plaintiffs' constitutional rights to associate politically, including their "constitutional right . . . to create and develop [a] new political party." *Norman v. Reed*, 502 U.S. 279, 288 (1992).

OTHER AVERMENTS

61. Plaintiffs state a claim for attorney's fees and costs under 42 U.S.C. § 1988.

REQUEST FOR RELIEF

62. Wherefore, the plaintiffs respectfully request that the Court:

a. Enter a judgment declaring that G. L. c. 53, § 14 applies to presidential elections and provides political organizations and/or minor parties not recognized as "political parties" under G. L. c. 50, § 1 with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers; or

b. Enter a judgment declaring that the Massachusetts statutory scheme addressing the ballot access rights of political organizations and/or minor parties not recognized as "political parties" under G. L. c. 50, § 1 violates Article 9 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts by failing to provide such political organizations and/or minor parties with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers.

ADDITIONAL REQUESTS

63. Plaintiffs further request reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988 and any other relief that this Court deems just and proper.

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

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Dated: August 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complaint was served by hand on August 12, 2011 on the following counsel of record:

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EXHIBIT A

H

United States Court of Appeals,
First Circuit.
Bob **BARR** et al., Plaintiffs, Appellees,
v.
William F. **GALVIN**, in his Official Capacity as Secretary of the Commonwealth of Massachusetts, Defendant, Appellant.

No. 09–2426.
Heard Sept. 15, 2010.
Decided Nov. 16, 2010.

Background: Political party that was not recognized in Massachusetts brought action seeking placement of its presidential and vice presidential candidates on statewide ballot for general election. The United States District Court for the District of Massachusetts, Nathaniel M. Gorton, J., 659 F.Supp.2d 225, entered judgment in favor of plaintiff, and appeal was taken.

Holdings: The Court of Appeals, Selya, Circuit Judge, held that:
(1) action was not moot;
(2) *Pullman* abstention was warranted with regard to whether Massachusetts statute governing substitution of certain classes of candidates on the ballot was void for vagueness; and
(3) ballot access restrictions as interpreted to preclude substitution of unrecognized party's candidates for president and vice-president did not violate equal protection.

Reversed in part, vacated in part, and remanded.

West Headnotes

[1] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases

When an intervening event strips the parties of any legally cognizable interest in the outcome, a case, once live, is rendered moot and, thus, nonjusticiable. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases

Litigants cannot confer jurisdiction over a moot case by acquiescence or consent.

[3] Federal Courts 170B ⚿723.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(I) Dismissal, Withdrawal or Abandonment
170Bk723 Want of Actual Controversy
170Bk723.1 k. In general. Most Cited Cases

If an appellate court finds that the issues presented have become moot, it must dismiss the appeal.

[4] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In general. Most Cited Cases

In determining whether there is a reasonable expectation that the same complaining party will be

subject to the same action again, as required for the "capable of repetition, yet evading review" exception to the mootness doctrine to apply, 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.

[5] Federal Courts 170B ⚿13.20

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.20 k. Elections and officers. Most Cited Cases

"Capable of repetition, yet evading review" exception to mootness doctrine applied to political party's challenge to constitutionality of Massachusetts statute that prevented it, as an unrecognized party in Massachusetts, from substituting its nominated candidates for president and vice-president on statewide general election ballot; although the election had been held and the party had gained recognition in Massachusetts, it was possible the party would lose its recognized party status in the next election, giving it a reasonable expectation of being in a position to complain about the lack of a substitution mechanism in future elections. U.S.C.A. Const. Art. 3, § 2, cl. 1; M.G.L.A. c. 53, § 14.

[6] Federal Courts 170B ⚿52

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk47 Particular Cases and Subjects, Abstention
170Bk52 k. Elections and voting rights. Most Cited Cases

Pullman abstention was warranted in action challenging, on vagueness grounds, constitutionality of Massachusetts statute governing substitution of certain classes of candidates on the ballot; although statute was unclear as to whether it applied to substitution of presidential and vice-presidential candidates by a political party that was not recognized in Massachusetts, it could be clarified by judicial interpretation in state courts before the next general election. M.G.L.A. c. 53, § 14.

[7] Federal Courts 170B ⚿43

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk43 k. Questions of state or foreign law involved. Most Cited Cases

" *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.

[8] Statutes 361 ⚿47

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and definiteness. Most Cited Cases

The mere fact that a statute requires interpretation does not necessarily render it void for vagueness.

