COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11109

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

Appellants,

v.

WILLIAM F. GALVIN, in his official capacity as
Secretary of the Commonwealth of Massachusetts,

Appellee.

ON RESERVATION AND REPORT OF
SINGLE JUSTICE OF
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY
NO. SJ-2011-0348

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

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Corporate Disclosure Statement

Pursuant to Supreme Judicial Court Rule 1:21, Plaintiff Libertarian National Committee, Inc. hereby states that it is a non-governmental corporate entity, that it does not have a parent corporation, and that no publicly-held corporation owns 10% or more of its stock.

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B. If G.L. c. 53, §14 does not provide a minor party with a mechanism for substituting the presidential and vice-presidential candidates selected at its national convention for those listed on its nomination papers, does the statutory scheme for minor party ballot access violate the Constitution of the Commonwealth of Massachusetts?

C. If this Court cannot determine whether G.L. c. 53, §14 provides minor parties with a mechanism for substituting the presidential and vice-presidential candidates selected at their national conventions for those listed on their nomination papers, is the statute unconstitutionally void for vagueness?

II. Statement of the Case

Prior to the 2008 election, plaintiffs-appellants the Libertarian Association of Massachusetts[1] and the Libertarian National Committee, Inc. ("Libertarians") sought to substitute the names of the presidential and vice-presidential candidates selected at their national convention on May 25, 2008 for the names of the presidential and vice-presidential candidates listed on their nomination papers, which had become available on February 6, 2008 and upon which the Libertarians had collected 7,000 signatures at the time of their substitution request. Defendant-Appellee William F. Galvin, in his official capacity as Secretary of the Commonwealth of Massachusetts, ("Secretary") denied the Libertarians' request for substitution.

The Libertarians then 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

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[1] In 2008, the Libertarian Association of Massachusetts was called the Libertarian Party of Massachusetts. In early 2010, the Libertarian Party of Massachusetts changed its name to the Libertarian Association of Massachusetts. Despite this change in nomenclature, the organization remains the same.

the names of their nationally nominated candidates on the Massachusetts ballot for the 2008 presidential election, which relief was granted. *Barr v. Galvin*, 584 F. Supp. 2d 316 (D. Mass. 2008)(ADD1).[2]

After the election, both sides cross-moved for summary judgment. The District Court granted summary judgment for the Libertarians, holding that the statutory scheme for substitution, as set forth in G.L. c. 53, §14, was unconstitutionally vague and violative of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Barr v. Galvin*, 659 F. Supp. 2d 225 (D. Mass. 2009)(ADD5).

The Secretary appealed, and on November 16, 2010, the First Circuit issued its decision reversing in part, vacating in part, and remanding the case to the District Court. *Barr v. Galvin*, 626 F.3d 99 (1st. Cir. 2010)(ADD10). Finding that "a live dispute remains" because the Libertarians have "a reasonable expectation of being in a position to complain about the lack of a substitution mechanism in future Massachusetts elections," the First Circuit found it

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[2] "ADD__" refers to pages of the Addendum attached to this Brief of Appellants. "A__" refers to pages of the separately bound Record Appendix.

"unclear" whether G.L. c. 53, §14 applies to presidential elections and provides minor parties like the Libertarians with a means to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers. *Barr*, 626 F.3d at 101 (ADD11), 106-107 (ADD14-15). Yet, instead of resolving the opaqueness of the statute, the First Circuit ordered federal court abstention under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). *Barr*, 626 F.3d at 108 (ADD15-16). According to the First Circuit, "[t]he Massachusetts courts should . . . be afforded the opportunity to address, in the first instance, the question of the statute's application" to minor party presidential and vice-presidential candidates. *Id.*

On remand, the District Court stayed the Libertarians' claim concerning G.L. c. 53, §14 "pending a state court interpretive clarification of the state statute." *Barr v. Galvin*, 755 F. Supp. 2d 293, 295 (D. Mass. 2010) (ADD21). To expedite matters, the Libertarians then moved the District Court to certify the question regarding the meaning of G.L. c. 53, §14. However, on June 14, 2011, the District Court denied the Libertarians' motion for

certification, reasoning that "the First Circuit clearly ordered this Court to abstain under the Pullman doctrine" and "certification 'serves as a substitute for, not complement to, abstention.'" *Barr v. Galvin*, 793 F. Supp. 2d 463 (ADD22), 464-465 (ADD23) (D. Mass. 2011). The District Court added: "By ordering this Court to abstain under the Pullman doctrine . . . the First Circuit indicated that the parties should seek that interpretation [of G.L. c. 53, §14] by filing a separate action in state court..." *Id.* at 465.

In light of the directive of both the First Circuit and the District Court to institute a separate action in Massachusetts state court to determine the meaning of G.L. c. 53, §14 and thereby resolve the pending federal litigation, the Libertarians filed the Complaint in the present action on August 12, 2011. (A1.) On October 27, 2011, the Secretary moved to dismiss the Libertarians' Complaint (54), and on November 30, 2011, the Libertarians opposed the Secretary's motion to dismiss (A74) and separately moved for summary judgment (A92). On December 14, 2011, Justice Cordy reserved and reported the case without decision to the full court (A292).

The open question of statutory interpretation before this Court is whether G.L. c. 53, §14 provides minor parties with a mechanism for substituting the presidential and vice-presidential candidates selected at their national conventions for those listed on their nomination papers. The Libertarians contend that G.L. c. 53, §14 must provide such a mechanism for presidential/vice-presidential candidate substitution; otherwise, G.L. c. 53, §14 is violative of Article 9 of the Declaration of Rights to the Massachusetts Constitution and/or unconstitutionally vague.

III. Statement of Facts

A. The Statutory Framework

Massachusetts recognizes as a "political party" any political organization that either (1) had a candidate for statewide office who received at least 3% of the votes in the previous biennial state election or (2) enrolled at least 1% of the total number of registered voters in the Commonwealth before the previous biennial state election. *See* G.L. c. 50, §1 (ADD25). Recognized political parties are entitled to automatic ballot access for their presidential and vice-presidential candidates in the following

election. *See* G.L. c. 50 , §1 (ADD25); G.L. c. 53, §1 (ADD28).

