UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

LIBERTARIAN PARTY OF NEW HAMPSHIRE, Plaintiff, v. WILLIAM M. GARDNER, Secretary of State of the State of New Hampshire, in his official capacity, Defendant	)	Civil Case. No. 1:14-cv-00322-PB

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Now comes Plaintiff Libertarian Party of New Hampshire and respectfully offers this Memorandum of Law in Support of its Motion for Summary Judgment seeking (i) a declaration that the sentence "Nomination papers shall be signed and dated in the year of the election" in RSA 655:40-a—which became law in House Bill 1542 ("HB 1542")—violates the First and Fourteenth Amendments and (ii) a permanent injunction enjoining its enforcement.

INTRODUCTION AND SUMMARY OF ARGUMENT

HB 1542's added language to RSA 655:40-a prohibits the Libertarian Party from collecting the nomination papers necessary to qualify as a political organization before January 1 of the general election year for which the Party is seeking placement on the ballot. These types of restrictive laws are highly unusual,[1] and for good reason: they place an "enormous speedbump on the path to party recognition." *See Block v. Mollis*, 618 F. Supp. 2d 142, 151 (D.R.I. 2009).

[1] *See* 50-State Survey (*Ex. A* to Bissonnette Affidavit ("Biss. Aff."), ¶ 2). Along with laws in Wisconsin and Texas, HB 1542 is among the most restrictive ballot access laws in the country concerning the start date for third-parties to begin collecting the number of signatures necessary to obtain ballot access in advance of an election.

Indeed, HB 1542 places severe burdens on the Libertarian Party—a party constantly struggling for recognition in our two-party system—that will make it difficult, if not impossible, for the Party to qualify as a political party under RSA 655:40-a in future general elections.

Such an artificial and arbitrary January 1 trigger for collecting nomination papers not only compresses the time frame from 21 months to 7 months for the Libertarian Party to collect the tens of thousands of nomination papers necessary to obtain party-wide ballot access, but it also puts the Party at a distinct disadvantage compared to the "major" parties in New Hampshire by placing this compressed time frame squarely in the middle of the general election campaign season. Using the 2016 general election as an example, the Libertarian Party must now "sit on the sidelines" for all of 2015 before the period to collect 14,800 verified nomination papers commences on January 1, 2016. If allowed to collect nomination papers during 2015, the Libertarian Party would hope to achieve party status by collecting signatures in 2015 and 2016 and then be able to fundraise and spend accordingly when it counts—in the summer months leading up to the 2016 general election. However, as it currently stands under HB 1542, the Libertarian Party would be collecting nomination papers well into the summer months during this crucial time period preceding the 2016 election. By the time the Party obtains all the nomination papers it needs—if it, in fact, can do so under this compressed time frame—it will be too late to meaningfully compete against the major parties on the campaign trail prior to the election given their significant head start.

Despite the severe burdens imposed by HB 1542, it was described by its sponsors as a "housekeeping" bill and was passed with little discussion by voice vote and without any evidence presented as to why its onerous restrictions were necessary. The State has no legitimate regulatory interest in the law, let alone a significant or compelling regulatory interest. The *one and only* justification for the law that exists in the legislative record—namely, to cull out "stale" nomination papers that the State (without any actual evidence) believes are more likely to not be verified by

municipal Supervisors of the Checklist due to death or relocation—was the same justification specifically rejected by the U.S. District Court for the District of Rhode Island in *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009). There, the Court correctly concluded that such an interest was "nonsensical" because the "process is self-regulating: if the new party is worried that it will get stale signatures by starting too early, then it will wait. It does not need an artificial statutory date to make it do so." *Id.* at 152. The same is true here. And, prior to advancing HB 1542, the Secretary of State's Office did not even study or conduct any research on the specific burdens it would impose on the Libertarian Party and other third parties. Nor has the State produced any evidence supporting its speculative assumptions that (i) the percentage of invalid nomination papers somehow increases if nomination papers are collected before January 1 of the general election year and (ii) the date of a nomination paper impacts the validation process. Instead, when the Libertarian Party's First Amendment rights were clearly at stake, the Secretary of State's approach in proposing HB 1542 was to "shoot first and aim later," with either a negligent unawareness or a deliberate disregard for its crippling impact on third-party ballot access.[2]

In a desperate attempt to avoid *Block* and its rejection of the Secretary of State's actual rationale for HB 1542, the State and the Republican National Committee ("RNC") have manufactured numerous post hoc justifications for the bill's onerous restrictions. As explained below, each of these purported justifications should be disregarded under the heightened scrutiny standard of review that applies to burdensome ballot access restrictions because they were never the actual justifications for HB 1542 before the legislature. But even if this Court considers them, they too are "nonsensical" for the reasons explained below. This case is no different than *Block*. In fact, this case is stronger than *Block* because the Libertarian Party has demonstrated, based on

[2] The State could only produce 13 pages of documents in this case, none of which provided a justification for the law. *See* State's Production, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4).

its history of involvement in prior New Hampshire elections in 2000 and 2012, that HB 1542 would effectively destroy its ability to successfully use the party-petitioning process in future elections. Only the Libertarian Party has successfully gone through the party-petitioning process in New Hampshire, and it is uniquely positioned to testify on HB 1542's onerous burdens.

Accordingly, for these reasons and the reasons below, Plaintiff's Motion for Summary judgment should be granted and HB 1542 should be permanently enjoined.

STATEMENT OF MATERIAL FACTS

I. The Third-Party Recognition Process in New Hampshire

1. The Libertarian Party desires to become an officially-recognized political party under the laws of the State of New Hampshire, with a view towards engaging in further political activity relating to future general elections. Gaining access to the ballot as a recognized political party in New Hampshire has real and substantial advantages, as it allows the party to run an entire slate of candidates without each individual third-party candidate needing to collect the number of nomination papers necessary under RSA 655:42 and RSA 655:40. *See* Verified Amended Complaint (Doc. No. 1) (hereinafter, "VC") ¶ 13.

2. In New Hampshire, a political organization can become a recognized political party for ballot access purposes in two ways. *See id.* ¶ 14. The first method—which is applicable to this lawsuit—is nomination by organization, or, in other words, by a third party. Under this process, "[a] political organization may have its name placed on the ballot for the state general election by submitting the requisite number of nomination papers, in the form prescribed by the secretary of state, pursuant to RSA 655:42, III." RSA 655:40-a. RSA 655:42, III, in turn, provides: "It shall require the names of registered voters equaling 3 percent of the total votes cast at the previous state general election to nominate by nomination papers a political organization." However, even if an organization succeeds in becoming a recognized political party under RSA

655:40-a, such recognition terminates unless the political party nominates a candidate for governor or United States Senate who receives at least 4 percent of the vote for such office in the election cycle for which the party was recognized. *See* RSA 652:11; VC ¶ 15.

3. The second method is by satisfying certain vote thresholds following the independent candidate petitioning process. RSA 652:11 defines "party" as "any political organization which at the preceding state general election received at least 4 percent of the total number of votes cast for any one of the following: the office of governor or the offices of United States Senators." Major parties—namely, the Democratic and Republican Parties—traditionally satisfy this 4 percent threshold during each general election cycle, thereby allowing these parties to run slates of candidates during the next general election who are nominated by the party through a primary process. A third party can aim to satisfy this criteria by having an individual candidate secure the 3,000 nomination papers necessary to run on the ballot for governor or the U.S Senate under RSA 655:40 and RSA 655:42, with the hope that this candidate will then meet this 4 percent threshold during the general election. If this 4 percent threshold is met, the party of the independent candidate will be formally recognized during the next general election and be able to nominate a slate of candidates. Once again, such party recognition terminates after the general election in which the party is recognized unless the political party nominated a candidate for governor or U.S. Senate who satisfied the 4 percent threshold during the election. *See* VC ¶ 16.[3]

4. This second method of obtaining third-party ballot access through an independent third-party candidate cannot be equated with the first method that enables a third party to engage in non-election-year party recognition and participation under RSA 655:40-a because RSA

[3] Under this second method, the Libertarian Party held "party" status during the general elections of 1992 (during the 1990 gubernatorial election, Libertarian Miriam Luce achieved 4.8% of the vote), 1994 (during the 1992 gubernatorial election, Libertarian Miriam Luce achieved 4.0% of the vote), and 1996 (during the 1994 gubernatorial election, Libertarian Steven Winter achieved 4.4% of the vote). The Libertarian Party is the only third party to have obtained "party" status under RSA 652:11 since 1979. *See* Sec. of State Int. Resp. No. 6, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4).