[9] Constitutional Law 92 ⚿3653

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3651 Conduct of Elections
92k3653 k. Ballot access. Most Cited Cases

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. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 ⚿3635

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3635 k. In general. Most Cited Cases

Constitutional Law 92 ⚿3636

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3636 k. Political parties in general. Most Cited Cases

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. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ⚿3039

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3039 k. In general. Most Cited Cases

Statutes create many classifications which do not deny equal protection; it is only invidious discrimination which offends the Constitution. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 ⚿3653

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3651 Conduct of Elections
92k3653 k. Ballot access. Most Cited Cases

When the burden imposed by a ballot access regulation is heavy, the provision must be narrowly tailored to promote a compelling state interest in order to satisfy equal protection; reasonable, nondiscriminatory restrictions, however, need be justified only by legitimate regulatory interests. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ⚿3653

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3651 Conduct of Elections
92k3653 k. Ballot access. Most Cited Cases

Court evaluating an equal protection challenge to a state ballot access regulation must conduct its inquiry by weighing the character and magnitude of the asserted injury to the complaining party's constitutional rights and evaluating the precise interests put forward by the State as justifications for the burden imposed. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 92 ⚿3653

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3651 Conduct of Elections
92k3653 k. Ballot access. Most Cited Cases

Massachusetts ballot access restrictions governing qualification of a political organization as a recognized political party were nondiscriminatory, and thus were only required to be supported by rational basis to satisfy equal protection; all political organizations were subject to the same criteria for determining whether they qualified for recognition, either based on success in prior elections or through enrollment of at least one percent of registered voters. U.S.C.A. Const.Amend. 14; M.G.L.A. c. 50, § 1.

[15] Constitutional Law 92 ⚿3653

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)9 Elections, Voting, and Political Rights
92k3651 Conduct of Elections
92k3653 k. Ballot access. Most Cited Cases

Elections 144 ⚿21

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k20 Power to Regulate Nominations and Ballots
144k21 k. In general. Most Cited Cases

Massachusetts ballot access restrictions governing qualification of a political organization as a recognized political party, as interpreted to preclude substitution of unrecognized organization's candidates for president and vice-president, were supported by a rational basis, as required by equal protection; substantial support requirements protected integrity of elections by avoiding overloaded ballots and frivolous candidacies, and that interest was advanced by refusal to grant to non-party candidates the right to substitution in circumvention of the state's signature requirements. U.S.C.A. Const.Amend. 14; M.G.L.A. c. 50, § 1.

[16] Elections 144 ⚿22

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k20 Power to Regulate Nominations and Ballots
144k22 k. Official ballots. Most Cited Cases

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.

West Codenotes
Negative Treatment VacatedM.G.L.A. c. 53, § 14

***101** 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.

Before BOUDIN, RIPPLE,[FN*] and SELYA, Circuit Judges.

FN* 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.[FN1] 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.

> FN1. 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.

After careful consideration, we find that a live dispute remains. With respect to that dispute, we conclude that the Equal Protection Clause does not 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* ***102** 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.[FN2]

> FN2. 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.

***103** 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 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 ***104** 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.*

[1] The Constitution "confines the jurisdiction of the federal courts to actual cases and controversies." *ConnectU LLC v. Zuckerberg*, 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, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (per curiam); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116, 40 S.Ct. 448, 64 L.Ed. 808 (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, 93 S.Ct. 705, 35 L.Ed.2d 147 (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.

[2][3] 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, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); ***105***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, 120 S.Ct. 1382, 146 L.Ed.2d 265 (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, 31 S.Ct. 279, 55 L.Ed. 310 (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, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *Moore v. Ogilvie,* 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), not every election case fits within its four corners.

[4] 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, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (quoting *Spencer v. Kemna,* 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (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, 127 S.Ct. 2652 (quoting *Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (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., Int'l Org. of Masters, Mates & Pilots v. Brown,* 498 U.S. 466, 473, 111 S.Ct. 880, 112 L.Ed.2d 991 (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, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *see also Sosna v. Iowa,* 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532 (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" ***106** showing. *See, e.g., Davis v. FEC,* 554

U.S. 724, 128 S.Ct. 2759, 2769–70, 171 L.Ed.2d 737 (2008); *Wis. Right to Life,* 551 U.S. at 462, 127 S.Ct. 2652; *see also Norman v. Reed,* 502 U.S. 279, 287–88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992). We therefore abide by the "same complaining party" requirement here.

[5] 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, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Moore,* 394 U.S. at 816, 89 S.Ct. 1493. 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.

[6] **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 ***107** 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, 96 S.Ct. 1236, 47 L.Ed.2d 483 (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, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975); *accord Baggett v. Bullitt,* 377 U.S. 360, 377–78, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). We believe that *Pullman* abstention is appropriate in this case.

[7] *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, 61 S.Ct. 643, 85 L.Ed. 971 (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." ***108** *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, 99 S.Ct. 2301, 60 L.Ed.2d 895 (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, 88 S.Ct. 391, 19 L.Ed.2d 444 (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, 99 S.Ct. 2301 (quoting *Baggett,* 377 U.S. at 378, 84 S.Ct. 1316). 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, 95 S.Ct. 870.