Political organizations that are not officially recognized as political parties are termed "political designations" in Massachusetts. In order to obtain ballot access for their presidential and vice-presidential candidates, political designations must file nomination papers signed by 10,000 Massachusetts voters. *See* G.L. c. 53, §6 (ADD30). Pursuant to G.L. c. 53, §6, nomination papers are made available for candidates for presidential electors, not President and Vice President. Under G.L. c. 53, §8, the name of each candidate for presidential elector -- as well as her address, the office for which she is nominated, and her political designation -- must be listed on the nomination papers before signature collection can begin. (ADD35.) Somewhat later, G.L. c. 53, §8 also states: "the surnames of the candidates for president and vice president of the United States shall be added to the party or political designation of the candidates for presidential electors." Nomination papers for candidates for presidential elector must be submitted to local election officials by the twenty-eighth day preceding the day on which these papers

must be filed with the Secretary, i.e., in late July since nomination papers must be filed with the Secretary on the last Tuesday of August. *See* G.L. c. 53, §§ 7, 10 (ADD32, ADD37).

The process for substitution of candidates "nominated for a state, city or town office" is set forth by G.L. c. 53, §14. (ADD41.) Although "state office" is not defined, G.L. c. 50, §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." (ADD25.) Pursuant to G.L. c. 53, §6, presidential electors are chosen at state elections and accordingly must qualify as "state officers." (ADD30.)

B. The 2008 Presidential Election

Plaintiffs-Appellants, the Libertarian Association of Massachusetts and the Libertarian National Committee, Inc., are political organizations, but under Massachusetts law, neither is recognized as a "political party." (A122, ¶¶ 1-2.) Rather, "Libertarian Party" is deemed a "political designation." (A122, ¶ 3.) Such is the case now as it was for purposes of the November 2008 presidential

election. (A122, ¶¶ 1-4.) Thus, in order to obtain ballot access for their presidential and vice-presidential candidates in 2008, the Libertarians were required to submit nomination papers signed by at least 10,000 Massachusetts voters by the end of July 2008. (A122-123, ¶ 5.)

Nomination papers were made available by the Secretary's Office on February 6, 2008. (A123, ¶ 6.) The deadline to submit such nomination papers to the local election officials for certification was July 29, 2008. (A123, ¶ 7.) However, the Libertarians' national nominating convention, where the party's candidates for President and Vice President would be selected, was scheduled for May 22-26, 2008. (A123, ¶ 8.) Given the crowded field of candidates vying for the Libertarian presidential nomination, the Libertarians anticipated that the candidates listed on nomination papers circulated before the convention might not be nominated at the convention. For this reason, on September 21, 2007, the Libertarians e-mailed an attorney with the Elections Division of the Secretary's Office inquiring whether it would be possible to substitute the candidates nominated at the Libertarians' national convention for the candidates

listed on their nomination papers. (A123-124, ¶¶ 9, 10.) This e-mail explicitly stated that the Libertarian National Convention was to take place on Memorial Day weekend. (A124, ¶ 11.)

On October 26, 2007, the Secretary replied to the Libertarians' inquiry, stating that "[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." (A124, ¶ 12.)

Relying on the Secretary's response, the Libertarians began circulating nomination papers in early 2008 listing George Phillies as the Libertarian Party's presidential candidate and Chris Bennett as their vice-presidential candidate. (A124, ¶ 13.) 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. (A124, ¶ 15.) On May 29, 2008, the Libertarians informed the Secretary that the candidates chosen at

the Libertarian National Convention were different from the candidates on their nomination papers, and the Libertarians requested the substitution form alluded to in earlier correspondence. (A125, ¶¶ 16, 17.)

On June 5, 2008, the Secretary responded that he would not permit the substitution of Barr and Root's names for Phillies and Bennett's names on the upcoming general election ballot. (A125, ¶ 18.) At no time did the Secretary provide the Libertarians with the "form that allows members of the party to request the substitution of the candidate" described in the Secretary's October 26, 2007 e-mail. (A125, ¶ 19.)

When the Libertarians received this decision, they had already collected approximately 7,000 signatures on their nomination papers listing Phillies and Bennett as the general election candidates. (A125, ¶ 20.) They spent over $40,000 collecting signatures on the Phillies/Bennett nomination papers. (A124, ¶ 14.) Lacking the time and resources to scrap the 7,000 signatures already collected and start over, 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 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. (A125-126, ¶ 21.)

Ultimately, via injunction, the Libertarians succeeded in placing Libertarian Party candidates Bob Barr and Wayne Root on the 2008 Massachusetts general election ballot as candidates for President and Vice President of the United States of America, respectively. (A126, ¶ 22.)

C. The 1996, 2000, 2004 Presidential Elections

Since 1995, the Secretary has suggested that substitution would be an option on more than one occasion. In granting and denying requests for substitution, the Secretary has offered a variety of explanations.

In 1995, the U.S. Taxpayers Party, which was not a recognized political party in Massachusetts, informed the Secretary that it would hold its presidential nominating convention in August 1996, subsequent to the deadline for submitting nomination papers. (A126, ¶23.) The U.S. Taxpayers Party sought advice on whether it would be allowed to substitute

its nationally nominated candidates for the ones listed on its nomination papers, if necessary. *Id.* In response, the Secretary stated that "this office has permitted substitution before, and will continue to permit substitution." (A126, ¶ 24.) The candidates in that case did not qualify for ballot access and therefore substitution was not ultimately required. (A126, ¶ 25.)

In 2000, the Reform Party, which was not a recognized political party in Massachusetts, informed the Secretary that it would hold its national nominating convention in August, subsequent to the deadline for submitting nomination papers. (A127, ¶ 26.) The Secretary responded:

> 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.

(A126, ¶ 27.) The Secretary later allowed the Reform Party to substitute the vice-presidential candidate selected at its national convention for the vice-presidential candidate listed on its nomination papers. (A127, ¶ 28.)

However, in 2004, the Secretary changed his position on substitution, denying Ralph Nader's request to substitute the name of his vice-presidential candidate, Peter Camejo. Despite the fact that the Secretary had previously been 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" (A127, ¶¶ 29, 30), the Secretary later told the Nader campaign that substitution of the vice-presidential candidate would not be allowed (A127-128, ¶ 31). According to the Secretary, 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." (A128, ¶ 32.)