655:40-a provides the only mechanism by which an organization can gain recognition and reap the undeniable benefits of official party status *before an election*. *See also id.* ¶ 17. The party-petitioning process is especially important because no third party in New Hampshire has become a recognized "party" by vote under the RSA 652:11 (the second method) since this law was modified in 1997.[4] Only the Libertarian Party has successfully completed the party-petitioning process under RSA 655:40-a (the first method), and other efforts to complete this process have failed by other political organizations. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

5. As the Party's experience demonstrates, even setting aside the burden imposed by HB 1542, the party-petitioning process is a massive undertaking that requires Party members to selflessly devote substantial time and money. The Party's members' dedication is inspired not only by a deeply-held desire to advance libertarian principles, but also by a commitment to improve our democracy through giving voters greater choice in the voting booth. Indeed, the whole point of the petitioning process, unlike campaigning, is to ask that New Hampshire voters be provided another choice on election day. The Party simply wants to put its candidates and its ideas before them and to earn their votes just like the two major political parties. *Id.*

II. The Libertarian Party

6. The Libertarian Party defends the right of each person in New Hampshire to engage in any activity that is peaceful and honest, and it welcomes the diversity that freedom brings. The Party seeks a New Hampshire where all individuals control their own lives and are never forced to compromise their values or sacrifice their property. The Party believes that no conflict exists between civil order and individual rights and that individuals, groups, or governments should not initiate force against other individuals, groups, or governments. In short, "live and let live" is the

[4] In 1997, the legislature amended RSA 652:11 by raising from 3 percent to 4 percent the number of votes a third-party gubernatorial candidate needs to obtain in a general election for that third party to become officially recognized for the next general election. Though this amendment also added elections for the U.S. Senate where this percentage threshold could be met to obtain party recognition, this increase undoubtedly hindered third-party ballot access.

Party's motto. The Libertarian Party is the United States' third largest political party. *See* VC ¶ 18; LPNH Int. Resp. No. 6 (*Ex. H* to Biss. Aff., ¶ 9).

7. The Libertarian Party has a demonstrated history of engaging in political activity in New Hampshire and is, by far, the most active and well known third party in the state. The Libertarian Party has run candidates in New Hampshire for more than four decades, and is affiliated with the national Libertarian party (which coordinates national efforts and publishes a platform describing its positions on numerous issues of public concern). The Libertarian Party holds regular meetings with its members, hosts conventions just like major parties, and sends members to the New Hampshire legislature to testify on pending bills. The Party also communicates with its constituents and with the public through an established website at http://lpnh.org/. The Party maintains a Twitter feed @LPNH. Further, the Party supports its candidates financially through direct contributions and purchasing advertisements, as well as with candidate training. *See* VC ¶ 19; LPNH Int. Resp. No. 6 (*Ex. H* to Biss. Aff., ¶ 9).

III. HB 1542, and the Secretary of State's Only Rationale to Reduce the Number of Invalid Signatures

8. In HB 1542, the New Hampshire General Court added to RSA 655:40-a the following language: "Nomination papers shall be signed and dated in the year of the election." This sentence became effective on July 22, 2014. In short, HB 1542 prohibits third parties from collecting nomination papers necessary to qualify as a political organization before January 1 of the election year for which they are seeking recognition.

9. Traditionally, nomination papers must be submitted for certification to the Supervisors of the Checklist in each town or city where each signatory is registered by early August—an arduous process that requires third parties to disaggregate nomination papers by municipality and then drop off (and later pick up) the papers at the offices of any one of New

Hampshire's 221 towns and 13 cities.[5] Thus, under HB 1542, third parties like the Libertarian Party only have approximately seven months—from January 1 to approximately early August—to collect the necessary nomination papers. *See* VC ¶ 25. Given New Hampshire's harsh winter months, this time period for collection is, in reality, much shorter—less than 5 months. *See id.*; Tomasso Depo. 104:1-10 (*Ex. F* to Biss. Aff., ¶ 7).

10. The New Hampshire legislature approved HB 1542 with little discussion by voice vote and without any evidence presented as to why these substantial burdens placed on third parties were even necessary. The *only* stated justification for the bill before the legislature was to create an environment where nomination papers of deceased and relocated individuals are culled out, thus allowing more nomination papers to be verified. According to the House Election Law Committee's explanation of the bill to the entire House of Representatives, "[t]his bill was requested by the secretary of state. It requires that nominating petitions for a political organization seeking placement on the ballot for the state general election shall be signed and dated in the year of the election, beginning January 1 of the political cycle. This will reduce the number of invalid signatures, due to death or relocation, which *might arise* if signatures are submitted earlier." *See* HB 1542 Leg. History, Gardner Ex. 1/Scanlan Ex. 1, at LPNH 422 (*Exs. C and E* to Biss. Aff., ¶¶ 4, 6) (emphasis added). Before the House Election Law Committee, Deputy Secretary David Scanlan testified that the law would "make[] the process more defined." HB 1542 Leg. History, Gardner Ex. 1/Scanlan Ex. 1, at LPNH 414, 429 (*Exs. C and E* to Biss. Aff., ¶¶ 4, 6); Apr. 2, 2014 Senate Testimony (0:53) (*Ex. I* to Biss. Aff., ¶ 10); VC ¶¶ 29-30.[6]

[5] Municipal supervisors usually must have nomination papers certified for political organizations by the last week of August. Political organizations then pick up the certified nomination papers from the municipal supervisors and then file the papers with the Secretary of State by the first week of September.

[6] HB 1542 was recommended "ought to pass" by a vote of 15 to 1 by the House of Representatives Election Law Committee on February 14, 2014. The House of Representatives passed HB 1542 by voice vote on February 19, 2014. By a vote of 4-0 on April 3, 2014, the Senate Public and Municipal Affairs Committee recommended that HB

IV. The State's Intentional Effort to Discriminate Against the Libertarian Party

11. Setting aside that this rationale presented to the legislature was rejected by *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009) because the State does not have a legitimate interest in increasing the verification rate of nomination papers, it is reasonable to infer that the true intent of the Secretary of State's Office was to respond to the fact that the Libertarian Party had obtained ballot access as a party during the 2012 general election by collecting nomination papers in 2011.

12. In approximately June 2011, the Libertarian Party was considering whether to engage in the party-petitioning process for the upcoming 2012 general election. Party member Howard Wilson engaged Secretary of State William Gardner about the Party's desires to soon begin collecting nomination papers. Secretary Gardner, however, informed Mr. Wilson that it was against the law—presumably referring to the 2009 law, RSA 655:40, that applies only to individual-candidate petitioning and states that "[n]omination papers shall be dated in the year of the election." *See* LPNH Agendas, LPNH 177 (*Ex. J* to Biss. Aff., ¶ 11).

13. In late June 2011, Rich Tomasso, the Chair of the Libertarian Party, then met Secretary Gardner and explained that the Secretary was misreading the 2009 law, which clearly did not apply to the party-petitioning process, but rather only to the individual candidate petitioning process. Once again, Secretary Gardner explained his view that "all petitions need to be circulated [during] the year of the election," but the Secretary stated that he would review the matter. *See id.*; Gardner Depo. 17:3-22, 10:15-11:11 (stating "policy" of counting only nomination papers signed during the general election year) (*Ex. D* to Biss. Aff., ¶ 5); Tomasso Depo. 45:12-46:18 (describing conversation with Secretary Gardner) (*Ex. F* to Biss. Aff., ¶ 7).

14. After Mr. Tomasso received no response and followed up on July 6, 2011,

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1542 "ought to pass." The Senate then passed HB 1542 by voice vote on April 17, 2014. The Governor signed HB 1542 into law on May 23, 2014, with an effective date of July 22, 2014.

