No. 09-2426

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Bob Barr; Wayne A. Root; Libertarian Party of Massachusetts; Libertarian National Committee, Inc., *Plaintiffs-Appellees*,

v.

William F. Galvin, in his official capacity as Secretary of the Commonwealth of Massachusetts, *Defendant-Appellant*.

Appeal from the United States District Court for the District of Massachusetts
Case No. 08-cv-11340-NMG

BRIEF OF APPELLEES BOB BARR, WAYNE A. ROOT, LIBERTARIAN PARTY OF MASSACHUSETTS, AND LIBERTARIAN NATIONAL COMMITTEE, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellee Libertarian National Committee, Inc. by and through its attorneys, certifies as follows:

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

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

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

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Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and First Circuit Local Rule 34.0(a), Appellees respectfully request that the Court schedule this matter for oral argument. This case involves issues of constitutional law that affect the electoral process and Appellees believe that oral argument will assist the Court in reaching a decision.

STATEMENT OF THE ISSUES

1. Whether the Massachusetts statutes governing candidate substitution are unconstitutionally vague as applied to minor party presidential candidates, giving the Secretary of the Commonwealth unfettered discretion to allow or deny substitution?

2. Whether the Secretary of the Commonwealth's decision to deny a minor political party the right to substitute its presidential candidate violates the U.S. Constitution?

3. Whether the Secretary of the Commonwealth should be estopped from arguing that allowing substitution for minor party presidential candidates is not the policy of his office?

STATEMENT OF THE CASE

The Libertarian Party of Massachusetts ("LPM") and the Libertarian National Committee, Inc. ("LNC") (collectively, "the Libertarians") are organizations seeking ballot access for Libertarian Party candidates for public office. In Massachusetts, the Libertarian Party was not a recognized political party in 2008, meaning the Libertarians had to collect 10,000 signatures on nomination papers in order for its presidential and vice presidential candidates to appear on the general election ballot. Bob Barr ("Barr") and Wayne A. Root ("Root") were selected by the national Libertarian Party as candidates for president and vice

president, respectively, in the 2008 presidential general election. The 2008 Libertarian National Convention, at which Barr and Root were selected, was scheduled for May 25, 2008. The Libertarians realized in 2007 that if they waited until after their candidates had been selected at the national convention to begin circulating nomination papers, they may not have adequate time to complete the process. Accordingly, the Libertarians asked the Secretary of the Commonwealth of Massachusetts (the "Secretary") whether the Libertarians could begin collecting signatures prior to the convention for candidates that may not be selected at the convention to be the general election candidates and then have the names of the candidates selected at the convention substituted on the general election ballot, should such a substitution prove necessary. The Secretary, through the Elections Division of his office, responded in writing that such substitution could be requested if required. As such, the Libertarians circulated nomination papers in Massachusetts with the names of George Phillies ("Phillies") and Chris Bennett ("Bennett") as candidates for president and vice president, respectively.

Nonetheless, when the Libertarians approached the Secretary after the Libertarian National Convention and requested that he substitute the names of Barr and Root for Phillies and Bennett on the 2008 general election ballot, the Secretary, in a reversal of position, simply refused. The Libertarians and their candidates filed an action in Massachusetts federal district court, alleging that the

Secretary's refusal to allow substitution was unconstitutional and seeking injunctive and declaratory relief. After briefing and oral argument, the district court granted the Libertarians' request for a preliminary injunction and ordered the Secretary to place Barr and Root's names on the 2008 general election ballot as the Libertarian Party candidates for president and vice president. The Secretary complied and Massachusetts voters were able to cast ballots for Barr and Root, the correct Libertarian candidates.

Following the 2008 election, the parties attended a court conference to discuss the best way to resolve the case. Agreeing that no new facts or intervening change in the law had occurred, and that the situation at issue was likely to repeat itself, the parties cross-moved for summary judgment in order to obtain a definitive, final ruling. The district court granted the Libertarians' motion, denied the Secretary's motion, and held that the Secretary's refusal to allow the Libertarians to substitute their general election candidates for the candidates listed on their nomination papers was unconstitutional. Judgment for the Libertarians entered and the Secretary filed a timely notice of appeal on October 16, 2009.

STATEMENT OF FACTS

I. Massachusetts Has A Statutory Framework Regulating Ballot Access.

Political organizations whose candidates secure three percent of the votes in a statewide election are recognized as "political parties" in Massachusetts. Mass. Gen. Laws ch. 50, § 1. The presidential and vice presidential candidates of such qualifying "political parties" are automatically eligible for ballot access in the next election. Mass. Gen. Laws ch. 53, § 1. Political organizations whose candidates do not secure the required three percent of votes are termed "political designations" (or, more informally, "minor parties") in Massachusetts. Mass. Gen. Laws ch. 50, § 1. Minor parties 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. This process requires the circulation of nomination papers which must be signed by 10,000 Massachusetts voters. *Id*. The nomination papers and signatures are then filed with the 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 certify the signatures and the certified nomination papers are then filed with the Secretary of the Commonwealth, who ensures the candidates are listed on the general election ballot. Mass. Gen. Laws ch. 53, § 10.

II. The Libertarians Recognized That Candidate Substitution May Be Necessary For The 2008 Election.

The Libertarian Party, not having received the requisite votes in the prior election, was considered a political designation (or minor party) in Massachusetts for the 2008 election. (J.A. 27.)[1] Therefore, the Libertarians understood that they had to circulate nomination papers in order to obtain ballot access for their presidential and vice presidential candidates. Mass. Gen. Laws ch. 50, § 1; Mass. Gen. Laws ch. 53, § 1; Mass. Gen. Laws ch. 53, § 6. For the 2008 election, the Libertarian Party's national nominating convention, where the party's 2008 general election candidates for president and vice president would be selected, was scheduled for May 22-26, 2008. (J.A. 246.) Recognizing the reality of the difficulties attendant in collecting the requisite signatures to meet the July deadline, the Libertarians determined that they needed to begin circulating nomination papers for signatures in Massachusetts early in 2008, before their national convention. (J.A. 247.)

Pursuant to Massachusetts General Laws chapter 53, section 8, "the surnames of the candidates for president and vice president of the United States

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[1] "J.A." refers to the Joint Appendix to the Briefs as filed by the Secretary on February 11, 2010, concurrently with his brief. "Addendum" refers to the Addendum bound to the rear of the Secretary's brief.

shall be added to the [nomination papers]" 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." Given the crowded field of candidates vying for the Libertarian presidential nomination, the Libertarians understood that the candidates on nomination papers circulated in Massachusetts before the national convention might differ from the actual general election candidates selected at the convention. Accordingly, the Libertarians needed to know whether it would be possible for the candidates listed on their nomination papers to withdraw and instead have the candidates selected at the Libertarian National Convention appear on the general election ballot, should such a substitution prove necessary. (J.A. 247.) The Libertarians looked to Massachusetts law, the Secretary's previous statements and actions, and the direct advice of the Secretary's office itself for guidance.

III. Massachusetts Law Includes Statutes Regulating Candidate Substitution. Furthermore, The Secretary Has Stated That Substitution Would Be Allowed In Elections Prior To 2008.