D. The 2012 Presidential Election

For the November 2012 general election, nomination papers will be available by February 14,

2012 and will be due to local officials by July 31, 2012. (A128, ¶ 33.)

IV. Summary of Argument

Contrary the Secretary's anticipated arguments, there is an actual controversy here, the Libertarians have standing to bring this lawsuit, and the case is not moot. *Infra* at 16-23. The Libertarians were directed to bring the present action by the First Circuit which abstained under the Pullman doctrine from deciding the Libertarians' claim that G.L. c. 53, §14 was unconstitutionally vague, pending a state court interpretation of the statute. *Infra* at 19-21. As there remains an actual unresolved controversy regarding the meaning of G.L. c. 53, §14 which can only be resolved by this Court, *infra* at 19-20, the case is not moot, *infra* at 22-23, and the Libertarians have standing to bring this suit, *infra* at 21-22.

Under well-established principles of statutory construction, G.L. c. 53, §14 must be interpreted to provide a means by which minor parties may substitute the presidential and vice-presidential candidates chosen at their nominating conventions for those listed on their nomination papers. *Infra* at 23-38.

Any other reading of the statute would lead to inconsistencies, absurd results, and/or significant gaps in the statutory framework for candidate nominations. *Id.*

Article 9 of the Declaration of Rights further supports interpreting G.L. c. 53, §14 to provide a means by which minor parties may substitute the presidential and vice-presidential candidates chosen at their nominating conventions for those listed on their nomination papers. *Infra* at 38-49. This Court has interpreted Article 9 to provide more expansive ballot access rights than those guaranteed by the U.S. Constitution (*infra* at 44-45), and absent a mechanism for minor party presidential and vice-presidential candidate substitution, the statutory scheme unconstitutionally restricts the ballot access rights of minor parties. *Infra* at 39-42.

Finally, should the Court be unable to determine the meaning of G.L. c. 53, §14, the statute must be declared unconstitutionally vague as it subjects minor parties to "an unascertainable standard" and allows the Secretary to exercise unreviewable discretion. *Infra* at 45-49.

V. Argument

A. There Is An Actual Controversy for Purposes of G.L. 231A, §1 And The Libertarians Have Standing to Bring This Action Thereunder

As an initial matter, the Libertarians will briefly address the arguments made in the Motion of Defendant Secretary of the Commonwealth to Dismiss the Complaint for Lack of an Actual Controversy and Lack of Standing ("Motion to Dismiss") as the Libertarians anticipate that the Secretary will repeat these arguments to the full court.

In the Motion to Dismiss, the Secretary argued that there is no actual controversy and the Libertarians lack standing because the issue of minor party candidate substitution has not yet arisen in connection with the 2012 presidential election. *See* A55, A66-73. However, the Libertarians' Complaint is not based upon what may or may not occur in 2012, but rather upon the continuing dispute surrounding the 2008 presidential election. *See* A3-4, ¶¶ 6-8; A9-12, ¶¶ 29-44. Although three years have passed since the 2008 election, **"a live dispute remains"** and **"all the parties share the view that their dispute survived the 2008 general election."** *Barr*, 626 F.3d at 105 (ADD13) (emphasis added). It is this admittedly live dispute

surrounding the 2008 election -- not some hypothetical dispute about the 2012 election -- that forms the basis for the Libertarians' Complaint, satisfies the actual controversy requirement of G.L. c. 231A, §1, and gives the Libertarians standing to bring this action. (ADD49.) *See* A3-4, ¶¶ 6-8; A9-12, ¶¶ 29-44.

1. *There Is An "Actual Controversy"*

With that in mind, there is no question that an "actual controversy" exists as required by G.L. c. 231A, §1 (ADD49). After all, an actual controversy requires nothing more than:

> a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation.

Bunker Hill Distrib., Inc. v. District Attorney for Suffolk County, 376 Mass. 142, 144 (1978). Here, the "real dispute" is over the interpretation of G.L. c. 53, §14, with the Secretary arguing that the statute does not provide a mechanism for minor party candidate substitution in presidential elections and the Libertarians asserting that it must, otherwise the

statutory scheme is unconstitutionally vague and/or violative of Article 9. *See* A2, ¶ 4; A13, ¶ 55; A14, ¶¶ 57, A59-A60. In other words, while the Libertarians assert their legal right to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers, the Secretary claims that no such legal right exists under G.L. c. 53, §14. This is exactly the type of controversy that G.L. c. 231A was intended to resolve. *See* G.L. c. 231A, §2 (ADD50) ("The procedure under section one may be used to secure determinations of right . . . under . . . statute . . . including determination of any question of construction or validity thereof which may be involved in such determination."); *see also Mass. Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Comm'r of Ins.*, 373 Mass. 290, 293 (1977) ("In the sense that the matter at issue . . . involves a dispute over an official interpretation of a statute . . . a justiciable controversy exists."). And, in this case, litigation is much more than an "immediate[] and inevitabl[e]" possibility; it has been ongoing for over three years. Thus, an actual controversy exists

sufficient to satisfy the requirements of G.L. c. 231A, §1. *See* ADD49.

The Libertarians seek declaratory relief from this Court because the dispute surrounding the 2008 election cannot be resolved by the federal courts until this Court clarifies the meaning of the Massachusetts substitution statute, G.L. c. 53, §14. Indeed, the Libertarians' claim that G.L. c. 53, §14 is unconstitutionally vague remains undecided and pending before the United States District Court for the District of Massachusetts, which has been ordered to abstain pursuant to *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). *See Barr*, 755 F. Supp. 2d at 295 (ADD21). To resolve this pending claim, the Libertarians were directed to file an action in Massachusetts state court to obtain clarification of G.L. c. 53 §14, and this is precisely what the Libertarians have done. *See Barr*, 793 F. Supp. 2d at 465 (ADD23) ("By ordering this Court to abstain under the Pullman doctrine . . . the First Circuit indicated that the parties should seek that interpretation [of G.L. c. 53, §14] by filing a separate action in state court..."). Of course, this is how Pullman abstention works, i.e., "[t]he federal court retains jurisdiction

but stays its proceedings pending a determination of state law" and "the case is sent to state court for a clarification of state law." 17A Moore's Federal Practice ¶122.07[1][a] (3d. 2011)(ADD54). The Libertarians are not required to establish another controversy different than that currently before the District Court, and any suggestion to the contrary is plainly mistaken.