Secretary Gardner responded on July 18, 2011 by email, stating that "[n]otwithstanding the last sentence of RSA 655:40, this office will accept nomination papers for political organizations only as described in RSA 655:40-a that are signed and dated in 2011 or 2012 and filed in accordance with RSA 655:41, 42 and 43." *See* LPNH/SOS Emails, LPNH 1400-04, Tomasso Ex. 5 (*Ex. L* to Biss. Aff., ¶ 13). In late July 2011, the Party then immediately began collecting nomination papers, and successfully completed the process in August 2012 on the eve of the submission deadline. Then, in December 2013, the Secretary of State's Office proposed HB 1542 in the legislature to restrict the Party's efforts.

V. HB 1542's Impact on the Libertarian Party

15. HB 1542's compression of the petitioning time frame and placement of that time frame squarely during the general election year creates an arbitrary, unjustifiable, and ultimately impermissible burden that makes the petitioning task far more difficult, if not impossible, to accomplish in future general elections—thereby chilling the Libertarian Party's pre-election efforts to associate. *See* VC ¶ 26.

16. Using the 2016 general election as an example, if HB 1542 continues to remain in effect, the Libertarian Party likely will be precluded from collecting the number of nomination papers necessary under RSA 655:40-a and RSA 655:42, III. The Libertarian Party will be required to submit in excess of 14,800 certified nomination papers to get on the ballot as a party in 2016—an amount which, indisputably, is substantial. As a practical matter, assuming a validity rate of 75%, the Libertarian Party likely would need to collect approximately 20,000 "raw" nomination papers to compensate for any nomination papers that municipal Supervisors of the Checklist may discard due to alleged irregularities or technical errors. For the 2018 general

election, the number of required verified nomination papers could exceed 22,000.[7] Again, assuming a 75% validity rate, the total number of "raw" nomination papers that will need to be collected could exceed 29,300 to reach this threshold. And, had HB 1542 been in effect in 2013, a third party seeking to get on the ballot for the 2014 general election through the nomination process under RSA 655:40-a would have been prohibited from collecting any of the 21,500 verified nomination papers necessary to gain ballot access until January 1, 2014. *See* VC ¶ 27; LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

17. Hence, even though the Libertarian Party is already in existence and plans on commencing the process of obtaining official recognition for future general elections, it cannot, under HB 1542, even begin the arduous and time-consuming process of collecting the necessary thousands of nomination papers until January 1 of the general election year. Any nomination papers collected prior to January 1 of the general election year would be considered invalid under this statutory scheme. *See* VC ¶ 28.

VI. The 2000 and 2012 General Election Cycles

18. The Libertarian Party was particularly active during the 2000 and 2012 general elections in New Hampshire when the Party successfully complied with the nomination process that is required for a third party to be recognized on the ballot as a "party" under RSA 655:40-a (the first method described above). *See id.* ¶ 20.

19. The nomination paper-collection process engaged in by the Libertarian Party in 2000 and 2012 was tremendously burdensome.[8] In fact, to comply with the requirements under

[7] This 2018 approximation is based on the fact that, during the presidential election year of 2012, over 710,000 people voted, making approximately 21,500 verified nomination papers necessary for ballot access in 2014. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Sec. of. State Int. Resp. No. 7, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4); Scanlan Depo. 50:18-51:6 (correcting interrogatory response) (*Ex. B* to Biss. Aff., ¶ 3).

[8] The Court should not view the petitioning process abstractly. It is an incredibly arduous endeavor that requires individuals to selflessly commit their time and energy to a petitioning process where there is no guarantee of success. To demonstrate to the Court the inherent difficulties of this process and the dedication of the Party's members,

RSA 655:40-a during those cycles, the Party had to start collecting nomination papers well before January 1 of the general election year. And, even then, the Party reached the threshold necessary to obtain ballot access only on the eve of the early August deadline. *See id.* ¶¶ 23-24; LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

A. The 2012 General Election Cycle

20. During the 2012 general election cycle, 13,843 verified nomination papers were required to obtain party-wide ballot access. Assuming a verification rate of 75%, approximately 18,600 "raw" nomination papers actually needed to be collected (assuming a validity rate of 70%, nearly 20,000 "raw" nomination papers needed to be collected). The Party ultimately collected more than 19,000 "raw" nomination papers, which translated into approximately 15,000 verified nomination papers. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Sec. of. State Int. Resp. No. 5, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4).

21. The Party began the signature-collection process in late July 2011, and it did so in the hope of finishing the petition drive well before August of the general election year so it could switch gears to campaigning and electioneering. Tomasso Depo. 33:5-17, 37:2-18, 142:19-143:9 (the Party started collecting in late July 2011 because otherwise "it wasn't going to get completed"; "the sheer volume that we needed was … the primary reason we started as early as we did"; "primary reason" for starting in July 2011 was that "we needed that much time") (*Ex. F* to Biss. Aff., ¶ 7). Given the burdens of petitioning and the Party's limited resources, this did not come to fruition, and the Party was only able to complete the petitioning drive by the last week of July 2012 right before the early August deadline. During this last week of petitioning, the Party

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Plaintiff has included as an exhibit all the emails concerning the petitioning process in the possession of Party Chair Rich Tomasso from approximately late July 2011 to September 2012 (over 450 pages worth). *See* LPNH Petitioning Emails from July 2011 to September 2012 (*Ex. M* to Biss. Aff., ¶ 14); *see also* Additional Petitioning Emails from Aug. 2011 to Aug. 2012 (*Ex. X* to Biss. Aff., ¶ 25). These emails capture the difficulties of this process. And, given high voter turnout during presidential election cycles, the signature threshold is all but impossible to meet to obtain party-wide ballot access for mid-term general elections. *See* Babiarz Depo. 127:7-19 (*Ex. G* to Biss. Aff., ¶ 8).

collected approximately 1,700 signatures from its last professional effort, which allowed the Party to cross the statutory threshold. *See* VC ¶ 22; LPNH Int. Resp. Nos. 2, 3 (*Ex. H* to Biss. Aff., ¶ 9); Tomasso Depo. 71:12-72:1 (*Ex. F* to Biss. Aff., ¶ 7).

22. Throughout the petitioning drive, the Party had approximately twenty (20) volunteers assist with varying degrees of participation. The Party also generally had between 3 and 5 paid petitioners working off and on at any given time, though at times only 1 petitioner was working. LPNH Int. Resp. No. 3 (*Ex. H* to Biss. Aff., ¶ 9). This signature-collection process was arduous, required substantial financial and volunteer resources, and entailed collecting signatures outside (i.e., fairs, parades, transfer stations, outside baseball stadiums, outside supermarkets, outside town halls during town elections, outside the post office on tax day, etc.), sometimes during inhospitable weather. In fact, few places in New Hampshire—including the Department of Motor Vehicles—will even allow petitioning inside, thus necessitating the need for outside petitioning. *Id.* at Int. Resp. No. 2.[9] During this process, the Party also had to continuously monitor the verification rate it was receiving from the select municipalities that voluntarily verified signatures before the August deadline to ensure that the Party was collecting enough signatures to meet the certified threshold. *See* Tomasso Depo. 41:22-43:1 (Party submitted nomination papers to those municipalities that would verify early "so we would have an idea of what the validity rate for this election was going to be. Because if the … validity rate was bad, we would need even more signatures than we planned.") (*Ex. F* to Biss. Aff., ¶ 7); *see also* Babiarz Depo. 88:2-88:23, 116:16-117:4 (*Ex. G* to Biss. Aff., ¶ 8).

23. Until the Party finished collecting enough nomination papers, the Party did not

[9] The approximate number of "raw" nomination papers collected per month (not taking into account verification) during the 2012 general election cycle was as follows: (i) July 2011: 206; (ii) August 2011: 7,334; (iii) September 2011: 5,770; (iv) October 2011: 1,344; (v) December 2011: 1,269; (vi) Collection During Primary in January 2012: 103; (vii) Collection During Liberty Forum in February 2012: 68; (viii) March 2012: 920; (ix) April 2012: 634; (x) May 2012: 138; (xi) June 2012: 352; (xii) July 2012: 2,253; and (xiii) By Mail: 34. *See* LPNH Int. Resp. No. (*Ex. H* to Biss. Aff., ¶ 9).

engage in substantive campaigning and electioneering, and any funds raised went only to petitioning. This was for obvious reasons: campaigning and electioneering would have been irrelevant if the Party did not obtain enough petitions to secure ballot access. LPNH Int. Resp. No. 3 (*Ex. H* to Biss. Aff., ¶ 9).