Massachusetts General Laws chapter 53, section 14 expressly provides procedures by which a candidate "nominated for a state, city, or town office" who has obtained ballot access may, upon withdrawing his or her candidacy, have the resulting ballot vacancy filled by substitution. 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." That same statutory section defines "state election" as "any election at which a national, state, or county officer . . . is to be chosen by the voters." Mass. Gen. Laws ch. 50, § 1.

The Elections Division of the Secretary's office has, in at least each of the three presidential elections prior to 2008, stated that it would allow presidential and vice presidential candidate substitution for political designations/minor parties. In 1996, the U.S. Taxpayers Party planned to hold its convention in August, after the deadline for submitting nomination papers. (J.A. 35-36.) The U.S. Taxpayers Party therefore sought advice from the Elections Division on whether the party would be permitted to substitute its national candidates for the ones listed on its nomination papers, if necessary. (*Id.*) The Elections Division stated in writing 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. . . . 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.

(*Id.*) The Elections Division cited *Anderson v. Firestone*, 499 F. Supp. 1027 (N.D. Fla. 1980), as a basis for its position. (*Id.*)

In 2000, the Reform Party, also a political designation/minor party in Massachusetts at the time, planned to hold its national nominating convention in August, subsequent to the deadline for submitting nomination papers. (J.A. 57.) 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.

(*Id*.)

During the next presidential election, 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." (J.A. 59-60.) The Secretary's office later told the Nader campaign that substitution would not be allowed and that a form to request substitution would not be provided. The Secretary's office 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." (J.A. 133-34.)

IV. The Libertarians Contacted The Secretary's Office In 2007 To Inquire About Substitution.

In order to verify that substitution would be allowed for the Libertarians in the 2008 election, George Phillies, a representative of the LPM, contacted an attorney with the Elections Division of the Secretary's office in late 2007. Phillies inquired by email 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 nomination papers circulated before the convention, should such a substitution prove necessary. (J.A. 247.) Specifically, Phillies' email stated that the Libertarians "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?" (J.A. 26-27.)

On October 26, 2007, an attorney from the Elections Division of the Secretary's office 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." (J.A. 26.)

Based on the advice of the Elections Division, the Libertarians began circulating nomination papers listing George Phillies as the Libertarian Party's presidential candidate and Chris Bennett as the vice presidential candidate in early 2008. (J.A. 248.)

V. Phillies Actively Campaigned For The Libertarian Party's Nomination, But Barr And Root Were Chosen At The Libertarian National Convention.

Phillies was actively seeking the Libertarian Party's nomination. (J.A. 71-74, 80-81, 248-49.) The LNC, LPM, and the Phillies 2008 campaign collectively spent over $40,000 collecting signatures on the Phillies/Bennett nomination papers in Massachusetts, and Phillies raised over $219,000 nationally for his campaign by the time of the convention. (J.A. 248.) Barr, the eventual nominee, had raised $184,857 by the time of the convention, and Root, a primary candidate for president and the eventual nominee for vice president, had raised $74,292. (*Id.*) Mary Ruwart, who finished second in delegate count at the national convention,

had raised only $29,974. (*Id.*) The only candidate who raised more than Phillies was Michael Jingozian, who had raised $288,000 by the time of the convention and who nonetheless finished behind Phillies in delegate count. (*Id.*)

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. (J.A. 249.) Both Barr and Root accepted the nominations. (*Id.*) Phillies finished in fifth place at the convention, out of a field of over ten candidates. (*Id.*; J.A. 72.)

VI. The Secretary Did Not Allow The Libertarians To Substitute Candidates.

On May 29, 2008, Phillies again contacted the Secretary's office via email, stating that, as the Libertarians had anticipated might be the case, the candidates chosen at the convention were different from the candidates on the Massachusetts nomination papers. (J.A. 45.) Phillies requested the substitution form alluded to in earlier correspondence. (*Id.*) On June 5, 2008, the Secretary's office replied 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 then-upcoming general election ballot. (J.A. 47-48.)

This letter stated two reasons for the Secretary's refusal to allow 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. (J.A. 47-48.) The Secretary's office 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. (J.A. 26.) The Secretary's office also informed the Libertarians that it did not believe that the withdrawal and substitution procedures set forth in Massachusetts General Laws chapter 53, sections 13-14 applied to presidential candidates. (J.A. 288.)

When the Libertarians received this information, they had already collected approximately 7,000 signatures on the nomination papers listing Phillies and Bennett as the general election candidates. (J.A. 250.) The Libertarians did not have sufficient time or financial resources to abandon the signatures collected on these nomination papers and start a new petition process. (*Id.*) If the Libertarians were to abandon the incomplete Phillies/Bennett nomination papers and begin collecting signatures on Barr/Root nomination papers that fell short of the required 10,000 signatures, no Libertarian Party candidates would appear on the general election ballot. To avoid this risk, the Libertarians continued to collect

signatures on the nomination papers listing Phillies and Bennett as the Libertarian Party presidential and vice presidential candidates, while continuing to communicate with the Secretary's office regarding reconsideration of its latest decision on substitution. (*Id.*; J.A. 63-66.)

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 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 2008 general election ballot. (J.A. 248.)

On August 6, 2008, after repeated unsuccessful attempts to persuade the Secretary's office to reconsider its decision not to permit substitution, the LNC, LPM, Barr, and Root filed an action for declaratory and injunctive relief in Massachusetts federal district court. (J.A. 10-24.) On September 12, 2008, the district court heard oral arguments from the parties regarding the Libertarians' request for a preliminary injunction directing the Secretary to substitute the names of Barr and Root for those of Phillies and Bennett on the general election ballot. (J.A. 5, 37-39.) On September 22, 2008, the district court issued a written decision granting the Libertarians' request for a preliminary injunction and ordered the Secretary to make the requested substitution. (J.A. 154-65.) The

Secretary complied with the Court's order.[2] On March 31, 2009, the parties cross-moved for summary judgment. (J.A. 177-78, 221-23.) The district court issued an order on September 17, 2009, granting the Libertarians' motion and denying the Secretary's motion, and entered final judgment in the Libertarians' favor on September 21, 2009. (Addendum 1-14.)

SUMMARY OF THE ARGUMENT

The Secretary of the Commonwealth violated the Libertarians' constitutional rights when he refused to allow the substitution of the Libertarian Party's presidential and vice presidential candidates on the general election ballot. The

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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. *Gjertsen v. Bd. of Election Comm'rs*, 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. The same procedure is appropriate here. *See also Gjertsen v. Bd. of Election Comm'rs*, 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.").

district court's grant of summary judgment in favor of the Libertarians should be affirmed.

Massachusetts General Laws chapter 53, section 14 provides a means by which a candidate nominated for "state, city or town office" may, upon withdrawing his candidacy, have the resulting vacancy filled. The statute defining whether a candidate for president is a candidate for "state office" is unconstitutionally vague and ambiguous, leaving presidential candidates to guess as to whether the substitution procedures of section 14 apply. The Secretary's arguments for why the Court need not reach a decision on whether the substitution framework is unconstitutionally vague are without basis in law or fact and are merely attempts to avoid the real issues of this case.