2. *The Libertarians Have Standing*

The Secretary's argument that the Libertarians lack standing also fails. As the Secretary admits, the Libertarians "had standing, and asserted a live controversy, when they sued in August 2008." (A69.) Moreover, as this Court has held, "a party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." *Mass. Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Comm'r of Ins.*, 373 Mass. 290, 293 (1977). Here, because the Libertarians allege an injury (i.e., denial of the right to candidate substitution) that is within the area of concern of the statute under which the injurious action occurred (i.e., G.L. c. 53, §14 concerning candidate substitution), the Libertarians

must have standing to bring the instant suit. Furthermore, courts have long recognized the right of minor parties like the Libertarians to bring suit to challenge ballot access restrictions. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down law restricting minor party ballot access in suit filed by the Socialist Labor Party and Ohio American Independent Party); *Libertarian Party of Tennessee v. Goins*, 793 F. Supp. 2d 1064 (M.D. Tenn. 2010) (finding that the Libertarian Party had standing in suit challenging constitutionality of election laws restricting minor party ballot access).

3. *The Case Is Not Moot*

Although the Secretary did not argue that the case has become moot in the Motion to Dismiss, the Libertarians anticipate that the Secretary will now try to add this argument.[3] This argument fails for a number of reasons. First, as the Secretary himself has repeatedly argued: "**The Case is Not Moot, Because the Claims Are Capable of Repetition Yet Evading Review.**" *See* A87-A88; *see also* A90-A91. The

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[3] The Secretary raised the issue of mootness for the first time in the Reply Memorandum in Support of Defendant Secretary's Motion to Dismiss the Complaint on Jurisdictional Grounds. *See* A289-A290.

Secretary made this argument at summary judgment, in an attempt to overturn the District Court's preliminary injunction ruling, and again on appeal, in an attempt to overturn the District Court's summary judgment decision. *Id.* It is hypocritical for the Secretary now to argue that the case has become moot because the Secretary is not concerned with the Libertarians' pending claim before the District Court. Second, both the District Court and the First Circuit addressed the issue of mootness and found that the case is not moot because the claims are "capable of repetition, yet evading review." *See Barr*, 659 F.Supp.2d at 227 (ADD6); *Barr*, 626 F.3d at 106 (ADD14). Finally, it would undercut the very purpose of Pullman abstention for this Court to disregard the First Circuit's ruling that the case is not moot, ignore the Libertarians' pending claim before the District Court, and choose not to decide an issue of state law despite the federal courts' deference to this Court on the matter. In short, there is no question the case is not moot, and the Secretary cannot argue otherwise.

B. Mass. Gen. Laws Ch. 53, §14 Provides for Minor Party Presidential/Vice-Presidential Candidate Substitution

While, at first glance, it may be unclear whether G.L. c. 53, §14 provides a mechanism for minor party presidential/vice-presidential candidate substitution, any ambiguity disappears when the statute is placed in context and read in connection with the surrounding provisions of Massachusetts election law. When viewed in this light, the statute clearly provides a means by which minor parties like the Libertarians may substitute the presidential and vice-presidential candidates selected at their national conventions for those listed on their nomination papers.

Beginning with the text of the statute, G.L. c. 53, §14 provides, in relevant part: "If a candidate nominated for state, city or town office dies before the day of the election, or withdraws his name from nomination, or is found ineligible, the vacancy . . . may be filled by the same political party or persons who made the original nomination . . ." (ADD41.) Upon reviewing this language, the First Circuit concluded that "[t]he statutory text contains two types of imprecision," namely:

> 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 this rubric. This, in turn, leaves open the 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 [Libertarians] did not qualify as a political party under Massachusetts law. Still, the reference to "persons who made the original nomination" arguably could apply to the [Libertarians] 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.

Barr, 626 F.3d at 107 (ADD14-15). Despite these "two types of imprecision," the First Circuit went on to state: "[w]hatever its semantic shortcomings, section 14 seems susceptible to clarification by judicial interpretation." *Id.*

Properly interpreted, G.L. c. 53, §14 provides a mechanism for minor party presidential/vice-presidential candidate substitution because candidates for presidential electors (and, by reference,

presidential and vice-presidential candidates[4]) qualify as candidates for "state office" and the political organizations circulating the nomination papers -- not the 10,000 voters who sign them -- must be deemed the "persons who made the original nomination."

1. *Candidates for Presidential Elector Qualify as Candidates for "State Office" Under G.L. c. 53, §14*

Though "state office" is not a defined term, G.L. c. 53 repeatedly includes candidates for presidential electors within the purview of candidates for "state office." Indeed, the statutory provisions that establish the framework for accessing the presidential ballot by submitting nomination papers signed by 10,000 voters often refer only to candidates for state, city, and town offices. For instance:

- Provision of Nomination Papers: G.L. c. 53, §17 requires blank nomination papers to be provided for the nomination of candidates for state, city, and town offices. (ADD43.)

- Submission of Nomination Papers: G.L. c. 53, §7 establishes deadlines for the submission of nomination papers for

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[4] In the case of presidential elections, the actual candidates who are nominated for election and who are elected at the statewide election are presidential electors, rather than the candidates for President and Vice President. *See* G.L. c. 53, §8 (ADD35); G.L. c. 54, §78 (ADD48).

candidates for state, city, and town offices.[5] (ADD32.)

- Objection to Nomination Papers: G.L. c. 53, §11 provides a means of objecting to nomination papers submitted on behalf of candidates for state, city, and town offices. (ADD39.)

Thus, either candidates for presidential electors are included within the purview of candidates for "state office" or there is a gaping hole in G.L. c. 53 regarding the provision of, submission of, and objection to nomination papers for these candidates.