[8] 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.[FN3]

> FN3. 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 (5th 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).

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, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). Some substantial regulation of elections is necessary, however, to ensure that they are fair, honest, and orderly. *See, e.g., id.* ***109** (citing *Storer*, 415 U.S. at 730, 94 S.Ct. 1274).

[9] 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).

[10][11] 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, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963)); *see also Clements v. Fashing*, 457 U.S. 957, 967, 102 S.Ct. 2836, 73 L.Ed.2d 508 (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,* 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955))).

[12][13] 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, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *Burdick v. Takushi,* 504 U.S. 428, 432–34, 112 S.Ct. 2059, 119 L.Ed.2d 245 (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, 117 S.Ct. 1364. 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, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)); *see also Libertarian Party of Me.,* 992 F.2d at 370.

[14] 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 ***110** 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, 94 S.Ct. 1296). 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,[FN4] that methodology constitutes an appropriate screen. *Cf. Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (approving provision requiring prospective candidate to obtain signatures from five percent of eligible voters).

> FN4. The appellees do not challenge the reasonableness of the number of enrolled voters required under Massachusetts law.

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 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, 94 S.Ct. 1296 (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, 102 S.Ct. 2836, the regime challenged here clearly had no such effect.

[15] 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, 117 S.Ct. 1364.

***111** [16] 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, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986); *Anderson*, 460 U.S. at 788–89, 103 S.Ct. 1564; *Am. Party of Tex.*, 415 U.S. at 782, 94 S.Ct. 1296; *Jenness*, 403 U.S. at 442, 91 S.Ct. 1970. 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, 91 S.Ct. 1970 ("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 trav-

elled 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*112 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, 118 S.Ct. 978 (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-à-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.[FN5]

> FN5. 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.

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. Hernández Colón,* 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 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 ***113** 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.

C.A.1 (Mass.),2010.
Barr v. Galvin
626 F.3d 99

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EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BOB BARR, WAYNE A. ROOT, LIBERTARIAN PARTY OF MASSACHUSETTS, and LIBERTARIAN NATIONAL COMMITTEE, INC., Plaintiffs, v. WILLIAM F. GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts, Defendant.	Case No.: 1:08-cv-11340-NMG

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Bob Barr, Wayne A. Root, Libertarian Party of Massachusetts ("LPM"), and Libertarian National Committee, Inc. ("LNC") (collectively, "Plaintiffs") hereby submit this memorandum of law in support of their motion for summary judgment. Plaintiffs seek a declaratory judgment that the Secretary's refusal to allow Plaintiffs to substitute their general election candidates for the candidates listed on the nominating petition they circulated violates Plaintiffs' constitutional rights. Prior to the 2008 election, this Court granted Plaintiffs' request for a preliminary injunction and ordered the Secretary to make the requested candidate substitution. *See* Mem. and Order on Prelim. Inj. Mot. (Ex. A.) Nothing has changed since the preliminary injunction stage. Massachusetts General Laws chapter 53, section 14 is unconstitutionally vague as to its application and allows the Secretary to exert unconstitutional, unfettered discretion. Candidate substitution of the type requested by Plaintiffs is required by the U.S. Constitution for parties in similar circumstances as Plaintiffs were in 2008. Election rights

are of unique constitutional importance, and Plaintiffs' rights as members of a minor political party must not be trumped. For these reasons and others detailed below, summary judgment should be entered for Plaintiffs.

Statement of Undisputed Facts

Pursuant to Local Rule 56.1, Plaintiffs state the following as grounds for their motion:

1. Plaintiffs LPM and LNC are organizations seeking ballot access for Libertarian Party candidates for public office. Plaintiffs LPM and LNC sought to place Plaintiffs Barr and Root on the 2008 Massachusetts general election ballot as candidates for President and Vice President of the United States of America, respectively. (Affidavit of Dr. George Phillies (hereinafter "Phillies Aff.") ¶¶ 16-17, attached as Ex. B.)

2. Political parties whose candidates secure three percent of the votes in a statewide election automatically qualify for ballot access for their presidential and vice presidential candidates in the following election. Mass. Gen. Laws ch. 50, § 1; Mass. Gen. Laws ch. 53, § 1.

3. Political parties that do not secure the required three percent of votes are termed "political designations" in Massachusetts, and they must employ a nominating petition process in order to obtain ballot access for their presidential and vice presidential candidates. Mass. Gen. Laws ch. 53, § 6.

4. Presidential and vice presidential candidates from political designations who file a certified nominating petition, signed by ten thousand Massachusetts voters, may have their names listed on the general election ballot. Mass. Gen. Laws ch. 53, § 6.