24. This is, of course, not to say that the Party did not have some candidates engage in campaigning prior to completing the petitioning drive. However, none of these individuals were actually formal candidates until the Party successfully completed its petitioning in early August 2012 and became recognized under RSA 655:40-a in early September 2012. And their chief focus was petitioning, not campaigning, during the petitioning drive. Moreover, recruiting candidates is very difficult while the petitioning process is under way given the uncertainty of whether the Party will actually meet the nomination-paper threshold to be deemed a recognized "political organization." Since the June candidate declaration deadline is before the early August petitioning deadline (*see* RSA 655:43, II), some potential candidates will also choose to file with one of the major parties instead. This is why it is better to both begin and finish the petitioning drive as early as possible so the Party can then switch gears to candidate recruitment and campaigning. LPNH Int. Resp. No. 3 (*Ex. H* to Biss. Aff., ¶ 9).

25. Having completed this process in August 2012, the Party was able to run a slate of candidates during the 2012 election, including the following:

- Gary Johnson/Jim Gray [President/Vice President]: 1.2% (8,212 votes)
- John Babiarz [Governor]: 2.8% (19,251 votes)
- Brendan Kelly [Congress District 1]: 4.2% (14,521 votes)
- Hardy Macia [Congress District 2]: 4.4% (14,936 votes)
- Howard Wilson [Executive Council District 1]: 4.8% (6,403 votes)
- Michael J. Baldassarre [Executive Council District 3]: 4.5% (6,182 votes)
- Kenneth E. Blevens [Executive Council District 4]: 4.7% (5,705 votes)
- Richard Kahn [Senate District 14]: 5.9% (1,466 votes)
- Rich Tomasso [Senate District 16]: 3.3% (921 votes)
- Ian Freemen [Cheshire House District 16]: 10.1% (1,488 votes)

- Stephen Stefanik [Hillsborough House District 16]: 9.9% (633 votes)
- Aidan Ankarberg [Strafford House District 5]: 4.7% (112 votes)

VC ¶ 22; LPNH Int. Resp. No. 6 (*Ex. H* to Biss. Aff., ¶ 9).

B. The 2000 General Election Cycle

26. During the 2000 general election cycle, approximately 9,800 verified nomination papers were required for the Party to obtain party-wide ballot access. The Party ultimately collected more than 13,000 "raw" nomination papers, which translated into between 10,000 and 11,000 verified nomination papers. During this cycle, there was an approximately 85% verification rate. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); LPNH Aug. 2000 Newsletter, Babiarz Ex. 1/Tomasso Ex. 17 (*Ex. N* to Biss. Aff., ¶ 15); Babiarz Depo. 15:16-16:12 (*Ex. G* to Biss. Aff., ¶ 8).

27. The petitioning process in 2000 was similar to the process in 2012. The Party began collecting nomination papers in approximately the spring of 1999. *See* May 1999 Ballot Access News Newsletter (*Ex. O* to Biss. Aff., ¶ 16) (indicating signatures collected in April 1999); *see also* LPNH Oct. 1999 Newsletter and Convention Materials (*Exs. P and Q* to Biss. Aff., ¶¶ 17-18). As John Babiarz, the Party's 2000 gubernatorial candidate, explained at deposition, the Party started collecting in the spring of 1999 "[b]ecause of the sheer number of … petition signatures we would need to collect." Babiarz Depo. 96:18-97:2, 106:2 (*Ex. G* to Biss. Aff., ¶ 8). As with the 2012 general election, the Party's hope was to finish the petition drive well before August 2000 so it could switch gears to campaigning and electioneering. However, as in 2012, this did not come to fruition, and the Party was only able to complete the petitioning drive a week or two before the August 9, 2000 deadline. *See* LPNH Aug. 2000 Newsletter, Babiarz Ex. 1/Tomasso Ex. 17 (*Ex. N* to Biss. Aff., ¶ 15); *see also* Photographs from 2000 Sorting (*Ex. R* to Biss. Aff., ¶ 19); LPNH Int. Resp. Nos. 2, 3 (*Ex. H* to Biss. Aff., ¶ 9).

28. Throughout the petitioning drive, the Party had approximately fifteen (15) individuals volunteer with varying degrees of participation. During the drive, the Party also generally had several paid professional petitioners working off and on at any given time. LPNH Int. Resp. No. 3 (*Ex. H* to Biss. Aff., ¶ 9).

29. Like the 2012 petitioning drive, the Party's near exclusive focus was on petitioning until that process was complete. The Libertarian Party began fundraising in mid-1999, but this fundraising was generally for petitioning. *See* LPNH Oct. 1999 Newsletter and Convention Materials, at LPNH 19 (*Exs. P and Q* to Biss. Aff., ¶¶ 17-18). And most, if not all, of the Party's resources were dedicated to petitioning, not campaigning, until it reached the statutory threshold necessary to obtain ballot access in early August 2000. As with 2012, the Party did have candidates assist in the petitioning drive but, once again, none of these individuals were actually formal candidates until the Party completed its petitioning in August 2000 and obtained status as a political party in September 2000. LPNH Int. Resp. Nos. 3 (*Ex. H* to Biss. Aff., ¶ 9); VC ¶ 21.

STANDARD

Summary judgment is appropriate when the record reveals "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The evidence submitted in support of the motion must be considered in the light most favorable to the nonmoving party, drawing all reasonable inferences in its favor. *See Navarro v. Pfizer Corp.*, 261 F.3d 90, 94 (1st Cir. 2001). A party seeking summary judgment must first identify the absence of any genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A material fact "is one 'that might affect the outcome of the suit under the governing law.'" *United States v. One Parcel of Real Prop. with Bldgs.*, 960 F.2d 200, 204 (1st Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Here, there are no material facts in dispute.

In determining whether to grant a permanent injunction, the Court must find that: "(1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction." *Healey v. Spencer*, 765 F.3d 65, 74 (1st Cir. 2014) (quoting *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 8 (1st Cir. 2007)). The first factor—success on the merits—predominates in this determination. *See Sindicato Puertorriqueno de Trabajadores v. Fortuno* 699 F.3d 1, 10 (1st Cir. 2012) ("In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis."). Each criteria is satisfied here, and a permanent injunction should be issued.

ANALYSIS

I. Plaintiff Prevails On The Merits.

As the U.S. Supreme Court has noted, third parties have played a "significant role … in the political development of the Nation." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185-186 (1979). "Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success." *Id.* The Libertarian Party of New Hampshire is no different. Thus, where "an election campaign is a means of disseminating ideas as well as attaining political office[,] … [o]verbroad restrictions on ballot access jeopardize this form of political expression." *Id.* Indeed, as the U.S. Supreme Court explained in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), any governmental interest in the stability of our political system does not extend so far as to permit a state to protect existing parties from competing with independent or third-party candidates. *Id.* at 801-02. And, as the Court similarly observed in *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009), "[s]ociety is best served when political parties outside the two existing major parties play an active, 'robust' role in the entire campaign process—not simply

appear on the final election ballot." *Id.* at 153-54. HB 1542, however, prevents the Libertarian Party from playing such a "robust" role in New Hampshire general elections.

HB 1542 not only implicates the Libertarian Party's essential rights of voting, free speech, association, and due process, but also the assurance of a fair system of representative government. The U.S. Supreme Court has specifically explained that fundamental rights of association and voting extend to political parties:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Williams v. Rhodes, 393 U.S. 23, 31 (1968) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *see also Norman v. Reed*, 502 U.S. 279, 288 (1992) ("For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties."). Hence, constitutional rights of the highest order are at stake in the political process and where access to the ballot is at issue.

The U.S. Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) set forth the analysis to be employed in considering the constitutionality of state election laws that impact the fundamental rights of political parties, candidates, and voters:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson, 460 U.S. at 789. This is a special balancing test, or sliding scale, in which the degree of scrutiny varies with the "extent of the asserted injury." *Green Party of Ark. v. Priest*, 159 F. Supp. 2d 1140, 1143 (E.D. Ark. 2001).