Such a tear in the statutory fabric would be especially troubling in light of G.L. c. 53, §2, which states that "[n]o candidates shall be nominated . . . in any other manner than is provided in this chapter or chapter fifty-two." (ADD29.) Of course, the very fact that candidates cannot be nominated in any manner other than as provided in G.L. c. 52[6] or G.L. c. 53 is evidence that the Legislature intended to establish a

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[5] G.L. c. 53, §10 provides the deadline by which "[n]omination papers for presidential elector" must be filed with the Secretary, but it does not provide the deadline by which such nomination papers must be submitted to the city and town registrars. (ADD37.) The Secretary's position is that the earlier deadline for the submission of nomination papers for presidential electors to city and town registrars is provided by G.L. c. 53, §7, which only refers to nomination papers for city, town, and state offices (ADD32). *See* A61.

[6] G.L. c. 52, titled "Political Committees," is not relevant to the current analysis.

comprehensive statutory scheme to govern the nomination process with the enactment of these two chapters. *See Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies & Bonds*, 382 Mass. 580, 585 (1981) ("The statutory language itself is the principal source of insight into the legislative purpose."). In light of the legislative intent to enact a comprehensive set of rules for candidate nominations and the well-known axiom that statutes should be interpreted according to the intent of the Legislature, the Court should resist any interpretation of G.L. c. 53 that would leave a gaping hole regarding the provision of, submission of, and objection to nomination papers for candidates for presidential electors. *See Glasser v. Director of Div. of Employment Sec.*, 393 Mass. 574, 577 (1984) ("Our task is to interpret the statute according to the intent of the Legislature, as evidenced by the language used, and considering the purposes and remedies intended to be advanced."). Accordingly, candidates for "state office" under G.L. c. 53 should be read to include candidates for presidential electors.

Other statutory provisions provide further support for the position that candidates for presidential elector fall within the purview of candidates for "state office." For instance, G.L. c. 50, §1 defines the associated term "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." (ADD26.)[7] And presidential electors are chosen at state elections. *See* G.L. c, 53, §6 (ADD30) ("Nominations of candidates for any offices to be filled at a state election may be made by nomination papers . . . signed in the aggregate by not less than the following number of voters: for . . . presidential electors, ten thousand"); *see also* G.L. c. 50, §1 (ADD25-26) (defining "state election"). Thus, as presidential electors are chosen at state elections, presidential electors must qualify as "state officers" under G.L. c. 50, §1. And since presidential electors qualify as "state officers," candidates for presidential electors must qualify as candidates for "state office." *See Comm. v. Baker*, 368 Mass. 58, 68

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[7] G.L. c. 50, §1 is the definitional section for G.L. c. 50 through G.L. c. 57. (ADD25.)

(1975) ("One such principle [of statutory construction] leads us to relate the words in question to the associated words and phrases in the statutory context.").

In summary, the first question asked by the First Circuit -- i.e., whether candidates for presidential electors qualify as candidates for "state office" under G.L. c. 53, §14 -- must be answered in the affirmative. Candidates for presidential electors fall within the purview of candidates for "state office" under G.L. c. 53, §14. Accordingly, if such candidates withdraw their names from nomination, "the vacancy . . . may be filled" under G.L. c. 53, §14. This raises the second question asked by the First Circuit -- i.e., who is entitled to select replacement candidates to fill such vacancies?

2. *Minor Parties Must Be Allowed to Fill Vacancies Caused by Candidate Withdrawals Under G.L. c. 53, §14*

According to the statute, vacancies "may be filled by the same political party or persons who made the original nomination . . . " G.L. c. 53, §14 (ADD41). As the First Circuit noted, "persons who made the original nomination" could conceivably refer to either the Libertarians or the individuals who

signed the nomination papers. *See Barr*, 626 F.3d at 107 (ADD15).

Obviously, interpreting "persons who made the original nomination" to mean the individuals who signed the nomination papers is problematic as nomination papers must be signed by at least 10,000 voters, and it would be a monumental undertaking to re-contact every one of the 10,000 voters who signed the original nomination papers and get each to sign another set of nomination papers listing the substituted candidates. Moreover, all of this may have to be done in as little as "seventy-two weekday hours," *see* G.L. c. 53, §50 (ADD47), thereby extinguishing even the faintest hope that presidential/vice-presidential candidate vacancies could be filled.

On the other hand, if vacancies could be filled by political organizations like the Libertarians -- who requested and circulated the nomination papers, collected the 10,000+ signatures, and filed all of the required documentation with the Secretary -- then G.L. c. 53, §14 could be given real effect and an absurd result could be avoided. As this Court has stated, "[i]f a sensible construction is available, [the

Court] shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results." *Flemings v. Contributory Ret. Appeal Bd.*, 431 Mass. 374, 375-376 (2000). Here, the only sensible construction of the phrase "persons who made the original nomination" in G.L. c. 53, §14 is as a reference to those persons or entities that requested, circulated, and filed the nomination papers that are the subject of the substitution request. The alternative would "make a nullity" of G.L. c. 53, §14 in the present circumstances and produce patently "absurd results."

Allowing minor parties to fill vacancies under G.L. c. 53, §14 also recognizes the political reality of national minor parties like the Libertarians (the nation's third largest political party) that regularly field candidates for President and Vice President but often do not qualify as recognized "political parties" under Massachusetts law. The alternative is to ignore the fact that it is the minor parties -- not the individual candidates or the 10,000 voters who sign the nomination papers -- which expend the time, money, and effort necessary to circulate the nomination

papers, collect the 10,000+ signatures, and file all of the required documentation with the Secretary.

Further, the Legislature recognized that it is minor parties like the Libertarians that are responsible for the nomination papers by rewarding the minor parties with the status of recognized "political party" if their candidates receive at least 3% of the vote in the election. *See* G.L. c. 50, §1 (ADD25). If minor parties were not the "persons who made the original nomination" under G.L. c. 53, §14, then it would be senseless to reward these minor parties -- as opposed to the individual candidates or the 10,000 voters who signed the nomination papers -- based on the election results. Yet that is exactly what the Legislature has done. By rewarding minor parties with the status of recognized "political party" if their presidential/vice-presidential candidates receive at least 3% of the vote in the election, the Legislature recognized that it is the minor parties that are responsible for the original nomination.

3. *Minor Parties Must Be Allowed to Fill Vacancies Without Collecting An Additional 10,000 Voter Signatures*

The Secretary may argue that even if vacancies may be filled by minor parties, G.L. c. 53, §14

requires vacancies to be filled "in the same manner," and this means minor parties must collect another 10,000 signatures on new nomination papers listing the names of the substitute candidates. However, there are a number of problems with this argument.