5. The petition and signatures must be filed with the various town election clerks of the Commonwealth by a deadline set by Massachusetts General Laws chapter 53, section 7. For the 2008 election, that deadline was July 29, 2008. The town clerks then certify the signatures and

file the nominating petition with the Secretary of the Commonwealth, who ensures the candidates are placed on the ballot. Mass. Gen. Laws ch. 53, § 10.

6. The Libertarian Party was considered a political designation for the 2008 election and therefore had to employ the nominating petition process in order to obtain ballot access for its presidential and vice presidential candidates. Mass. Gen. Laws ch. 50, § 1; Mass. Gen. Laws ch. 53, § 1; Mass. Gen. Laws ch. 53, § 6.

7. For the 2008 election, the Libertarian Party's national nominating convention ("Libertarian National Convention" or "convention"), where the party's candidates for president and vice president would be selected, was scheduled for May 22-26, 2008. (Phillies Aff. ¶ 4.)

8. The LNC and LPM wanted to begin circulating a nominating petition for signatures in Massachusetts early in 2008, before the convention, so as to ensure enough time to collect the required signatures. (Phillies Aff. ¶ 5.)

9. Pursuant to Massachusetts General Laws chapter 53, section 8, "the surnames of the candidates for president and vice president of the United States shall be added to the [nominating petition]" and "this information . . . 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."

10. Given the crowded field of candidates vying for the Libertarian presidential nomination, the LPM and LNC believed that the candidates on a nominating petition circulated before the convention might differ from the actual general election candidates selected at the convention. For this reason, the LPM and LNC needed to know whether it would be possible to substitute, on the general election ballot, the candidates nominated at the Libertarian National Convention for

the candidates listed on the nominating petition, should such a substitution prove necessary. (Phillies Aff. ¶ 6.)

11. Massachusetts General Laws chapter 53, section 14 sets forth a process for substitution of candidates "nominated for a state, city or town office."

12. Massachusetts General Laws chapter 50, section 1 defines "state officer" as "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."

13. Massachusetts General Laws chapter 50, section 1 defines "state election" as "any election at which a national, state, or county officer . . . is to be chosen by the voters."

14. Interpreting these provisions of Massachusetts law, the Elections Division of the Secretary's office has on at least three occasions previous to 2008 allowed presidential and vice presidential candidate substitution for political designations. *See* Letter from Robin E. Hall, Legal Counsel, Elections Division, to Richard Winger, Founder, Coalition on Free and Open Elections (Sept. 26, 1995) (Ex. C); Letter from Lauren F. Goldberg, Legal Counsel, Elections Division to Daron H. Libby, Chair, National Ballot Access Committee (Mar. 30, 2000) (Ex. D); Frank Phillips, *Nader Effort to Gain Mass. Ballot Access is in Doubt*, Boston Globe, Aug. 6, 2004, *available at* http://www.boston.com/news/local/articles/ 2004/08/06/nader_effort_to_gain_mass_ballot_access_is_in_doubt/ (Ex. E).[1]

15. In 1996, the U.S. Taxpayers Party planned to hold its convention in August, subsequent to the deadline for submitting nominating petitions, and therefore sought advice on whether it would be allowed to substitute its national candidates for the ones listed on its nominating petition, if

[1] The truth and accuracy of all exhibits is attested to in the attached affidavits of George Phillies (Ex. B) and Amrish V. Wadhera (Ex. K).

necessary. The Elections Division stated that "Massachusetts law does not clearly provide a procedure for this. The statute governing withdrawals and filling vacancies caused by withdrawals applies only to candidates nominated at state, city or town elections. Generally, vacancies created after the withdrawal of independent candidates are not filled. G.L. ch. 53, § 14. However, to avoid an interpretation of the election laws which burdens the constitutional rights of independent and minor party candidates for President to obtain ballot access, this office has permitted substitution before, and will continue to permit substitution." (Ex. C.) The Elections Division cited *Anderson v. Firestone*, 499 F. Supp. 1027 (N.D. Fla. 1980), as a basis for its position. *Id.*

16. In 2000, the Reform Party planned to hold its national nominating convention in August, subsequent to the deadline for submitting a nominating petition. The Elections Division told the Reform Party that "[i]n the event the Reform Party obtains ballot access for an individual, and the party subsequently elects a different individual as its presidential candidate at the party's August 2000 national convention, the Commonwealth will allow the Reform Party to place the successful nominee on the ballot based on such exigent circumstances." (Ex. D.)