The vagueness of the substitution statutory framework allows the Secretary to exert unconstitutional, unfettered discretion to allow or prohibit substitution during any given election. Furthermore, when the Secretary has exercised this authority in the past, he has allowed substitution in several cases substantially similar to the instant case, illustrating not only that he operates with no standards in this area, but also that he violated the Libertarians' right to equal protection by not allowing substitution for them.

Even in the absence of a statutory procedure for substitution, which the Libertarian presidential candidates would have followed in 2008 and which future

Libertarian candidates would follow were it clear that it applied to them, the right to substitution for minor parties is required by the U.S. Constitution. Not allowing substitution places an undue burden on a minor party to choose its candidates far in advance of the general election, a result that courts have found unconstitutional. Furthermore, the Secretary can point to no state interest, compelling or otherwise, in prohibiting substitution in cases such as this. Indeed, the public interest weighs in favor of ensuring the correct national candidates always appear on the Commonwealth's general election ballot.

Lastly, the Secretary should be estopped from asserting that allowing substitution for minor party presidential candidates is not the policy of his office. In the last four elections, including the 2008 election, his office has, at one point or another, informed minor parties that substitution would be allowed. An examination of the events that occurred leading up to the 2008 election illustrates precisely the perplexing nature of the Secretary's guidance with regard to substitution. A finding by the Court that the Secretary's official policy is to allow substitution will provide minor parties the guidance they are constitutionally due and is in the best interest of the public.

ARGUMENT

Substitution is a constitutional necessity for minor political parties in the United States and is integral to the vitality of the electoral process. Substitution is

rendered essential by the fact that, in Massachusetts, minor parties must collect signatures and submit them in July of the election year to obtain ballot access for their candidates. Yet, given the varying tempo of the election cycle in any given year, parties do not always hold their nominating conventions sufficiently in advance of July to begin the collection process after their conventions, particularly because signature collection is a necessity in a number of states. The distinct characteristics of each individual presidential election require that a minor party be able to freely schedule its nominating convention at the time of its choosing without fear of risking ballot access for its candidates. Thus, substitution becomes essential for minor party ballot access. The fact that each of the last several general elections raised minor party substitution issues in Massachusetts confirms this. A ruling by this Court, affirming the district court's grant of summary judgment, would finally give minor parties guidance on the issue and allow the citizens of Massachusetts a greater array of choices in the general election.

I. Standard Of Review

Ballot access "implicates basic constitutional rights" including "'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (quoting *Williams v.*

Rhodes, 393 U.S. 23, 30-31 (1968)). As the Supreme Court has emphasized, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). This Court has observed that election campaigns are "a means of disseminating ideas" and "attaining political objectives" and that "[a]n overly stringent regulatory scheme may place an intolerably heavy burden on political expression." *Perez-Guzman v. Gracia*, 346 F.3d 229, 239 (1st Cir. 2003) (citing *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979)). Further, in our democratic society, "'[i]t is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.'" *Celebrezze*, 460 U.S. at 787 (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)). "The right to vote is heavily burdened if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot." *Id*. (internal quotations omitted).

Because of the importance of ballot access and the impact of ballot access on constitutional rights, the Court of Appeals reviews ballot access rulings *de novo* and does so as "'a rule of federal constitutional law' reflecting 'a deeply held conviction that judges . . . must exercise such review in order to preserve the

precious liberties established and ordained by the Constitution.'" *Perez-Guzman*, 346 F.3d at 238.

II. The Massachusetts Substitution Statutory Framework Is Unconstitutionally Vague, Leaving Minor Party Presidential Candidates To Guess As To How To Achieve Substitution.

A ballot access statute is unconstitutionally void for vagueness "if a reasonable person must necessarily guess at its meaning" and where the "applicable coverage of the statute may be unclear." *Duke v. Connell*, 790 F. Supp. 50, 54 (D.R.I. 1992) (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620-22 (1976)). As the district court noted, "a vague statute can be justified by no legitimate state interest." (Addendum 8 (citing *Duke*, 790 F. Supp. at 53-54).)

The Massachusetts substitution scheme is an impermissibly vague series of laws. Massachusetts General Laws chapter 53, section 14 expressly provides procedures by which a candidate "nominated for a state, city, or town office" may, upon withdrawing his or her candidacy, have the resulting ballot vacancy filled (i.e. substitution).[3] Chapter 50, section 1 defines "state officer" as "any person to

[3] The Secretary states that the Libertarians "did not set forth any claim in the complaint challenging Mass. G.L. c. 53, § 14 – indeed, the complaint does not even mention that section of the statute at all" and that the Libertarians "seized on the provision in their preliminary injunction papers." (Appellant Br. 43.) The Libertarians plainly put the Secretary on notice of their claims as required by Rule 8 of the Federal Rules of Civil Procedure. *See, e.g., Coleman v. Pension Benefit Guar. Corp.*, 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2000) (complaints need not

be nominated at a state primary or *chosen at a state election* and shall include United States senator and representative in Congress" (emphasis added). The same section defines "state election" as "any election at which a *national*, state, or county officer . . . is to be chosen by the voters" (emphasis added).

As the district court correctly noted, "based upon the circular definitions set forth in § 1, the inclusion of the term 'state [] office' in M.G.L. c. 53, § 14 leaves the determination of whether that statute is applicable to presidential and vice-presidential nominees positively ambiguous." (Addendum 8.) "The category of 'state officers' is defined to be broader than itself, a nonsensical conclusion. It is therefore ambiguous whether the substitution process set forth in § 14 applies to presidential nominees" and "interested parties are left with no statutory guidance on the issue." (J.A. 160.) No state interest can justify a situation in which reasonable persons are left to guess as to whether chapter 53, section 14 applies to candidates for president and vice president.

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describe in detail the legal theories underlying claims therein). Furthermore, it can hardly be argued that the Secretary was ambushed or in any way prejudiced, as the Libertarians filed their motion for preliminary injunction, which set out in detail the challenge to the Massachusetts substitution statutory framework, less than ten days after filing the complaint. Lastly, demonstrating that the Secretary did not view this as a serious challenge to the Libertarians' claims is the fact that he did not raise it in either of two full rounds of briefing in the district court.

Furthermore, all evidence on the record suggests that an assessment of the vague terms at issue should be resolved in favor of inclusion of presidential candidates and elections. The Secretary has consistently interpreted the terms "state office" and "state election" to apply to presidential candidates and elections. For example, the Secretary states that Massachusetts General Laws chapter 53, section 7 dictates the procedures for *presidential* candidates to submit nomination papers. (Appellant Br. 9-10.) This statute makes no reference to presidential candidates, rather referencing "[e]very nomination paper of a candidate for a *state office*." Mass. Gen. Laws. ch. 53, § 7 (emphasis added). Additionally, in 2004, the Secretary's office told presidential candidate Ralph Nader that the procedure to obtain review of a denial of the validity of signatures on his nomination papers was governed by Massachusetts General Laws chapter 55B, section 6. (J.A. 133-34.) That statute states, in its very opening clause, that it "applies only to candidates for president who file nomination papers to be placed on the ballot at presidential primaries, and to all candidates at regular state primaries and biennial *state elections*." Mass Gen. Laws ch. 55B, § 6 (emphasis added). Nader was not a "candidate[] for president who file[d] nomination papers to be placed on the ballot at a presidential primar[y]," nor was he a candidate at a "regular state primary[]." The Secretary's office nevertheless interpreted chapter 55B, section 6 to apply to Nader, showing beyond a doubt that the Secretary considers candidates in the

presidential general election to be candidates at "state elections." Yet the Secretary takes the opposite position here.