First, if the only means of filling vacancies under the statute is for minor parties to start over and collect another 10,000 voter signatures on new nomination papers, G.L. c. 53, §14 would be rendered superfluous. After all, candidates are already entitled to withdraw under G.L. c. 53, §13 (ADD40), and minor parties are already entitled to nominate candidates via nomination papers under G.L. c. 53, §6 (ADD30). Nothing would be added by G.L. c. 53, §14 if "in the same manner" simply meant "start over." Of course, this would also violate "a basic tenet of statutory construction that a statute must be construed 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" *Bankers Life & Cas. Co. v. Commissioner of Ins.*, 427 Mass. 136, 140 (1998) (quoting 2A B. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992)).

Second, if "in the same manner" meant that minor parties had to collect another 10,000 voter signatures on new nomination papers listing the names of the substitute candidates, it would be impossible to fill presidential and vice-presidential candidate vacancies in many cases. This is because presidential and vice-presidential candidates may withdraw up to 72 hours after the deadline for submitting nomination papers. *See* G.L. c. 53, §§13, 11 (ADD40, ADD39); G.L. c. 55B, §5 (ADD49). And if a minor party's presidential and vice-presidential candidates withdrew after the deadline for submitting nomination papers, there would be no time for the minor party to start over and circulate new nomination papers for signature.

Third, interpreting "in the same manner" to mean "start over" would ignore the practical reality that minor parties often cannot afford to spend the tens of thousands of dollars needed to re-circulate nomination papers and re-collect 10,000+ signatures in whatever limited time might remain before the submission deadline. Such an interpretation would also ignore the political reality of national minor parties like the Libertarians that hold their national nominating conventions close to (or after) the July deadline for

submitting nomination papers. It must be presumed that the Legislature did not intend to deprive minor parties of the opportunity to place their nationally nominated candidates for President and Vice President on the ballot in Massachusetts after they have already expended the time, money, and effort needed to collect 10,000+ voter signatures on their nomination papers. *See* 2A N.J. Singer & J.D. Shambie, Statutes and Statutory Construction §45.12, at 108-109 (7th ed. 2007) (ADD70-71) ("the construction of a statute that is unreasonable [or] unjust . . . should be avoided").

In summary, "in the same manner" simply cannot mean "start over" because such an interpretation would (1) render G.L. c. 53, §14 superfluous, (2) make it impossible to fill presidential and vice-presidential candidate vacancies in many cases, and (3) lead to unreasonable, unjust results.[8]

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[8] Even assuming *arguendo* that "in the same manner" required minor parties to collect another 10,000 voter signatures on new nomination papers listing the names of the substitute candidates, G.L. c. 53, §14 (ADD41) further states: "if the time is insufficient therefor . . ." and then describes alternate means of filling vacancies. This indicates that minor parties should be given an alternate means of filling vacancies if there is insufficient time to re-circulate nomination papers (e.g., when the filing deadline has passed). While the statute is silent as to what this alternate means should be, the provisions regarding filling vacancies for candidates nominated by convention or caucus are informative -- i.e., if the convention/caucus made no provision for filling vacancies, the vacancy is filled by "a regularly elected general or executive committee representing the

Moreover, there is another plausible reading of "in the same manner" that leads to a more reasonable result. *See Coffey v. County of Plymouth*, 49 Mass. App. Ct. 193, 196 (2000) ("It is a 'golden rule of statutory interpretation' that, as between competing statutory interpretations, the one that leads to an unreasonable result is rejected in favor of the one that leads to a reasonable result.") The better interpretation of "in the same manner" is as a reference to the manner in which the candidates were selected by the minor party. In other words, in filling vacancies, minor parties should be allowed to follow internal procedures similar to those they used to determine the candidates who were originally listed on their nomination papers. Not only does this interpretation avoid the negative results noted above, it is also consistent with the other provisions of

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political party or person who held such convention or caucus." In other words, it falls to the party to fill the vacancy. In light of the Legislature's deference to the party's candidate selection here, it is likely the Legislature would have similarly deferred to minor parties to select candidates to fill vacancies when "the time is insufficient" to re-circulate nomination papers. *See* 2A N.J. Singer & J.D. Shambie, Statutes and Statutory Construction §45.12, at 115 (ADD77) (7th ed. 2007) ("where the drafters of a statute did not contemplate a specific situation, that statute should be construed in conformity with the probable intent of the draftsmen as if they had anticipated the situation").

G.L. c. 53, §14 in which the Legislature defers to the candidate selection process of political organizations. *See, e.g., id.* (ADD41-42) ("the vacancy may be filled...by a regularly elected general or executive committee representing the political party"). Moreover, as this Court has recognized, political parties have a "substantial interest in ensuring that party members have an effective role in determining who will appear on a general election ballot as that party's candidate." *Langone v. Secretary of the Commonwealth*, 388 Mass. 185, 190 (1983).

In conclusion, G.L. c. 53, §14 must provide a mechanism for minor party presidential and vice-presidential candidate substitution because candidates for presidential electors qualify as candidates for "state office" and minor parties like the Libertarians which request, circulate, and file nomination papers (not the 10,000 voters who sign them) are the driving force behind the original nomination and must be given the power to fill vacancies to avoid an otherwise unworkable, absurd result.

C. Under Article 9 of the Declaration of Rights, G.L. c. 53, §14 Must Provide a Mechanism for Minor Party Presidential and Vice-Presidential Candidate Substitution

Further, any ambiguity in the language of G.L. c. 53, §14 must be interpreted to allow minor parties to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers as such a right of substitution is guaranteed by Article 9 of the Declaration of Rights to the Constitution of the Commonwealth of Massachusetts. *See Langone*, 388 Mass. at 190 (court is duty-bound "to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit it").