17. In 2004, Ralph Nader was running as an independent candidate and attempting to collect the required number of signatures to appear on the general election ballot. Nader officially chose Peter Camejo to be his running mate on June 25, 2004, approximately one month before the deadline for filing the required signatures. Camejo's name had not been listed on the petition on which Nader had been collecting signatures. The Secretary was quoted in the *Boston Globe* as saying "[w]e would find some way, if Nader were to be certified, to substitute Camejo's name. The substitution is not their problem." (Ex. E.)

18. The Secretary later told the Nader campaign that substitution of the vice presidential candidate would not be allowed and a form to request substitution would not be provided. The

Secretary stated that the form developed in 2000, when the Reform Party was allowed substitution, would not be applicable to Nader because "the Reform Party was a national party that conducted a national convention at which delegates conducted a nominating process. In Mr. Nader's situation, he is not affiliated with any political party or designation and therefore the form that was previously developed could not be utilized." Email from Michelle Tassinari, Legal Counsel, Elections Division, to Mike Richardson, Ballot Access Coordinator, Nader 2004 Presidential Campaign (Aug. 5, 2004). (Ex. F.)

19. In order to determine whether substitution would be allowed for Plaintiffs in the 2008 election, a representative of the LPM contacted an attorney with the Elections Division of the Secretary's office in late 2007 to inquire whether it would be possible to substitute, on the general election ballot, the actual candidates chosen at the Libertarian National Convention for the candidates listed on a nominating petition circulated before the convention, should such a substitution prove necessary. (Phillies Aff. ¶ 6.)

20. Specifically, this email stated that the LPM and LNC "expect to be able to collect signatures beginning in February [2008], but our party convention is not until Memorial Day weekend. We could collect signatures for a candidate, but if that candidate lost at our national convention, could we replace her on the nominating papers?" Email from George Phillies, Chair, Libertarian Party of Massachusetts, to Kristen Green, Attorney, Elections Division (July 31, 2007). (Ex. G.)

21. On October 26, 2007, the Elections Division replied via email to the LPM's inquiry, stating that "[i]f the Libertarian Party seeks to substitute a candidate for President who they already got signatures for on nominating papers, our Office can prepare a form that allows members of the party to request the substitution of the candidate." Email from Kristen Green,

Attorney, Elections Division to George Phillies, Chair, Libertarian Party of Massachusetts (Oct. 26, 2007). (Ex. G.)

22. Based on the advice of the Elections Division, the LPM and the LNC began circulating a nominating petition listing George Phillies as the Libertarian Party's presidential candidate and Chris Bennett as the vice presidential candidate in early 2008. (Phillies Aff. ¶ 10.)

23. Phillies and Bennett were actively seeking the Libertarian Party's nomination. The LNC, LPM, and the Phillies 2008 campaign collectively spent over $40,000 collecting signatures on the Phillies/Bennett nominating petition in Massachusetts, and Phillies raised over $219,000 nationally for his campaign. (Phillies Aff. ¶¶ 11-15.)

24. On May 25, 2008, at the Libertarian National Convention in Denver, Colorado, Bob Barr and Wayne A. Root were nominated to serve as the Libertarian Party's general election candidates for president and vice president, respectively. Both Barr and Root accepted the nominations. Phillies finished in fifth place at the nominating convention. (Phillies Aff. ¶ 16.)

25. On May 29, 2008, a representative of the LPM contacted the Elections Division via email, stating that, as Plaintiffs had anticipated might be the case, the candidates chosen at the convention were different from the candidates on the nominating petition. The LPM requested the substitution form alluded to in earlier correspondence. Email from George Phillies, Chair, Libertarian Party of Massachusetts, to Kristen Green, Attorney, Elections Division (May 29, 2008). (Ex. H.)

26. On June 5, 2008, the Elections Division replied to the LPM via email with a letter indicating that it would not permit the substitution of Barr and Root's names for Phillies and Bennett's names on the upcoming general election ballot. Letter from Kristen Green, Attorney, Elections Division, to George Phillies, Chair, Libertarian Party of Massachusetts (June 5, 2008). (Ex. I.)

27. The Elections Division stated two reasons for its refusal to allow substitution or provide a form allowing the LPM to request substitution: (1) that Phillies and Bennett were mere "'stand-ins' and not actually seeking the party's nomination;" and (2) that "the party has almost 2 months to obtain the requisite number of signatures" on a new nominating petition listing Barr and Root as the candidates. *Id.*

28. The Elections Division at no time provided Plaintiffs with a "form that allows members of the party to request the substitution of the candidate," as described in the Elections Division's October 2007 email to the LPM. (Ex. G.)

29. When the LPM and LNC received this decision, they had already collected approximately 7,000 signatures on the nominating petition listing Phillies and Bennett as the general election candidates. (Phillies Aff. ¶ 23.)