At one end of that sliding scale, where First and Fourteenth Amendment rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); *see also Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000) ("prohibitively expensive or otherwise difficult to achieve" requirements trigger strict scrutiny). In short, strict scrutiny applies. However, if the law imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters and political organizations, the Court must nonetheless continue to weigh the burdens imposed on the plaintiff against "the precise interests put forward by the State." *Id.* at 434. Under this more deferential standard, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788); *see also Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108-109 (2d Cir. 2008) (explaining difference between rational basis review and the *Anderson/Burdick* analysis of reasonable/nondiscriminatory restrictions).

But this analysis need not be an "either/or" proposition where the burdens imposed by the regulation are either "severe" (thus, triggering strict scrutiny) or "reasonable and nondiscriminatory" (thus, triggering more deferential review). This is a sliding scale. If the burden of an election regulation is significant or substantial—thus, in the middle of this sliding scale—then intermediate scrutiny should be applied. *See Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 701 (N.D. Ohio 2006) (in evaluating an Ohio third-party voter-registration law subjecting voter-registration workers to felony charges if registration forms are not returned to an appropriate state agency within ten days of being collected, determining that intermediate scrutiny was appropriate because burdens were "substantial"), *same result reached on summary judgment in* 2008 U.S. Dist. LEXIS 9878 (N.D. Ohio Feb. 11, 2008); *see also Veasey v. Perry*, No. 13-CV-00193, 2014 U.S. Dist. LEXIS 144080, at *152, 154 (S.D. Texas Oct. 9, 2014). Under

intermediate scrutiny, the government must articulate an important or substantial governmental interest, and "the Court must determine if the means chosen to enforce that interest is no greater than is essential to the furtherance of that interest." *Id.* As with strict scrutiny, the State may not rely on post hoc rationales in the application of the intermediate scrutiny analysis. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (in applying intermediate scrutiny to gender classification, the government must demonstrate that its justification is "genuine, not hypothesized or invented post hoc in response to litigation"). Finally, as explained below, even if the Court concludes that HB 1542 is a reasonable and nondiscriminatory restriction (which it is not), the law still fails because, as in *Block*, there is no legitimate regulatory interest for the law.

A. HB 1542 Imposes Severe Burdens, Thereby Triggering Strict Scrutiny Review

HB 1542 places severe burdens on the Libertarian Party that will cripple the Party's ability to qualify as a political party under RSA 655:40-a in future general elections. Thus, strict scrutiny applies. For example, in *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009), the Moderate Party of Rhode Island challenged, *inter alia*, a January 1 start date for collecting signatures to qualify for the ballot. *Id.* at 144. That start date would have given the party just 201 days[10] to gather the required 23,588 signatures of registered voters, which prompted the party to bring a declaratory judgment action similar to this one. *Id.* at 147. Though the Court did not formally decide whether the law was a "severe" burden, it did find that the law was an "enormous speedbump on the path to party recognition." The same is true here for three reasons.[11]

[10] The "Rhode Island scheme is probably the most onerous in the nation," *Block*, 618 F. Supp. 2d at 151 n. 11, and nearly identical—201 versus 210 days (7 months)—to the time frame subsequently adopted by New Hampshire. *See also* 50-State Survey (Ex. A to Biss. Aff., ¶ 2) (indicating that the New Hampshire law is among the most burdensome in the nation concerning the start date for obtaining party-wide ballot access).

[11] Even if the Court were to examine the burdens imposed by HB 1542 as a whole to all third parties, the burdens also must be viewed as severe. Here, if the burden is severe as to the Libertarian Party—the largest and most well-known minor party in New Hampshire and the only party that has successfully gone through the party-petitioning process in New Hampshire—then surely the law would severely burden other, lesser-known minor parties that have more modest financial resources.

1. The January 1 Start Date Severely Burdens the Party By Compressing the Time Frame to Collect Nomination Papers to, in Practice, Less than 5 Months.

HB 1542's January 1 start date severely burdens the Party by compressing the time period from 21 months to approximately seven (7) months for the Party to collect the 3% threshold of verified nomination papers. *See* Scanlan Depo. 7:7-10 (pre-HB 1542 law allowed for collecting signatures immediately after prior election) (*Ex. B* to Biss. Aff., ¶ 3). By law, nomination papers must be submitted for certification to the Supervisors of the Checklist in each town or city where each signatory is registered for review by early August[12]—an arduous process that requires minor parties to disaggregate nomination papers by municipality and then drop off or mail (and later pick up) the papers at the offices of any one of New Hampshire's 221 towns and 13 cities. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Tomasso Depo. 28:13-29:19 (noting "monumental effort" of the process) (*Ex. F* to Biss. Aff., ¶ 7).

But, in reality, this compressed time period is much shorter than seven (7) months under HB 1542. For example, given New Hampshire's harsh winter months, petitioning cannot begin in earnest until mid-March at the earliest because the more efficient places for successful, high-volume petitioning are outside. As Rich Tomasso explained at deposition:

> You have to be outside to collect petition signatures. You're not allowed to be inside. So if it's snowing or raining, people won't stop [to talk]. You've got paper in front of you, and obviously if it's raining, that is pretty useless. Having petitioned when it's snowing before, I can tell you people don't stop for you and it's cold. So you're standing out there all day. It's just—it's just—it's a very bad situation unless the weather's good.

Tomasso Depo. 104:1-10 (*Ex. F* to Biss. Aff., ¶ 7); Babiarz Depo. 107:14-109:6 (*Ex. G* to Biss.

[12] It should be noted that this August deadline for parties or candidates to submit nomination papers is tied to the date of the September primary. *See* RSA 655:41(I) ("Each nomination paper shall be submitted to the supervisors of the checklist no later than 5:00 p.m. on the Wednesday 5 weeks before the primary."); Babiarz Depo. 119:11-23 (*Ex. G* to Biss. Aff., ¶ 8). Currently, the primary is held on the second Tuesday of September. *See* RSA 653:8. Thus, if New Hampshire ever moves its primary up, the deadline to submit nomination papers would also be moved up, thus further compressing the time frame under RSA 655:40-a. Additionally, many municipalities will not verify signatures until the early August deadline even in circumstances where nomination papers are collected and ready for submission earlier in the year. *See* Babiarz Depo. 88:2-88:23 (*Ex. G* to Biss. Aff., ¶ 8).

Aff., ¶ 8).[13] One of the more common times for petitioning to begin after the cold winter months is during town election day, where voters are accessible outside and which typically occurs in mid-March (though New Hampshire's 13 cities do not hold such forums in March, removing the best access to a huge amount of registered voters). The Party's 2012 petitioning drive, for example, only effectively restarted after the winter months in mid-March during town election day. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); *see also Jones v. McGuffage*, 921 F. Supp. 2d 888, 897, 900 (N.D. Ill. 2013) ("plaintiffs have made a credible case that the 15,682 signature requirement could not be met in this 62-day period" for a special election where "the signature-gathering period encompassed December and January—months during which weather in the Chicago area is particularly inclement and in which there are a dearth of large scale, outdoor, public events during which signature drives are most successful"); *Kelly v. McCulloch*, No. CV–08–25–BU–SHE, 2012 WL 1945423, at *5 (D. Mont. May 25, 2012) (deadline to submit petitions burdensome where it, in part, required individuals "to do their signature gathering and early campaigning in late fall and winter, when the weather in Montana is often inclement").

Moreover, the bulk of petitioning activity cannot, as a practical matter, be conducted in the last week or two before the early August deadline. Rather, the week or two before the early August deadline must generally be spent (i) manually organizing and sorting, by municipality, the thousands of "raw" nomination papers received[14] and (ii) physically transporting these nomination papers to the town or city hall of each municipality where the signatory is domiciled so they can be verified by the various Supervisors of the Checklist.[15] The work this process entails on the eve

[13] Mr. Tomasso further explained that, if the weather in January and February 2016 is anything approximating the weather in January and February 2015, collecting signatures, even by paid professionals, will be "prohibitive." Tomasso Depo. 106:2-13 (*Ex. F* to Biss. Aff., ¶ 7).