The conclusion that the statutory framework is unconstitutionally vague is buttressed by the specific inclusion of "senator" and "representative" within the definition of "state officer," which suggests that the Massachusetts legislature intended presidential candidates to be covered by statutes regulating "state elections." If senator and representative are specifically defined as "state officers," that logically suggests that they are *not* "national officers." As such, there would be no reason for the legislature to have included "national officers" within the definition of candidates chosen at a "state election" had it not intended that definition to include the office of president; there is no other elected officer besides president (and vice president) that could reasonably be deemed a "national officer." In any event, the competing arguments themselves illustrate the Libertarians' point – the statutory framework is unconstitutionally vague and lends itself to a number of interpretations, leaving minor parties to guess, in the important context of ballot access, what the framework requires.

III. The Ambiguity In The Massachusetts Substitution Statutory Framework Effectively Grants The Secretary Unconstitutional, Unfettered Discretion To Allow Or Deny Substitution.

The ambiguity in the Massachusetts substitution statutory framework leaves the Libertarians to guess at its coverage and applicability, which constitutes an

unconstitutional burden on their rights. That burden is further exposed by the fact that the ambiguity allows the Secretary, functioning as the sole arbiter of the statute's applicability, near-dictatorial power to arbitrarily allow substitution or not. Such unfettered discretion is unconstitutional and further entitled the Libertarians to summary judgment. The Massachusetts substitution scheme unconstitutionally "permit[s] public officials to exercise unreviewable discretion in their enforcement of the statute because of a lack of standards." *Duke*, 790 F. Supp. at 54 (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610, 621-22 (1976)).[4] Such a regime "encourages arbitrary and erratic" enforcement by public officials. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). For, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The Secretary's office, which is charged with regulating ballot access matters, apparently operates without any guidelines in this area. When asked by

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[4] In *Duke*, the Secretary of State was permitted full discretion in deciding which candidates would appear on the presidential primary election ballot. *Duke*, 790 F. Supp. at 54. The court found this impermissible, stating that "[t]he fact that an unduly vague law deprives a court of the ability to review potentially arbitrary or discriminatory decisions of public officials, is one of the principal reasons for the void-for-vagueness doctrine." *Id.* (internal citation omitted).

the district court at oral argument during the preliminary injunction phase, "[w]hat is the Commonwealth's procedure for substitution of presidential candidates?," the Secretary, through counsel, candidly responded that "[t]here may well be a gap in the state law" and reaffirmed the Secretary's position that chapter 53, section 14 does not apply to presidential candidates. (J.A. 275.) Indeed, the Secretary's office has recognized its own ability to be the final arbiter as to whether substitution of presidential candidates will be permitted. In a 1995 advisory letter, the Secretary's office stated that:

> Massachusetts law does not clearly provide a procedure for [presidential candidate substitution]. . . . 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.

(J.A. 35-36.) In another instance the Secretary's office has stated "that ballot substitution may be made . . . based on exigent circumstances." (J.A. 57.) There is no statutory or common law basis for the Secretary's standard; in fact, there is not even a standard, written or otherwise. This lack of guidelines caused by the ambiguity in the law is, as the district court noted, "evidenced by the actions of the Elections Division itself" in this case, first stating that it could prepare a form by which the Libertarians could request substitution and then abruptly reversing

course after inducing reliance. (J.A. 160.) The casualty of this lack of standards is ballot access for minor party candidates.

IV. Indicative Of The Secretary's Unconstitutional Discretion And Arbitrary Substitution Policy Is The Fact That The Secretary Has Allowed Substitution In The Past.

The vagueness of the statutory framework, the Secretary's resulting unfettered discretion in allowing substitution, and the impropriety of his refusal to allow substitution for the Libertarians in 2008 is further illustrated by the fact that his office has dealt with the substitution issue in at least the three presidential elections preceding 2008 and has stated that it would allow substitution each time. The Secretary has attempted to distinguish these previous instances in his briefing, but these attempts uniformly fail.

As an initial matter, the Secretary has asserted that his office allowed substitution on only one occasion – in 2000, for the Reform Party. (Appellant Br. 41-42.) However, the more precise statement is that 2000 was the only year in which the minor party for which the Secretary agreed to allow substitution was actually able to secure enough signatures to gain ballot access and thereby take advantage of the Secretary's offer. That fact has no bearing on an analysis of the Secretary's statements that he would have allowed substitution in several other instances and the unchecked discretion those statements display.

In any event, the Secretary does admit that presidential candidate substitution was allowed for the Reform Party in 2000. The *only* distinguishable difference between the Reform Party in 2000 and the Libertarian Party in 2008 is the timing of the parties' respective national conventions – the Reform Party held its convention after the deadline for submitting nomination papers; the Libertarian Party held its convention before the deadline. While the Secretary now emphasizes that a minor party's *specific candidates* must show substantial community support, (Appellant Br. 4, 33), he did not voice such a concern when allowing the Reform Party to substitute. The fact that the Reform Party convention occurred after the deadline for submitting nomination papers could not have allayed the Secretary's concern about specific candidates' community support. Furthermore, the Secretary's approval of substitution for the Reform Party in 2000 undermines the Secretary's argument that the endorsement of a party's national nominating convention does not confer any change in status for candidates running under the banner of political designations in Massachusetts, as the Reform Party was also a political designation/minor party in 2000. (Appellant Br. 10, 39.) The Secretary's attempt to distinguish the Reform Party situation in 2000 from the Libertarians' situation in 2008 without a rational basis is precisely the kind of arbitrary discrimination prohibited by the equal protection clause. *Duke*, 790 F. Supp. at 53-54.

The Secretary also stated that he would allow candidate substitution in the 1996 election. Similar to the Reform Party in 2000, the U.S. Taxpayers Party, a minor party in Massachusetts, was holding its national convention after the date for submitting nomination papers. In late 1995, the U.S. Taxpayers Party asked the Secretary's office whether substitution would be allowed for its presidential and vice presidential candidates should the candidates chosen at the convention differ from those on the nomination papers. (J.A. 35-36.) The Secretary's office replied, "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." (*Id.*) The Secretary cited *Anderson v. Firestone*, 499 F. Supp. 1027 (N.D. Fla. 1980), as a grounds for its decision. (*Id.* [5]) In a reversal from that written guidance, the Secretary now states that he only "expressed a willingness to consider 'substitution' in the case of the U.S. Taxpayers Party . . . but it ultimately

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[5] In his brief, the Secretary admits that he relied on *Firestone* in 1995, but states that he "was not presented with a fully developed equal protection claim" at that time and that he no longer finds *Firestone* persuasive. (Appellant Br. 40 n.16.) This is, again, indicative of the constitutional infirmity of the current situation. The Secretary employs his own shifting standards when deciding whether to allow a minor party to substitute candidates. It is now also evident that the Secretary asserts that it is within his sole discretion to decide when to follow the seminal legal holding analyzing the issue. *Firestone* will be discussed at greater length below.