30. The LPM and LNC did not have sufficient time or financial resources to abandon the signatures collected on the Phillies/Bennett nominating petition and start a new petition process. Abandoning the Phillies/Bennett nominating petition short of 10,000 signatures and collecting signatures on a Barr/Root nominating petition that fell short of the required 10,000 signatures would mean that no Libertarian candidates would appear on the general election ballot. As such, the LPM and LNC continued to collect signatures on the nominating petition listing Phillies and Bennett as the Libertarian presidential and vice presidential candidates, while continuing to communicate with the Elections Division regarding reconsideration of its latest decision on substitution. (Phillies Aff. ¶ 23.)

31. On July 29, 2008, the LPM and LNC submitted nomination papers with the required number of signatures to the various town clerks, with George Phillies and Chris Bennett listed as the Libertarian general election candidates. These papers were subsequently certified and

submitted to the Secretary, meaning that Phillies and Bennett met the requirements to appear, and would have appeared, on the general election ballot. (Phillies Aff. ¶ 14.)

Procedural Posture

On August 6, 2008, after repeated attempts to persuade the Elections Division to reconsider its decision not to permit substitution had failed, the LNC, LPM, Barr, and Root filed the instant action for declaratory and injunctive relief. On September 12, 2008, this Court heard oral arguments from the parties regarding Plaintiffs' request for a preliminary injunction directing the Secretary to substitute the names of Barr and Root for those of Phillies and Bennett on the November ballot. On September 22, 2008, the Court granted Plaintiffs' request for a preliminary injunction, ordering the Secretary to make the requested substitution. *See* Mem. and Order on Prelim. Inj. Mot. (Ex. A.) The Secretary complied with the Court's order.[2] The parties have conducted no discovery since then.

Summary Judgment Standard

Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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); *Carroll v. Xerox Corp.*, 294 F.3d 231, 236-37 (1st Cir. 2002). The fact that the Secretary and Plaintiffs both move for summary judgment "does not

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[2] As an initial matter, it should be noted that although the 2008 election is in the past, "because there [is] a strong probability that these candidates would find themselves frustrated by the same [ballot access] requirement in the next election," this case is not moot. *See, e.g., Gjertsen v. Board of Election Commissioners*, 791 F.2d 472, 475 (7th Cir. 1986). In *Gjertsen*, the plaintiff candidates challenged the constitutionality of an Illinois ballot access requirement and successfully moved for preliminary injunctive relief. Following the election, the plaintiffs successfully moved for summary judgment on their claims that the ballot access requirement violated the plaintiffs' rights under the U.S. Constitution. The defendant then appealed. A similar procedural approach is appropriate here. *See also Gjertsen v. Board of Election Commissioners*, 751 F.2d 199, 202 (7th Cir. 1984) (an earlier proceeding in which the Court explained that, post-election, the underlying case was not moot and summary judgment proceedings were appropriate because "plaintiffs will be in the same position three and a half years from now as they were last [year] – trying to collect signatures on their nominating petitions [and] frustrated by what they contend is an unconstitutional law.").

substitute their general election candidates for the candidates listed on the nominating petition they circulated violates the U.S. Constitution.

Respectfully submitted,

BOB BARR, WAYNE A. ROOT, THE LIBERTARIAN PARTY OF MASSACHUSETTS, and THE LIBERTARIAN NATIONAL COMMITTEE, INC.,

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Dated: March 31, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies shall be served by first class mail postage prepaid on all counsel who are not served through the CM/ECF system on March 31, 2009.

/s/ Matthew C. Baltay
Matthew C. Baltay

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOB BARR, et al., Plaintiffs, v. WILLIAM F. GALVIN, as he is SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, Defendant.	CIVIL ACTION NO. 08-11340-NMG

SECRETARY'S RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 56.1, defendant William F. Galvin, Secretary of the Commonwealth ("Secretary") responds to Plaintiffs' Statement of Undisputed Facts ("Plaintiffs' Statement") as follows.

1. The Secretary disputes the assertions set forth in the first sentence of paragraph 1 of Plaintiffs' Statement to the extent that the sentence refers to "Libertarian Party" candidates and the "LPM" (an abbreviation for "Libertarian Party of Massachusetts"), insofar as the "Libertarian Party" or the "Libertarian Party of Massachusetts" was not a "political party" recognized under Massachusetts law, following the 2006 election and up to the time of the November 2008 election. Affidavit of Michelle K. Tassinari in Support of Secretary's Motion for Summary Judgment ("Tassinari Affidavit") ¶ 5. In order to avoid repetition of the foregoing statement, reflecting that the Secretary disputes the plaintiffs' characterization of the Libertarians as a "party," the Secretary incorporates by reference the foregoing statement in paragraphs 6-8, 10, and 19-31 below, in response to all the other instances in which plaintiffs refer to either the "Libertarian Party," the "Libertarian Party of Massachusetts," or the "LPM." In response to the

second sentence, the Secretary does not dispute that plaintiffs sought to place the names of Barr and Root on the November 2008 ballot but notes that the candidates on the ballot are candidates for presidential electors rather than candidates for President and Vice President.