1. A Statutory Scheme Without a Mechanism for Substitution Violates Article 9

Pursuant to Article 9, "[a]ll elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." (ADD51.) This Court has interpreted Article 9 to protect ballot access rights and limit restrictions thereon, stating: "Ballot access is of fundamental importance in our form of government

because through the ballot people can control their government." *Batchelder v. Allied Stores*, 388 Mass. 83, 91 (1983).[9]

However, absent a mechanism for presidential and vice-presidential candidate substitution, the statutory scheme severely limits the ballot access rights of minor parties by effectively forcing them to hold their nominating conventions or otherwise select their presidential and vice-presidential candidates very early in the election cycle, before the electorate is fully engaged, or risk forgoing a place on the ballot in Massachusetts altogether. Minor parties are forced to make this lose-lose decision (absent a substitution mechanism) because they gain access to the presidential ballot in Massachusetts by submitting nomination papers signed by 10,000 voters.[10] These nomination papers, which become available in

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[9] In *Batchelder*, the plaintiff was circulating nomination papers in an attempt to gain ballot access not only for himself, but also for his minor party's presidential candidate. *Id.* at 85.

[10] The alternative means of gaining ballot access -- becoming a recognized "political party" under G.L. c. 50, §1 -- requires a minor party to take action more than two years before the election in which it desires ballot access, i.e., by garnering at least three percent of the vote in the previous biennial election (*see* G.L. c. 50, §1) (ADD25) or enrolling at least one percent of the total electorate before the previous biennial election. *See* G.L. c. 50, §1 (ADD25); G.L. c. 53, §38A (ADD46); G.L. c. 51, §26 (ADD27); G.L. c. 53, §28 (ADD44).

February of the election year and have to be submitted by the end of July, must contain the names of the minor party's presidential and vice-presidential candidates *before* being circulated for signatures. *See* G.L. c. 53, §§ 6, 7, 8, 10 (ADD30, 32, 35, 37). Thus, without a means to substitute candidates, minor parties must either hold their nominating conventions and select their presidential and vice-presidential candidates in February (or earlier) or lose some (or all) of the time granted by statute for signature collection and thereby risk losing a place on the ballot as well.

This is especially problematic for *national* minor parties like the Libertarians whose presidential and vice-presidential candidates are not chosen by Massachusetts voters alone but by voters in states across the country. As a practical matter, national minor parties, which have many candidates competing for their nominations, need more time to complete the candidate selection process and cannot hold their national nominating conventions too early in the election cycle without sacrificing significant support. Of course, Massachusetts recognizes this political reality for major parties (i.e., Democrats

and Republicans) by giving them until the second Tuesday in September to select their candidates.

A statutory scheme without a substitution mechanism also burdens the voting rights of the individuals who wish to vote for the minor parties' chosen candidates. After all, if the presidential and vice-presidential candidates selected by a minor party at its national convention cannot be placed on the ballot via substitution, then those who wish to vote for the minor party's chosen candidates cannot do so without utilizing the write-in process. Moreover, if minor parties are denied the right to substitute their nationally nominated candidates for those listed on their nomination papers, many individuals will undoubtedly be misled into believing they are voting for the minor party's chosen candidates by casting their ballots for those candidates listed under the minor party's political designation.

In short, without a mechanism for candidate substitution, the Massachusetts statutory scheme places heavy burdens on the ballot access rights of minor parties[11] and the individual voters who wish to

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[11] Moreover, as this Court has recognized, "the right to associate with the political party of one's choice is an integral part of

support their candidates in violation of Article 9's directives that "[a]ll elections ought to be free" and all qualified voters "have an equal right to elect officers" of their choosing.[12] (ADD51)

2. *The Legislative History Surrounding the Enactment of Article 9 Further Supports the Conclusion that a Candidate Substitution Mechanism is Required*

The legislative history surrounding the enactment of Article 9 further supports the conclusion that a candidate substitution mechanism is required under the Massachusetts Constitution. John Adams, who authored Article 9, wrote: "**There is nothing which I dread so much as a division of the republic into two great parties**, each arranged under its leader, and concerting measures in opposition to each other. **This, in my humble apprehension, is to be dreaded as**

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the freedom of association for the advancement of common political beliefs" and "implicit in that freedom [is] a political party's substantial interest in ensuring that party members have an effective role in determining who will appear on a general election ballot as that party's candidate." *Langone*, 388 Mass. at 190 (citing *Opinion of the Justices*, 385 Mass. 1201, 1204 (1982)). A statutory framework that does not allow minor parties to substitute the presidential and vice-presidential candidates chosen at their conventions for those listed on their nomination papers interferes with this constitutionally protected right.

[12] Additionally, because G.L. c. 53, §14 provides a mechanism for substituting candidates for governor, city, and town offices, it would place an unequal burden on the ballot access rights of presidential and vice-presidential candidates (and the voters who wish to support them) to deny them the right to substitution.

the greatest political evil under our Constitution." (A121. (Ltr. to Jonathan Jackson (2 October 1780))(emphasis added)). Yet, a statutory scheme that lacks a substitution mechanism necessarily favors the two major parties as they are guaranteed ballot access for their presidential/vice-presidential candidates and need not select their candidates until mid-September. Of course, such a built-in advantage for the two major parties would have been abhorrent to Adams who greatly feared "division of the republic into two great parties." *Id.* In sum, there is ample reason for this Court to find that Article 9 guarantees a right to substitution.

3. *Article 9 Provides Greater Rights than the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution*

The Secretary will undoubtedly argue that the First Circuit concluded that "the Equal Protection Clause does not require the Commonwealth to afford a substitution mechanism" to minor parties. *See Barr*, 626 F.3d at 101 (ADD10). However, as this Court is aware, "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar

provisions of the United States Constitution." *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 328 (2003) (citing *Arizona v. Evans*, 514 U.S. 1, 8 (1995)). Indeed, this Court has found the Massachusetts Constitution to provide greater protections than the U.S. Constitution in numerous contexts. *See, e.g.*, *Goodridge*, 440 Mass. 309 (2003); *Opinion of the Justices to the Senate*, 412 Mass. 1201 (1992); *Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n*, 403 Mass. 692 (1989); *Commonwealth v. Upton (Upton III)*, 394 Mass. 363, 373 (1985); *Cepulonis v. Secretary of the Commonwealth*, 389 Mass. 930 (1983); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629 (1981); *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414 (1965).

Furthermore, this Court has already concluded that Article 9 provides greater ballot access rights than those guaranteed by the U.S. Constitution. *See Batchelder*, 388 Mass. at 88-89 (1983). Thus, this Court is free to interpret Article 9 to guarantee minor parties the right to substitute the presidential and vice-presidential candidates chosen at their national conventions for those listed on their

nomination papers, even if the Equal Protection Clause of the Fourteenth Amendment does not.