was not allowed." (Appellant Br. 42 n.18.) Such an artificial reading of the 1995 letter strains credibility. The Secretary did not merely "express[] a willingness to consider" substitution – his office said substitution has been permitted and will be permitted and even cited a case holding that not permitting substitution violates minor parties' constitutional rights.[6] His office then advised the party on the specific procedures it needed to follow to withdraw the candidates on its nomination papers and substitute its convention-chosen candidates, and informed the party by which specific dates it needed to complete those procedures.[7] Furthermore, as noted above, "substitution ultimately was not allowed" only because, unlike the Libertarian Party in 2008, the U.S. Taxpayers Party did not collect the required number of signatures and, therefore, *did not qualify for ballot access*. (*See* J.A. 198.[8])

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[6] Even if the Secretary had merely "expressed a willingness to consider" substitution, that hypothetical situation would serve as an even better illustration of the problem with the current substitution scheme. If a minor party asks the Secretary for advice on whether substitution will be allowed, and the best the Secretary can do is "express a willingness to consider" it, a minor party is left with little quality guidance on the subject and can do no better than to guess as how to proceed, a result not permitted by the U.S. Constitution.

[7] "We advise that you file a notarized withdrawal no later than August 30, 1996, and that you make a substitution no later than September 5, 1996." (J.A. 35-36.)

[8] There is also no difference between the situation of the U.S. Taxpayers Party in 1996 and the Reform Party in 2000, illustrating that substitution was not allowed

Similarly demonstrating the unfettered discretion caused by current unconstitutional substitution framework is the series of events that took place concerning the Nader presidential campaign in 2004. The Secretary asserts that the Libertarians "suggest[], incorrectly, that the Secretary expressed his approval of 'substitution' on the ballot of Peter Camejo as the running mate for non-party presidential candidate Ralph Nader in 2004." (Appellant Br. 42 n.18.) The Secretary stated, as quoted in the *Boston Globe*, "*[w]e would find some way, if Nader were to be certified, to substitute Camejo's name. The substitution is not their problem.*" (J.A. 59-60 (emphasis added).) The Libertarians respectfully assert that their interpretation of this comment is the only reasonable one – the Secretary did not only express his approval of substitution, but said that his office would "bend[] over backwards" to effectuate it. (*Id.*)

The Secretary has attempted to explain away the significance of this statement by asserting that, "[i]n any event, the Secretary subsequently determined

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for the U.S. Taxpayers Party solely because it did not obtain ballot access. Both parties were non-party political designations, both had scheduled conventions after the deadline for submitting nomination papers, both asked in advance if they could substitute candidates if the candidates chosen at their respective conventions differed from those listed on the nomination papers, and both times the Secretary said substitution would be permitted. If there were some other reason substitution was allowed for the Reform Party but not the U.S. Taxpayers Party, it would only serve as further *prima facie* evidence of the complete arbitrariness of the Secretary's substitution regime.

that 'substitution' of Camejo's name would not be allowed." (Def.'s Mem. Supp. Summ. J. 15 n.12. *See also* Appellant Br. 42 n.18.) This indicates precisely what is wrong and, indeed, unconstitutional about the current substitution scheme. The Secretary not only sets his own substitution standard, but acts as its sole enforcer, extending and retracting the possibility of substitution at will to the detriment of minor parties and the voting public.[9] In any event, the Secretary's permitting, or even "expressing his willingness to consider," substitution in past situations significantly analogous to the instant case demonstrates the absence of any legitimate interest in not allowing substitution of the kind requested by the Libertarians, a national party with a national nominating convention. Such a state of affairs supports affirming the district court's grant of summary judgment to the Libertarians.

V. The Secretary's Arguments For Why The Court Need Not Reach A Decision As To Whether The Substitution Statute Is Unconstitutionally Vague Are Without Merit.

As he did in the district court, the Secretary continues to only nominally dispute the Libertarians' challenge to the vagueness in the Massachusetts substitution statutory framework and the unfettered discretion it allows, and instead

[9] Furthermore, like the U.S. Taxpayers Party in 1996, the Nader campaign did not actually secure the required 10,000 signatures to appear on the ballot, so a live controversy about substitution never arose.

focuses the majority of his argument on the fact that the Massachusetts requirements for obtaining ballot access are constitutional. However, the constitutionality of the number of signatures minor parties are required to collect and/or the time which minor parties are given to collect those signatures is not, and has never been, at issue in this case. The Libertarians have never challenged Massachusetts' requirements for obtaining ballot access; indeed, they *met* those requirements. Rather, the Libertarians challenge the Secretary's refusal to allow substitution.

As an initial matter, the Secretary asserts that the Libertarians had sufficient time after the 2008 national convention to collect signatures on a petition listing Barr and Root as the candidates. (Appellant Br. 19-20.) The Libertarians disagree and have submitted uncontroverted affidavit testimony to that effect. (J.A. 248-50.) In any event, the signature requirement and the time to meet it only posed a burden to the Libertarians in 2008 because they would essentially have had to meet this requirement *twice* following the Secretary's mid-campaign reversal of his position on substitution – the Libertarians had already expended vast resources to collect thousands of signatures for Phillies/Bennett prior to learning that substitution would not be allowed. This is the only concern the Libertarians have raised with respect to the signature requirement—that it would have been overly burdensome for them to have met it twice in the unique circumstances of 2008—

and the Secretary should not be permitted to reframe the issues in this case by ignoring this fact.

After setting aside any issues specific to 2008, the plethora of cases cited by the Secretary in which a certain signature requirement for obtaining ballot access was upheld are simply irrelevant to the issue of whether candidates and parties who obtain ballot access must be permitted to substitute. The issue in this case is whether candidates from minor political parties who *meet* the Massachusetts ballot access requirements must be permitted substitution, not whether the requirements themselves are constitutional. The Libertarians challenge the undue burden created by the Secretary's conflicting guidance on the substitution issue under an ambiguous statutory framework, not the burden of any ballot access requirement. Similarly, the Libertarians do not challenge the fact that there are different paths to the ballot for major parties and minor parties; the Libertarians challenge that minor parties are not allowed to substitute candidates. As during all phases of this action, the Libertarians' arguments challenging the constitutionality of the Secretary's refusal to allow substitution pursuant to section 14 continue to proceed uncontested in any meaningful manner because the Secretary instead sidesteps the issues.[10]

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[10] Furthermore, there is no evidence that the Libertarians were attempting to escape the signature requirement through substitution. As the district court noted, "the plaintiffs in this case clearly were not attempting to circumvent the election laws,