2-6. With the exception of one sentence in paragraph 5, concerning the deadline for submission of nominating papers in 2008, the statements in paragraphs 2 through 6 constitute characterizations of the legal requirements set forth in Mass. G.L. c. 50, § 1, Mass. G.L. c. 53, § 1, and Mass. G.L. c. 53, §§ 6-7, and 10, rather than statements of material fact. To the extent that any response to those statements may be required, the Secretary states that the cited statutory provisions speak for themselves. In further response, the Secretary does not dispute the statement in the second sentence of paragraph 5, namely, that in 2008, the deadline for non-party candidates to submit nominating papers to local election officials was July 29. Tassinari Affidavit ¶ 7. The Secretary further notes that, contrary to the third sentence in paragraph 5, it is not the local election officials but rather the candidates or their supporters who file certified nominating papers with the Secretary; however, there is no material dispute between the parties on this point.

7. The Secretary does not dispute the statements in paragraph 7.

8. Because the question of whether plaintiffs had "enough time" to collect signatures presents a question of law rather than a question of fact, the assertion in paragraph 8 that circulation of nominating papers in early 2008 would "ensure enough time to collect the required signatures" constitutes an argument rather than a statement of material fact. To the extent that plaintiffs are asserting what, as a factual matter, constituted "enough time" for Massachusetts political organizations to gather 10,000 signatures, the Secretary disputes the assertion that circulation of nominating papers in early 2008 was necessary to "ensure enough time to collect

the required signatures," because other non-party candidates as well as initiative petitioners have obtained the required number of signatures (10,000 or more) to obtain ballot access, including a non-party presidential candidate in November 2008 whose supporters collected signatures in less than the 65-day period that plaintiffs had to collect signatures in support of Barr and Root. Tassinari Affidavit ¶¶ 20-25. To the extent that plaintiffs are asserting what, as a factual matter, constituted "enough time" for them (as opposed to other Massachusetts political organizations) to gather 10,000 signatures, the Secretary has no basis (other than comparisons with other Massachusetts political organizations) to dispute the assertion that starting early in 2008 was necessary to "ensure enough time," but the Secretary asserts that what would have been "enough time" for plaintiffs, based on their own particular group's membership, organizational discipline, and resources, is not material. In further response, the Secretary states that while he has no basis to dispute the statement that the LNC and LPM "wanted" to begin signature-gathering in early 2008, that assertion is not material to any issues presented in the summary judgment motions.

9. The statements in paragraph 9 constitute characterizations of the legal requirements set forth in Mass. G.L. c. 53, § 8, rather than statements of fact but, to the extent that any response may be required, the Secretary states that the cited statutory provision speaks for itself.

10. The first sentence of paragraph 10, concerning what the LPM and LNC "believed" in connection with the identity of candidates to be selected at the "Libertarian" convention, is not material to any issues presented in the summary judgment motions. To the extent that in the second sentence plaintiffs intend to assert that they "wished" to learn whether "substitution" was permissible, the Secretary has no basis to dispute the assertion.

11-13. The statements in paragraphs 11-13 constitute characterizations of Mass. G.L. c. 53, § 14, and Mass. G.L. c. 50, § 1, rather than statements of material fact but, to the extent that

any response may be necessary, the Secretary states that the cited statutory provisions speak for themselves.

14. The Secretary disputes the assertions set forth in paragraph 14, as the Secretary has allowed "substitution" on only one of the three occasions referred to in paragraph 14, as detailed more fully in paragraphs 15-18 below.

15. The Secretary does not dispute that the Secretary's Office sent the letter cited in the paragraph 15 and that paragraph 15 accurately quotes the letter. Exhibit C to Plaintiffs' Summary Judgment Memorandum. In response to the statement that the U.S. Taxpayer's Party "planned to hold its convention in August [1996]," the Secretary notes that the Secretary's letter does not reflect what the U.S. Taxpayer Party "planned" but only reflects that the Secretary's Office was informed by Richard Winger that the U.S. Taxpayers Party would hold its presidential nominating convention in August 1996.

16. The Secretary does not dispute that the Secretary's Office sent the letter cited in paragraph 16 and that paragraph 16 accurately quotes the letter. Exhibit D to Plaintiffs' Summary Judgment Memorandum. The Secretary disputes the assertions in paragraph 16 only to the extent that the cited letter does not reflect that the Reform Party "planned to hold its national nominating convention in August" but only reflects that the Secretary's Office was informed that the Reform Party would hold its presidential nominating convention in August 2000.