[14] *See* Photographs from 2000 Sorting (*Ex. R* to Biss. Aff., ¶ 19); Photographs from 2012 Sorting (*Ex. S* to Biss. Aff., ¶ 20); *see also* Photographs of Stacked 2012 Petitions to SOS Office at LPNH 1303-06 (*Ex. M* to Biss. Aff., ¶ 14).

[15] After the papers are verified in late August, Party members must travel back to the municipality, collect the papers, and hand deliver them to the Secretary of State's Office by early September for final verification

of the early August deadline is enormous, presents logistical challenges, and can take hundreds of man hours. The Party members who assist in this massive exercise do so at considerable personal and financial sacrifice. In short, the real time period for petitioning allowed under HB 1542 is less than (5) months—from mid-March to late July. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

In excluding the odd-numbered year from petitioning, HB 1542 also excludes a huge number of events occurring during the late summer and autumn of the odd-numbered year that would be good petitioning opportunities and that do not occur during the general election year. *See* Babiarz Depo. 24:16-22, 25:5-14 (noting that autumn fairs and City election day in November are good odd-year petitioning events) (*Ex. G* to Biss. Aff., ¶ 8). One timely example would be all the campaign events that occur outdoors and draw crowds during the New Hampshire primary season—the bulk of which happens during the year before the general election. Tomasso Depo. 137:15-138:5 (*Ex. F* to Biss. Aff., ¶ 7); Babiarz Depo. 110:16-113:6 (*Ex. G* to Biss. Aff., ¶ 8).

Given this compressed time frame, the Libertarian Party would likely be unable to complete the party-petitioning process under RSA 655:40-a if HB 1542 continues to be enforceable—a conclusion that is borne by the Party's experience during the 2000 and 2012 general election years in which, to comply with the requirements under RSA 655:40-a, it had to start collecting nomination papers well before January 1 of the general election year. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

For example, during the 2012 general election cycle, the Libertarian Party began collecting nomination papers in late July 2011. *See* 2011-12 LPNH Meeting Agendas, July 2011 Agenda at LPNH 176-77 (*Ex. J* to Biss. Aff., ¶ 11); LPNH Int. Resp. No. 3 (*Ex. H* to Biss. Aff., ¶ 9). The goal behind starting the petition in July 2011 was to complete the process as soon as possible so the party could then begin meaningful recruiting, electioneering, and fundraising for the 2012 general election. *See* Tomasso Depo. 33:5-17, 37:2-18, 142:19-143:9 (*Ex. F* to Biss. Aff., ¶ 7).

Approximately 13,800 verified nomination papers were required. Assuming a verification rate of 75%, approximately 18,600 "raw" nomination papers actually needed to be collected. Even with this early start, the Party was still scrambling for signatures as the August 8, 2012 deadline approached. *See* Petitioning Counts Spreadsheet, Tomasso Ex. 11 (*Ex. T* to Biss. Aff., ¶ 21). And to start this process during the summer of 2011 required an upfront investment of approximately $28,000 from the national Libertarian Party. *See* LNC July 25, 2011 Executive Committee Minutes, Tomasso Ex. 6 (*Ex. U* to Biss. Aff., ¶ 22).[16] This is because paid support—including professional petitioners—is a necessity in conducting a successful petition drive of this magnitude. Without paid support, a petition drive cannot get off the ground because the Libertarian Party structure is not a large organization. Babiarz Depo. 126:23-127:6 (*Ex. G* to Biss. Aff., ¶ 8). When petitioning began in July 2011, a professional paid petitioner generally charged $1.50 per signature. When petitioning finished in July 2012, a professional paid petitioner charged approximately $3 per signature given the demand for paid help elsewhere and time constraints. Even the best paid petitioner is only able to obtain from 80 to 100 raw signatures per day. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Babiarz Depo. 115:8-13 (*Ex. G* to Biss. Aff., ¶ 8).

The $28,000 in initial funding lasted only a few months. *See* 2012 Petitioning Expenses Paid By National, Tomasso Ex. 10 (*Ex. V* to Biss. Aff., ¶ 23); Invoices (*Ex. W* to Biss. Aff., ¶ 24). By October, the $28,000 (excluding an additional $1,000) had been spent, and approximately 13,500 of the 18,600 needed "raw" signatures had been collected (again, assuming a 75% verification rate). *See* November 2011 Email Exchange, at LPNH 932-35 (*Ex. M* to Biss. Aff., ¶ 14); 2011-12 LPNH Meeting Agendas, Sept.-Nov. 2011 Agendas at LPNH 179-81 (*Ex. J* to Biss.

[16] Of course, the fact that the Libertarian Party relied on national support to assist in its petitioning drive is not an indication that the Party does not have sufficient support in New Hampshire, just as the fact that the Republican and Democratic Parties in New Hampshire rely on out-of-state resources (like the RNC in Washington D.C.) does not indicate that those major parties lack support in New Hampshire. Like the major parties, the Libertarian Party relies on local volunteers, paid help, and national resources to have various tasks performed.

Aff., ¶ 11); Tomasso Depo. 57:4-58:21, 62:4-63:1 (*Ex. F* to Biss. Aff., ¶ 7). The remaining gap of "raw" 5,000 nomination papers was, as expected, then left to local Party volunteers and some petitioners paid by the local Party, who ultimately collected between 4,000 and 5,000 nomination papers in the following months (though petitioning in January and February 2012 was sporadic, as it was wintertime). Some local fundraising was done to pay for these petitioners. However, having collected thousands of additional nomination papers, the Party still needed a final push in the last week of July 2012 to successfully complete the drive. This push was aided by a cash infusion of approximately $4,000 from the national Party and from some generous donors, which was used to pay professional petitioners to collect an additional approximately 1,700 "raw" signatures in late July. *See* 2012 Petitioning Expenses Paid By National, Tomasso Ex. 10 (*Ex. V* to Biss. Aff., ¶ 23); Invoice for 1,700 "Raw" Signatures at $3/signature Rate, at LPNH 641-42 (*Ex. X* to Biss. Aff., ¶ 25); Petitioning Counts Spreadsheet, Tomasso Ex. 11 (*Ex. T* to Biss. Aff., ¶ 21); Tomasso Depo. 71:8-72:6 ("There was concern that we didn't have enough signatures … [T]he numbers were very—were getting very close at the end of the drive such as we had to rely on volunteers.") (*Ex. F* to Biss. Aff., ¶ 7). The total cost of the 2012 petition drive was approximately $40,000, which included approximately $33,000 from the national Party. *See* 2012 Petitioning Expenses Paid By National, Tomasso Ex. 10 (*Ex. V* to Biss. Aff., ¶ 23). This $40,000 figure was only a fraction of the real cost. Rich Tomasso—the Chair of the Libertarian Party—like many members, paid additional costs out of his own pocket (approximately $2,000) to support the effort, in addition to spending hundreds of man hours on the process. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Tomasso Depo. 154:12-155:10 (*Ex. F* to Biss. Aff., ¶ 7).[17]

[17] The 2000 general election cycle was similar experience where the Libertarian Party began collecting nomination papers in approximately the spring of 1999 and completed the drive a week or two before the early August 2000 deadline. *See* LPNH Oct. 1999 Newsletter and Convention Materials (*Exs. P and Q* to Biss. Aff., ¶¶ 17-18); LPNH Aug. 2000 Newsletter, Babiarz Ex. 1/Tomasso Ex. 17 (*Ex. N* to Biss. Aff., ¶ 15); LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

2. The January 1 Start Date Severely Burdens the Party's Ability to Meaningfully Campaign and Electioneer During the General Election Year.

HB 1542's artificial January 1 trigger for collecting nomination papers puts the Party at a distinct disadvantage compared to the two major parties in New Hampshire during the general election year. The law effectively compels the Party to complete the petitioning process from, as explained in Part I.A.1 *supra*, mid-March to late July, which are critical months prior to the election. The Party should instead be, like the major parties, engaging in fundraising and electioneering during this time period. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 592 (6th Cir. 2006) ("The LPO does not aspire simply to assemble in public meeting places and engage in speech activities that further their beliefs …. *[T]he goal of a political party and its supporters is to govern*. A party cannot lead if not elected and cannot be elected if not on the ballot.") (emphasis added).