Notwithstanding the above, the Secretary now asserts the novel theory that the availability of the petition process under Massachusetts General Laws chapter 53, section 6 as a non-burdensome means to obtain ballot access obviates the need for this Court to reach a decision on the constitutional necessity for substitution and the vagueness of the Massachusetts statutes regulating such substitution. (Appellant Br. 45-48.) This argument ignores the important fact that the amount of time a minor party will have to collect signatures with the official general election candidates' names will vary from election to election depending on when that party's national convention is scheduled. In future general elections, the Libertarian Party, or another minor party, may schedule its national convention, for example, a week before the deadline for submitting signatures, when following the procedures of section 6 to collect signatures on behalf of the chosen candidates would be practically impossible. A minor party may perhaps schedule its convention after the deadline, when the Secretary has allowed substitution for minor parties specifically because following the procedures of section 6 was then impossible. Furthermore, a minor party presidential candidate could become ill or die. By the Secretary's logic, a minor party that obtains ballot access for a

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nor have they circumvented them. . . . [P]laintiffs have made a good faith effort to comply with the law." (J.A. 162-63.)

presidential candidate who dies would not be allowed to substitute a new candidate in his or her place without collecting 10,000 new signatures, regardless of when the death occurred. This illustrates why a clear substitution policy is necessary and, indeed, constitutionally required – there is a strong likelihood that the petition process will not always present "a valid route to the ballot that does not unconstitutionally burden" a minor party.[11] (Appellant Br. 45.)

The assertion that, because a constitutionally sound means to obtaining ballot access exists, the Court need not reach a decision on whether substitution is constitutionally required, is baseless, and the cases cited by the Secretary do not in any way support such a notion. *LaRouche v. Kezer*, 990 F.2d 36 (2nd Cir. 1993), dealt with a situation in which a candidate could choose from two competing methods of obtaining ballot access – collecting signatures or submitting materials to the Secretary of State to demonstrate a certain amount of "media recognition." *Id.* at 37-38. The Second Circuit held that, because the signature collection method

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[11] The Secretary also states, correctly, that more than one candidate could have collected signatures under the "Libertarian" designation in 2008 and suggests that this is a reason not to allow substitution of the national Libertarian general election candidates. (Appellant Br. 33 n.11.) It is hard to see how the fact that two presidential candidates could appear on the ballot under the same political designation affects an analysis of whether one presidential candidate who has obtained ballot access can withdraw and have the resulting ballot vacancy filled pursuant to Massachusetts General Laws chapter 53, section 14.

provided a constitutional route to ballot access, the "media recognition" method was not constitutionally required and, therefore, the court need not decide whether it posed an unconstitutional burden on candidates. This case did not discuss a situation in which the signature collection method no longer provided a constitutional route to the ballot, as the Libertarians assert was the case in 2008 and as will almost certainly be the case in future elections depending on the timing of national nominating conventions, and did not at all discuss the constitutional need for substitution. Similarly, this Court's decision in *Libertarian Party of Maine v. Diamond*, 992 F.2d 365 (1st Cir. 1993), does not support the Secretary's contention. In *Diamond*, the minor party candidates challenged the requirements of Maine's primary election ballot access procedures. However, in Maine, the minor party candidates at issue were given the *choice* at the outset of whether to organize and participate in the primary process, which has its own specific ballot access requirements, or collect signatures on nomination petitions, a process which the candidates offered no evidence to suggest was burdensome. Indeed, this Court noted that the minor party could have, at any time, chosen to "disqualify" itself from the primary process and employed the petition route. *Id.* at 374-75. Like *LaRouche, Diamond* did not deal with the issue of whether substitution is constitutionally required for minor party candidates who obtain ballot access and is likewise of no import to the instant case.

The Secretary also argues that this Court should not reach the Libertarians' challenge to chapter 53, section 14's vague applicability because that statute is "not intended to provide a means by which a candidate can plan in advance" to employ its procedures. (Appellant Br. 44, 47-48.) If this were the case, it is only through guesswork that one would so conclude – the statute includes no such restriction and the Secretary points to no case law or legislative history to suggest that this is the case. Chapter 53, section 14 applies, by its plain language, to filling the vacancy created by a candidate who "withdraws his name from nomination." Mass. Gen. Laws ch. 53, § 14. Nothing in the statute supports the notion that a vacancy can only be filled if the withdrawal is unexpected. In any event, the Secretary's attempt to characterize the Libertarians' actions as some illicit plot to avoid complying with the law is puzzling, considering his office was informed, more than a year before the general election, of the Libertarians' plans to collect signatures for a candidate who, at that time, may not have been selected at the national convention and, in response, his office said it would "work with" the Libertarians and would "prepare a form" allowing the Libertarians to request substitution. (J.A. 26.)

Particularly troubling is the Secretary's continued adherence to the idea that a challenge to the vagueness of the application of chapter 53, section 14 need not be reached because, in any event, "section 14 simply directs the party or non-party

to fill the vacancy through 'the same political party or persons who made the original nomination, and in the same manner.'" (Appellant Br. 48.) The Secretary has argued that this would have required "new nomination papers, with 10,000 voter signatures, to be submitted on behalf of Barr and Root." (Def.'s Mem. Supp. Summ. J. 18-19.) It belies common sense to interpret a statute that regulates the procedures for *filling vacancies* upon the withdrawal of candidates as requiring that the vacancies be filled in the exact same manner the withdrawn candidate originally obtained ballot access. If that were the case, a statute purporting to regulate the filling of vacancies would simply serve no purpose. Furthermore, contrary to the Secretary's assertion, section 14 expressly provides a specific procedure for substitution of candidates "nominated by nominating papers" and expressly states that this procedure is different than the procedure for obtaining ballot access in the first instance.[12] The Libertarians would have fully complied with this procedure, and would in the future, if the Secretary had a clear policy stating that chapter 53, section 14 applies to candidates in presidential elections.[13]

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[12] "If a vacancy is caused by withdrawal, certificates of nomination made *otherwise than in the original manner* shall be filed within seventy-two week day hours in the case of state offices . . . succeeding five o'clock in the afternoon of the last day for filing withdrawals." Mass. Gen. Laws ch. 53, § 14 (emphasis added).

[13] The Secretary also appears to suggest that the fact that the candidates did not actually withdraw within 72 hours after submitting nomination papers in 2008, per

Finally, the Secretary asserts that, to the extent the Libertarians' vagueness challenge turns on the proper interpretation of chapter 53, section 14, the Court should decline to reach it because the matter would be one of pure state law beyond a federal court's reach. (Appellant Br. 48-49 (citing *Socialist Workers Party v. Davoren*, 378 F. Supp. 1245 (D. Mass. 1974)).) However, unlike in *Davoren*, the Secretary here has left the Libertarians "in the dark about how it must go about qualifying for the ballot." *Davoren*, 378 F. Supp. at 1249. Precisely, the Libertarians challenge the unconstitutional vagueness of the Massachusetts substitution regime and the unchecked discretion of the Secretary. The Secretary admittedly has no official stated policy regarding substitution and allows substitution in his sole discretion. This leaves candidates, parties, and voters with

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Massachusetts General Laws chapter 55B, section 5, has some bearing on the outcome of this case. (Appellant Br. 48 n.22.) This line of argument conveniently ignores that the candidates did not withdraw precisely *because* the Secretary said he would not allow them to fill the vacancies. Furthermore, in the days leading up to the deadline for withdrawing under Massachusetts General Laws chapter 53, section 13, the Libertarians' counsel specifically asked the Secretary, through his counsel, whether the candidates should withdraw pursuant to section 13. (J.A. 288-89.) The Secretary's counsel replied that "it is the Secretary's position that G.L. 13-14 do not apply here. I cannot provide any advice, beyond our stated position, as to how your client should proceed." (*Id.*) Following the district court's Preliminary Injunction Order, the Libertarians' counsel again verified that the candidates and/or the electors did not need to officially withdraw to effectuate the district court's Order that Barr and Root be placed on the ballot. (J.A. 291.)

no certainty as to the standard (because there is none) and leaves minor parties with no explanation for the ever-changing position of the Secretary's office. The Secretary's actions implicate the federal constitutional rights of minor parties and of citizens of the Commonwealth to freely associate and vote for candidates for the offices of President and Vice President of the United States of America. As such, they were properly addressed by the district court. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. 304, 344 (1816) ("The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity."); *Duke*, 790 F. Supp. at 53-54.