D. If This Court Cannot Interpret G.L. c. 53, §14, the Statute is Unconstitutionally Vague

As set forth above, the Libertarians contend that G.L. c. 53, §14 provides for a substitution mechanism for minor party presidential/vice-presidential candidates. However, should the Court be unable to determine the meaning of G.L. c. 53, §14, then the statute must be held to be unconstitutionally vague as it allows the Secretary to exercise unfettered, unreviewable discretion in deciding whether to permit or deny the substitution of presidential and vice-presidential candidates in any given election.

A law is void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application," *Caswell v. Licensing Commn. for Brockton*, 387 Mass. 864, 873 (1983), or if it "subjects people to an unascertainable standard." *Brookline v. Commn. of the Dept. of Envtl. Quality Engr.*, 387 Mass. 372, 378 (1982); *see also Duke v. Connell*, 790 F. Supp. 50, 54 (D.R.I. 1992) (finding a ballot access statute unconstitutionally vague "if a reasonable person must necessarily guess at its

meaning").[13] Such laws impermissibly grant public officials "unbridled discretion," *Reproductive Rights Network v. President of University of Massachusetts*, 45 Mass. App. Ct. 495, 503 (1998), and "deprive[]a court of the ability to review potentially arbitrary or discriminatory decisions of public officials." *Duke v. Connell*, 790 F. Supp. at 54 (internal citations omitted). This "is one of the principal reasons for the void-for-vagueness doctrine." *Id.*

In this case, if the Court is unable to determine whether G.L. c. 53, §14 provides a mechanism for minor party presidential/vice-presidential candidate substitution, minor parties like the Libertarians will necessarily be left to "guess at its meaning" and the Secretary will be able to continue to "differ as to its application." *Caswell*, 387 Mass. at 873.

The problem with allowing the Secretary, who is himself an elected official, to continue to exercise unfettered, unreviewable discretion in permitting or denying substitution requests may be best illustrated by the Secretary's inconsistent responses to such

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[13] In *Duke*, the Secretary of State was permitted full discretion in deciding which candidates would appear on the presidential primary election ballot, which the court found impermissible. *See Duke*, 790 F. Supp. at 54.

requests in the past four presidential elections. In 1995, in response to a request for substitution by the U.S. Taxpayers Party, the Secretary stated that "this office has permitted substitution before, and will continue to permit substitution." (A126, ¶¶ 23, 24.) Similarly, in 2000, the Secretary told the Reform Party:

> 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.

(A127, ¶ 27.) Thus, for purposes of the 1996 and 2000 elections, the Secretary took the position that the substitution of presidential and vice-presidential candidates was permissible. However, in 2004, the Secretary changed his position and denied Ralph Nader's request to substitute the name of his vice-presidential candidate, Peter Camejo. (A127, ¶ 29; A127-A128, ¶31.) This about-face was especially shocking in light of the Secretary's prior statement to the *Boston Globe* that "We would find some way, if Nader were to be certified, to substitute Camejo's name. The substitution is not their problem." (A127,

¶ 30.) Of course, the Secretary pulled a similar reversal of position with the Libertarians in 2008, i.e., first stating that "[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" (A124, ¶ 12) and then denying the Libertarians' request for substitution (A125, ¶ 18).

Without intervention by this Court, the Secretary will continue to permit or deny substitution requests at his sole discretion. The exercise of such unreviewable discretion in the enforcement of election laws is repugnant to the principles of constitutional democracy on which this nation was founded. If G.L. c. 53, §14 cannot be interpreted, then the statute is unconstitutionally void for vagueness.

VI. Conclusion

G.L. c. 53, §14 must and does provide a substitution mechanism for minor party presidential and vice-presidential candidates. Thus, the Libertarians respectfully request that the Court:

(1) 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;

(2) Or, should the Court find that G. L. c. 53, §14 does not provide such a substitution mechanism, 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;

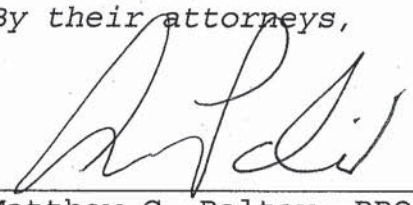
(3) Or, should the Court be unable to interpret G. L. c. 53, §14, enter a judgment declaring that the Massachusetts statutory scheme addressing the ballot access rights of political organizations and/or minor parties not recognized as "political parties" under G. L. c. 50, §1 is unconstitutionally void for vagueness.

Plaintiffs-Appellants further request reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other relief this Court deems just and proper.

Respectfully submitted,

Appellants Libertarian
Association of Massachusetts
and Libertarian National
Committee, Inc.,

By their attorneys,



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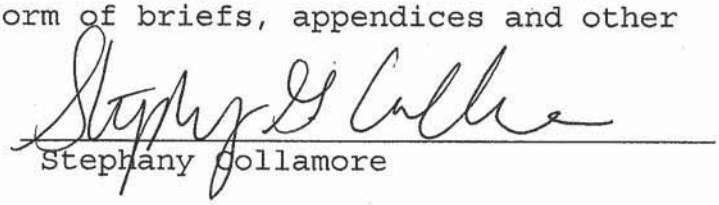
Dated: January 6, 2012

RULE 16K CERTIFICATION

The undersigned hereby certifies that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision), Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to the briefs) and Mass. R.A.P. 20 (form of briefs, appendices and other papers.)



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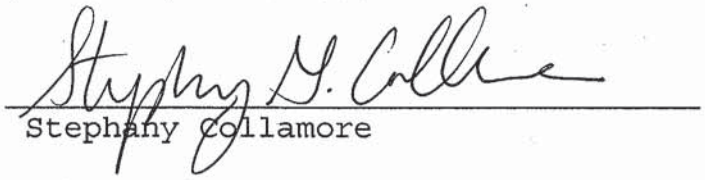
CERTIFICATE OF SERVICE

I hereby certify that on this day two true copies of the above document and the Record Appendix was served by hand upon Amy Spector, Esq., attorney of record for the Appellee, at the Office of the Attorney General, One Ashburton Place, Boston, MA 02108.



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