Thus, HB 1542 prevents the Party from meaningfully engaging in the campaign process during the majority of the general election cycle, while the major parties—which need not complete the party-petitioning process under RSA 655:40-a—are free to engage in campaign activities. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9). Thus, as in *Block*, HB 1542 "hampers the ability of a political organization to compete in a meaningful way in an election year leading up to the actual election date." *Block*, 618 F. Supp. 2d at 152 (noting the "minor" party's contention that "Plaintiffs will be collecting signatures during this crucial period; by the time they get done, it will be too late to do much recruiting, fundraising and electioneering"). And the months before an election are critical. As *Block* explained: "Historically, so much of the value of a minor party lies in what it can do *before an election*: spark debate, introduce new ideas, educate voters, and challenge the status quo." *Id.* at 153-54 (emphasis added).

For example, if allowed to collect nomination papers during 2015, the Party would do so

with the hope of completing the petitioning process well before the August 2016 submission deadline so it could fundraise and spend accordingly when it counts—in the months leading up to the 2016 general election. However, because of the late start required under HB 1542, the Party will be racing to collect nomination papers well into the summer months of 2016 during this crucial time period preceding the general election. Indeed, if the Party now uses the party-petitioning process, it is difficult to imagine how the Party would be able to collect the required number of signatures well in advance of the August deadline (at least before HB 1542, the Party had a greater opportunity to finish early given the larger time frame to collect). And, by the time the Party obtains all the verified nomination papers it needs by August under HB 1542—if it, in fact, can do so under this compressed time frame—it will be too late for the Party to do significant recruiting, fundraising, and electioneering prior to the 2016 election, let alone catch up to the major parties that have (i) been engaging in these activities for months with superior resources and (ii) enjoyed free publicity by participating in the state-sponsored general election primary. Moreover, to the extent the Party uses professional petition collectors, signatures will cost more during these critical months before the general election than during the odd year before the general election due to competition for such paid resources in other states. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Tomasso Depo 118:23-119:20, 122:16-123:12 (*Ex. F* to Biss. Aff., ¶ 7); Babiarz Depo. 120:10-121:10, 142:20-143:15 (*Ex. G* to Biss. Aff., ¶ 8).

In assessing this burden, it is also important for the Court to understand that the petitioning process is neither a replacement for nor an equivalent to campaigning. While campaigning requires often time-consuming interactions with voters in which candidates answer policy questions that may culminate in the candidate asking the voter for his or her vote, petitioning for ballot access is a faster and more superficial interaction in which the petitioner simply asks a registered voter to give the Party a chance to be on the ballot. In fact, the Party actually

discourages petitioners from having substantive policy discussions with prospective signatories. If a petitioner takes the time to speak with each voter on policy details, the petitioner will lose the opportunity to collect signatures from other voters. As Rich Tomasso testified at deposition:

> We consider them [petitioning and campaigning] separate processes. I mean … when you're petitioning … you're not campaigning. You don't have the time to campaign. You're not there to persuade a voter to vote for you. You just need a signature so you have a chance to run for office …. But they're two different modes for—for us, as a practical matter . . . .
>
> We recommend against [candidates campaigning while the petition drive is ongoing], though …. It's a timing [thing]—especially if you're a candidate working alone—you know, if I spend say five or ten minutes talking to a voter trying to persuade them, then you run the risk of getting—you know, getting into arguments with the voter. Or if they disagree with you, they won't sign. You're also missing an opportunity to talk to other people around you. So petitioning is a—it's a volume game. So if I—if I take the time to talk to a voter and engage in campaigning, I'm not—I'm not completing my objective of—of getting a signature to get on the ballot. And I'm also losing the opportunity to talk to other voters who may be nearby.

Tomasso Depo: 95:1-96:6, 120:3-121:1 (*Ex. F* to Biss. Aff., ¶ 7); *see also* Babiarz Depo. 98:16-101:6, 123:8-124:19, 126:1-126:10 (explaining difference between petitioning and campaigning) (*Ex. G* to Biss. Aff., ¶ 8). In short, by necessity, when one petitions, volume—not votes—is critical. *See* 2001 Libertarian Political Action Materials (*Ex. Y* to Biss. Aff., ¶ 26) ("Stay out of political discussions. You are out to collect signatures, not to convert people to Libertarianism."; "One good 'closer' for people who are hesitant to sign is to tell them that they are not really supporting the candidate or his ideas, just his right to be on the ballot."); LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

The Party does not campaign or engage in significant electioneering, campaigning, or candidate fundraising during the petitioning process for another simple reason—the Libertarian Party has not yet even become eligible to run a slate of candidates. Given this reality, when the Party is engaging in petitioning, it must have a single-minded focus and spend all of its available resources—whether it be in manpower or funds—on the petitioning process. *See* 2011-12 LPNH

Meeting Agendas (*Ex. J* to Biss. Aff., ¶ 11); 2011-12 LPNH Meeting Minutes (*Ex. K* to Biss. Aff., ¶ 12); Tomasso Depo. 28:13-21 ("As a party, nearly all of your efforts are focused on that petition drive, because if you don't complete the petition drive, there's nothing else for you to do for the rest of the year. You don't have candidates on the ballot …. [E]verything you've been working for is for naught. And so essentially, you have to go all in and get this drive finished in time") (*Ex. F* to Biss. Aff., ¶ 7). Even if funds are spent to get into events such as fairs and policy seminars, it is done with the idea that those will be good petitioning opportunities. Any resources spent on non-petitioning activities would be wasteful and inefficient if the Party were ultimately unable to successfully complete the petitioning process. Thus, when the Party petitions, it sacrifices substantive interactions with voters with the hope that the Party will successfully complete the petitioning process and "live another day" to campaign on the eve of the general election. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9). And when the petitioning ends and the campaigning begins, the Party scrambles to catch up, which is practically impossible given its limited resources. *See* 2011-12 LPNH Meeting Agendas (*Ex. J* to Biss. Aff., ¶ 11) (demonstrating switch to campaigning after petitioning ends in September 2012); 2011-12 LPNH Meeting Minutes (*Ex. K* to Biss. Aff., ¶ 12) (same); Tomasso Depo. 140:1-141:9 (explaining disadvantage when Party ultimately switches gears to campaigning and that the Party is "tapped out financially" at this point) (*Ex. F* to Biss. Aff., ¶ 7).

3. The January 1 Start Date Severely Burdens the Party By Making it "Sit on the Sidelines" During the Odd Year Before the General Election.

HB 1542 also forces the Party to "sit on the sidelines" for the entire odd-numbered year before the general election year. *Block*, 618 F. Supp. 2d at 150 (noting that analogous Rhode Island law requires the Moderate Party to "sit on the sidelines" for a full calendar year before the collection period commences on January 1). The Party is now barred from engaging in petitioning

during the odd numbered year. While the Party could use this "down time" to begin campaigning (only to halt campaign activity and switch gears to petitioning on January 1), the odd year of the general election does not provide for meaningful and productive opportunities to campaign given the remoteness of the general election. *See Anderson*, 460 U.S. at 792 ("When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit, retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign."); *see also Kelly*, 2012 WL 1945423, at *5-6 (deadline to submit petitions burdensome, in part, where it required party "to begin campaigning prior to the March petition deadline when voters are less interested, while the qualified party candidates 'do virtually all of their campaigning in the Spring and Summer' prior to the primary and general elections, when voter interest is higher"); LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Babiarz Depo. 140:6-17 (campaigning during odd year is "not really that effective") (*Ex. G* to Biss. Aff., ¶ 8). The inefficiency of campaigning during the odd year is further compounded by the fact that the Party does not even yet know if it will successfully complete the petitioning process the following year and therefore be able to run a slate of candidates. The effect of HB 1542 is to only increase that uncertainty. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

4. Analyzing HB 1542's Collective Impact, HB 1542 Is Severely Burdensome And Will Cripple the Party's Access To The Ballot Through The Party-Petitioning Process.