VI. The U.S. Constitution Requires That Substitution Must Be Allowed For Minor Parties.

Even in the hypothetical absence of any statute allowing or regulating substitution for minor party presidential candidates, the Libertarians were nonetheless entitled to summary judgment. The result of the Secretary's refusal to allow the requested substitution is that the Libertarian Party presidential and vice presidential general election candidates would have been denied a place on the Massachusetts general election ballot. Such a denial violates Plaintiffs' First and Fourteenth Amendment rights as candidates, as voters, and as members of a minor political party. As the district court noted, "a right to substitute is guaranteed by

the Equal Protection Clause of the Constitution to ensure that the names of the actual candidates appear on the ballot." (Addendum 12.)

Facing an essentially identical issue, a federal district court in Florida found that substitution of a vice presidential candidate was required where the failure to substitute would amount to unconstitutional discrimination in favor of the major parties. *Anderson v. Firestone*, 499 F. Supp. 1027, 1030 (N.D. Fla. 1980). In *Firestone*, John Anderson, a presidential candidate, was required to collect signatures to appear on the general election ballot. *Id.* at 1028. Anderson had not yet picked his vice presidential candidate and asked the Deputy Secretary of State whether he could use a surrogate name on the petition and then substitute the actual vice presidential candidate once he or she had been selected. *Id.* Anderson was told this would not be permitted. *Id.* at 1029. He nonetheless circulated petitions with the name of a surrogate candidate, who subsequently attempted to withdraw from the race on the condition that Anderson's actual vice presidential candidate would be substituted on the ballot. *Id.* The court held that the Secretary's denial of substitution was unconstitutional, in part because minor party candidates would have to select their running mates before the major party presidential candidates were even finalized. *Id.* The state's failure to allow substitution therefore denied Anderson equal protection of the laws. *Firestone* is instructive here, demonstrating that actions that target minor parties are particularly

suspect. *See also El-Amin v. State Bd. of Elections*, 721 F. Supp. 770 (E.D. Va. 1989).

In this case, the Secretary discriminates between major parties and minor parties in an arbitrary manner, just as the Secretary of State in Florida impermissibly discriminated in *Firestone*. The Secretary in essence claims that the Libertarians should have (1) selected their general election candidates far in advance of the July deadline for submission of signatures to the town clerks so that substitution would not be an issue, or (2) scheduled their convention after the deadline for submission of signatures, in which case substitution would have apparently been allowed, as it has been in the past.

The Secretary cannot use the denial of substitution to effectively force a minor party to select its general election candidates months before the deadline for submitting signatures. *See id.* at 1030 (finding that Secretary of State could not force minor party to select candidates "several months before the [major] party candidates have themselves been selected" and therefore had to allow substitution). *See also Toporek v. South Carolina State Election Comm'n*, 362 F. Supp. 613, 620 (D.S.C. 1973) (finding that allowing major parties to substitute candidates up to thirty days before the election, but requiring minor parties to submit candidate names two-and-a-half months before the election and not allowing minor parties to substitute candidates, violated the Constitution).

Requiring early selection would constitute impermissible discrimination against minor parties, considering the major political parties' certificates of nomination with the candidates' names do not have to be presented to the Secretary until the second Tuesday in *September* before the election. Mass. Gen. Laws ch. 53, § 8. Forcing late selection would also unconstitutionally burden Plaintiffs. Mandating that a minor party like the Libertarian Party, which often has a field of over ten candidates vying for the nomination and therefore often cannot predict which candidate will win at the convention, always hold its convention so late in the summer, when it would be competing with the major parties for attention, could effectively ruin a Libertarian candidate's chances for viability.

VII. The Secretary Can Point To No Interest, Compelling Or Otherwise, For Not Allowing Substitution.

As the district court stated, "the constitutionality of state action affecting ballot access is reviewed using a sliding scale such that, to pass muster, voting regulations imposing 'severe burdens' must be narrowly tailored to a 'compelling state interest' but 'reasonable, nondiscriminatory restrictions' must be justified by only 'important regulatory interests.'" (Addendum 6 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *McClure v. Galvin*, 386 F.3d 36, 41 (1st Cir. 2004)).) The Secretary cannot point to an "important regulatory"

interest, much less a "compelling" one, served by not allowing the substitution the Libertarians requested.

The Secretary has focused on his interest in not allowing the use of "stand-in candidates" on nominating petitions. (Appellant Br. 48. *See also* J.A. 29-30.) Yet, as supported by uncontroverted and unchallenged affidavit and documentary evidence, Phillies was no mere "stand-in" candidate.[14] (J.A. 71-74, 80-81, 248.) Further, it is unclear what the Secretary intends to convey by labeling Phillies a "stand-in." That undefined term only highlights the arbitrariness of the Secretary's approach. Indeed, if the Secretary had been permitted to deny substitution, he would have placed Phillies, the "stand-in," on the general election ballot.

The Secretary has further asserted that his decision to prohibit the requested substitution serves an interest in preventing voter confusion, because the voters signed a petition for one set of candidates, yet would see another set on the ballot. (Appellant Br. 33.) This assertion is unpersuasive given that the Secretary would admittedly allow substitution in other cases in which voters

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[14] At oral argument on the Libertarians' preliminary injunction motion, the district court specifically asked the Secretary's counsel whether the Secretary had "any evidence to support [the] view" that Phillies was a "stand-in" candidate and whether "such a designation affect[s] the statutory analysis." (J.A. 274.) The Secretary declined to respond.

signed nomination papers for a candidate who ultimately does not appear on the general election ballot, such as when a minor party schedules its presidential nominating convention after the signature submission deadline or when a minor party seeks to substitute candidates for other offices which are clearly "state, city, or town offices," such as senator or representative. If voter confusion were an issue, it would be no less present in these circumstances. To the extent the Secretary is concerned with voter confusion, he would increase such confusion by barring substitution and thereby ensuring that the *wrong* candidates appear on the general election ballot. As the district court noted, "[t]he lack of a substitution procedure does not serve the state interest in protecting ballot integrity" and "[n]o public interest is served by having the wrong nominees on the ballot." (Addendum 12; J.A. 249. *See also* J.A. 145-153.)