17. The Secretary does not dispute the assertions in the first, third, and fourth sentences of paragraph 17. The Secretary does not dispute the assertion in the second sentence of paragraph 17 to the extent it asserts that on or before June 25, 2004, Ralph Nader chose Peter Camejo as his running mater.

18. The Secretary does not dispute the assertions in paragraph 18.

19. The Secretary does not dispute the assertions in paragraph 19.

20. The Secretary does not dispute the assertions in paragraph 20.

21. The Secretary does not dispute the assertions in paragraph 21 except to note that the e-mail quoted in paragraph 21 contains the phrase "nomination papers" rather than "nominating papers" as asserted.

22. The Secretary disputes that the Elections Division provided "advice," noting that the e-mail indirectly referred to in paragraph 22 was from a staff attorney at the Elections Division, but the Secretary otherwise does not dispute the assertions of paragraph 22.

23. The Secretary disputes the assertion in the first sentence of paragraph 23, insofar as George Phillies, in an email dated May 29, 2008, referred to candidates listed on the Libertarians' nominating papers as "stand-ins." See Exhibit H to Plaintiffs' Summary Judgment Memorandum. The Secretary has no basis to dispute the assertions in the second sentence, concerning the amount expended by plaintiffs LPM and LNC and candidate Phillies to gather signatures in support of Phillies/Bennett, and concerning the amount raised by Phillies for his campaign, but those assertions are not material to any issues presented in the summary judgment motions.

24. The Secretary does not dispute the assertions in paragraph 24.

25. The Secretary does not dispute the assertions in paragraph 25.

26. The Secretary does not dispute the assertions in paragraph 26.

27. The Secretary does not dispute the assertions in paragraph 27.

28. The Secretary does not dispute the assertions in paragraph 28.

29. The Secretary does not dispute the assertions in paragraph 29.

30. Because the question of whether plaintiffs had "sufficient time" to collect signatures in support of Barr and Root presents a question of law rather than a question of fact, the assertion in the first sentence of paragraph 30 that the LPM and LNC did not have "sufficient time" constitutes an argument rather than a statement of material fact. To the extent that plaintiffs are asserting what, as a factual matter, constituted "sufficient time" for Massachusetts political organizations to gather 10,000 signatures, the Secretary disputes the assertion that plaintiffs did not have "sufficient time" to gather signatures in support of Barr and Root, because other non-party candidates as well as initiative petitioners have obtained the required number of signatures (10,000 or more) to obtain ballot access, including a non-party presidential candidate in November 2008 whose supporters collected signatures in less than the 65-day period that plaintiffs had to collect signatures in support of Barr and Root. Tassinari Affidavit ¶¶ 20-25. To the extent that plaintiffs are asserting what, as a factual matter, constituted "sufficient time" for them (as opposed to other Massachusetts political organizations) to gather 10,000 signatures, the Secretary has no basis (other than comparisons with other Massachusetts political organizations) to dispute the assertion, but the Secretary states that what would have been "sufficient time" for plaintiffs, based on their own particular group's membership, organizational discipline, and resources, is not material. The Secretary disputes the assertion that the LPM and LNC did not have "sufficient . . . financial resources" to gather signatures on behalf of Barr and Root, insofar as plaintiffs (like other organizations) are free to gather signatures using unpaid volunteers. Tassinari Affidavit ¶ 9. The Secretary disputes the second sentence in paragraph 30, because, under Massachusetts law, the Libertarians were not a "political party" limited to one nomination per office but instead were a political designation, and thus any one or more presidential candidates who wished to be designated as "Libertarian" could have obtained ballot access by

gathering and filing 10,000 certified signatures. Tassinari Affidavit ¶¶ 5-6, 40. Indeed, as noted above, other non-party presidential candidates have satisfied the Massachusetts ballot requirement and collected signatures in less than the 65-day period applicable to plaintiffs. Tassinari Affidavit ¶ 20. The Secretary does not dispute the statement in the third sentence of paragraph 30 with the exception of the introductory words "As such," referring back to the disputed second sentence.

31. The Secretary does not dispute the statements in paragraph 31.

Respectfully submitted,

SECRETARY OF THE COMMONWEALTH
OF MASSACHUSETTS,

By his attorneys,

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April 30, 2009

Certificate of Service

I hereby certify that the above Response to Plaintiffs' Statement of Undisputed Facts was filed through the Electronic Case Filing (ECF) system on April 30, 2009, and thus copies will be sent electronically to the registered participants as identified on the Court's Notice of Electronic Filing (NEF); paper copies will be served by first-class mail to those indicated on the NEF as non-registered participants.

/s/ Amy Spector
Amy Spector