Further illustrating the error in the Commonwealth's position on substitution is the fact that several other states confronted with this issue have specifically allowed substitution. (J.A. 97-106.) For example, the Arkansas Secretary of State has stated that "[a] [minor party] may substitute a candidate upon providing a Statement of Substitution signed by both the State chair or leader and the National chair or leader of the [minor party.]" (J.A. 97.) The Kentucky Attorney General's office has stated that it is "of the opinion that [a minor party] may fill a vacancy created by the resignation of its presidential

candidate subsequent to the nomination by appropriate certification filed with the Secretary of State by the chairman of the political organization's state committee or by a supplemental petition of nomination." (J.A. 99-100.) The Indiana State Election Board has similarly endorsed substitution. (J.A. 106.) Even in the 2008 election, the Pennsylvania Secretary of State allowed the Libertarians to withdraw the presidential candidate listed on the nomination papers, Rochelle Etzel, and have Barr substituted on the general election ballot. This action was challenged by a state Republican Party chairman and upheld as proper in Pennsylvania state court. (J.A. 145-153.) Indeed, until deciding to reverse course in June 2008, the Massachusetts Secretary's office had indicated that it would allow substitution on several occasions, including in this very case.

VIII. The Libertarians Were Also Entitled To Substitution Because The Secretary Should Be Estopped From Stating That Substitution Is Not The Policy Of His Office.

The Libertarians respectfully adhere to their argument that the Secretary was estopped from denying the requested substitution by the statements made by the Elections Division of the Secretary's office in late 2007. Under the doctrine of estoppel, a party knowingly inducing reliance will be held to his or her statements. Fundamental fairness dictates this result. As a very basic principle, the government is not above or exempt from the law – just as private actors are subject to estoppel, so too should the government. In determining the availability of

estoppel against the government, courts consider: (1) statements or actions of government officials; (2) reliance to one's detriment; (3) the reasonableness of the reliance; and (4) the risk, through estoppel, that a government official will, in effect, waive legislatively enacted public policy. *Apex Construction Co., Inc. v. United States*, 719 F. Supp. 1144, 1156 (D. Mass. 1989) (citing *Best v. Stetson*, 691 F.2d 42, 44 (1st Cir. 1982)). The Libertarians met all these traditional elements.

The Libertarians informed an attorney with the Elections Division, the appropriate government body charged with stating election policy, that the candidates nominated at the Libertarian national convention may end up differing from those on the nomination papers and inquired whether substitution on the general election ballot would be allowed. The Libertarians also informed the Elections Division that the convention was being held *before* the deadline for submitting nomination papers. The Elections Division stated that it would research the issue and respond. (J.A. 135.)

After deliberating for over a month, the Elections Division replied that the Secretary's office could provide a form by which substitution could be requested, and that "[i]f the situation comes up, please contact our Office and we will work with you." (J.A. 26.) The Libertarians reasonably understood this to mean substitution would be allowed, as any reasonable party would have; they would not have proceeded on the Elections Division's guidance if that guidance was merely

an admonition to "ask again later."[15] When the events described to the Elections Division proceeded to happen *exactly as described*, the Secretary refused to allow substitution.[16] Furthermore, the Secretary did not even provide the form by which Plaintiffs could *request* substitution, even though it appears one existed earlier this decade. (J.A. 133-34.)

There was no risk that, through estoppel, a government official was waiving public policy in this case. Certainly, one can imagine cases in which a government actor's statements cannot be kept consistent with public policy, for example, where a prison guard promises to release an inmate before termination of sentence or a records clerk promises to transfer public land to a private individual. But no such circumstance is presented here. If anything, public policy clearly favors placing the correct candidates on the general election ballot. Public policy also clearly

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[15] Even if the Court does not read this email to indicate the Secretary's approval of substitution, it undoubtedly indicates the Secretary's plans to "work with" Plaintiffs, which in and of itself undermines the Secretary's current argument that substitution cannot be planned in advance, whether pursuant to chapter 53, section 14 or not.

[16] This series of events begs the question as to why the Elections Division did not simply say that substitution would not be allowed at the outset. The then-hypothetical facts under which the Elections Division was willing to provide a form for the Libertarians to request substitution and was willing to "work with" the Libertarians are exactly the facts which indeed proceeded to happen.

favors subjecting governmental actors to the general rules of law, including the doctrine of estoppel.

The district court also stated that "a party pressing [a claim of estoppel] against the government must demonstrate 'affirmative misconduct' on the part of the government." (J.A. 158.) There is no reason why an "affirmative misconduct" bar should be set high, particularly where there is none for private actors, and where such a high bar would serve no purpose other than to insulate government conduct from the principles of estoppel. Indeed, as one district court within this circuit has explained:

> The standard for "affirmative misconduct" appears to be only moderately demanding. In an effort to define what constitutes "affirmative misconduct," the First Circuit in *Akbarin v. Immigration and Naturalization Serv.* set forth a two-part test: (1) was the government's action error, and (2) did the government's misconduct induce the petitioner to act in a way he or she would not otherwise have acted.

Griffin v. Reich, 956 F. Supp. 98, 107-108 (D. R.I. 1997) (citing *Akbarin*, 669 F.2d 839, 843 (1st Cir. 1982) and *United States v. Ortiz-Perez*, 858 F. Supp. 11, 12-13 (D.R.I. 1994)). Here, the governmental "error" was that the Elections Division informed the Libertarians in writing that substitution would be allowed when in fact it would not be, inducing the Libertarians to expend tremendous resources collecting signatures on nomination papers listing possibly incorrect candidates and risking the Libertarians' opportunity to obtain ballot access for the correct

candidates. This should constitute "affirmative misconduct" under any definition. These are not circumstances suggesting negligent behavior, particularly in light of the Commonwealth's documented history of allowing substitution in similar cases.

The Libertarians' estoppel argument is not moot. The situation that unfolded in 2008 is "capable of repetition, yet evading review." *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (citation omitted). As is evident from the record, minor parties seek the advice of the Elections Division of the Secretary's office for questions regarding substitution and other ballot access issues in nearly every election cycle. Minor parties are dependant on the Elections Division for guidance on how to comply with the election laws. Where the guidance given by the Elections Division does not violate public policy, the Elections Division must stand by that guidance. The Elections Division has stated, in this case and others, that it would allow a minor party to circulate nomination papers with certain candidates listed and then substitute other candidates if the original candidates were not the ones ultimately chosen at the national convention. This guidance is in keeping with the practices of several other states and the leading case law on the subject. The Secretary should be estopped from now claiming that this is not the policy of his office regarding candidate substitution in future presidential elections.

CONCLUSION

For the reasons stated above, Appellees Bob Barr, Wayne A. Root, the Libertarian Party of Massachusetts, and the Libertarian National Committee respectfully request that this Court affirm the district court's order granting their motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,186 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface known as 14-point Times New Roman.

Dated: April 14, 2010 /s/ Amrish V. Wadhera

CERTIFICATE OF SERVICE

I hereby certify that I filed this Brief through the Court's electronic case filing (ECF) system on April 14, 2010, and thus copies will be served electronically on that date on all registered counsel, including Amy Spector, Timothy Casey, and Julie Goldman.

Dated: April 14, 2010 /s/ Amrish V. Wadhera