Given the collective impact of these burdens and based on the Libertarian Party's own experience in the petitioning process—*an experience that no other entity has in New Hampshire*—HB 1542 is severely burdensome, thus triggering strict scrutiny. *See Blackwell*, 462 F.3d at 593 ("There are few greater burdens that can be placed on a political party than being denied access to the ballot. In this case, the combination of the laws challenged by the LPO acted to impose just

such a burden."). The Party has made clear in discovery that, if HB 1542 remains in force, it likely would not go through the party-petitioning process in the future, and instead would go through the individual candidate petitioning process. And even if the Party does engage in party petitioning, it will not likely succeed in meeting the threshold of verified nominating papers by the deadline without an unrealistic cash infusion to pay for professional petition collectors. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Tomasso Depo. 97:4-5, 104:23-105:15, 116:6-117:15 ("If this law stands, we will have to use the individual [candidate petitioning] process."; "[W]e obviously needed the—almost a year to collect all those signatures [in the 2012 cycle], and compressing that down to five months, the logistics of that would have been prohibitive.") (*Ex. F* to Biss. Aff., ¶ 7); Babiarz Depo. 121:11-122:4, 134:18-135:1 (If HB 1542 was in effect in 2000, the Party would not have used the party-wide petitioning process "[b]ecause of the amount of resources that we'd have to put in the short period of time.") (*Ex. G* to Biss. Aff., ¶ 8).

Based on the Party's past experience, to complete this process in what is tantamount to less than a 5-month time frame placed squarely during the campaign season would require a huge upfront cash infusion—likely in excess of $50,000—that would go significantly beyond what was spent in 2012. This figure is a cost-prohibitive barrier to entry given the local and national Party's limited resources. *See* Tomasso Depo. 101:7-9 (noting that the local Party has a "couple of thousand dollars" in its general fund), 109:23-110:5 (noting that the national Party only has $250,000 allocated for ballot access nationally in 2016) (*Ex. F* to Biss. Aff., ¶ 7). As Mr. Tomasso explained at deposition, he is the national Party's regional representative for the northeast, and, as a leader in the national Party, even he would not recommend using the national's Party's scarce resources to fund a petition drive in New Hampshire if HB 1542's burdens remain in force, especially given New Hampshire low amount of electoral votes:

…. [T]his would be probably a $50,000 effort, maybe even more, in a very compressed

> time frame …. [Relative to 2012], our costs per petition would likely go up, and given the—the short time window, it's unlikely that we could—we could make the case for them to fund—for them to fund the drive. I wouldn't vote for it ….

Id. at 97:14-20; 108:6-21 (estimating cost of 25,000-signature drives in other states at approximately $65,000 to $70,000), 109:13-14. And, especially given the compressed time frame, the Party would have to rely almost exclusively on paid petitioners who are compensated per signature (regardless of whether they are verified). As the August deadline approaches, the cost per signature would increase significantly. *Id.* at 118:23-119:20, 122:16-123:12 (explaining how paid petitioners charge more closer to the election); *see also* Babiarz Depo. 125:1-12 (explaining added costs imposed under HB 1542) (*Ex. G* to Biss. Aff., ¶ 8). Funding will especially be hard to obtain from the national party and outside sources given the uncertainty of being able to successfully complete the petitioning process under this new compressed time period. In short, if HB 1542 were to stay in force, RSA 655:40-a would no longer be a viable means of the Party to obtain ballot access, and the Party would have to rely on the individual candidate petitioning process which, as explained in Part I.A.5 *infra*, does not provide benefits immediately before an election. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

But even if the Libertarian Party *could* comply with the party-petitioning process after HB 1542—which is unlikely—that does not mean that HB 1542 is any less severely burdensome. The focus of this Court is and should be on *undue* burden (justification), not lack of impossibility. *See Blackwell*, 462 F.3d at 592 ("The fact that the LPO could comply with all of the requirements, and had done so in the past, the State contends, is evidence that the burden imposed is not severe. We find this argument equally unpersuasive. …. [T]he fact that an election procedure can be met does not mean the burden imposed is not severe."); *Jones*, 921 F. Supp. 2d at 900 ("But the plaintiffs do not have to satisfy an impossibility standard. This is an exercise in balancing, not in absolutes."); *Cal. Justice Comm. v. Bowen*, No. 12-3956 PA (AGRx), 2012 U.S. Dist. LEXIS 150424, *20-21

(C.D. Cal. Oct. 18, 2012) ("Whether Plaintiffs have met, or ever would meet, the numeric threshold has no bearing on determining whether setting the deadline for doing so ten months before the relevant election impermissibly burdens Plaintiffs fundamental rights, which involves assessing the severity of that restriction against the justifications for it proffered by the Secretary of State."); *Anderson*, 460 U.S. at 792 n.12 ("Five individuals were able to qualify as independent Presidential candidates in Ohio in 1980. But their inclusion on the ballot does not negate the burden imposed on the associational rights of independent-minded voters.").

The *Anderson* analysis is not mechanical or mathematical.[18] Numerous factors, often intertwining or interdependent, can influence outcomes concerning the various criteria and thresholds governing political party recognition. For example, "the facial validity of a signature requirement is but one indication of the constitutionality of a state's access provisions ... The time at which nominating petitions are filed can have an equal if not greater impact on the viability of third party candidacy." *McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980) (emphasis added) (striking down a 15,000 (3.3%) signature party candidate petition requirement even though only 300 signatures were needed to qualify as an independent candidate).[19] Here, the burdens imposed by HB 1542 go well beyond its compressed time frame by placing this time frame *squarely in the*

[18] The State and the RNC will undoubtedly attempt to assemble a variety of cases to suggest mathematical comparisons to the New Hampshire time window. But the cases the State has relied upon thus far do not address the specific time frame in which the petitioning period takes place. In *Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010), there was no challenge to the start date for the plaintiff to collect signatures, which was not imposed by statute but was triggered by the date of the plaintiff's nomination at the third-party's nominating convention. Moreover, *Barr*, unlike this case, addressed the ability of the plaintiff, as nominee of the third party, to be substituted on the ballot and replace a member of his party that collected enough signatures but was not the party's nominee. *See also American Party of Texas v. White*, 415 U.S. 767 (1974) (not addressing start date); *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983) (the Party did not challenge the start date but rather the number of signatures required, and other aspects of the law); *Stone v. Board of Elections Comm'rs for City of Chicago*, 955 F. Supp. 2d 886, 896 (N.D. Ill. 2013) (not addressing start date).

[19] In 2008, for example, the U.S. Supreme Court found a 37-day window acceptable, but only where 500 signatures in a New York assembly district were required. *N.Y. State Bd. of Elections v. Torres*, 128 S. Ct. 791, 798 (2008). Another example is *Mandel v. Bradley*, where the U.S. Supreme Court vacated and remanded a district court ruling which suggested that a 21-day period was not insufficient to meet a 2% threshold. 432 U.S. 173, 177 (1977) ("This limited time enormously increased the difficulty of obtaining the number of signatures necessary to qualify as an independent candidate.").

critical months of the general election year while the major parties are campaigning. *Blackwell*, 462 F.3d at 593 (noting that while a 120-day signature collection period may be reasonable, explaining that this was not the analysis before the Court and that the Court must instead examine "whether mandating that this 120-day period take place in advance of a March primary, resulting in a filing deadline one year in advance of the general election, promotes a compelling state interest"). Only a handful of other states have laws that are this extreme, further evidencing just how exceptional HB 1542 actually is. *See* 50-State Survey (*Ex. A* to Biss. Aff., ¶ 2). And, unlike the Moderate Party in *Block*, the Libertarian Party has gone through the party-petitioning process twice successfully (and is the only third party in New Hampshire to have done so since 1979). *See* Sec. of State Int. Resp. No. 5, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4). The Libertarian Party, unlike the RNC or even the Secretary of State's Office, knows how difficult the process is and what it entails. And it knows that, in all likelihood, it will have to forego party petitioning altogether if HB 1542 remains in force given the severe burdens it imposes.

5. The Severe Burdens Imposed Under HB 1542 Are Not Lessened By The Existence of Alternatives To The Party-Petitioning Process.

Finally, the existence of the individual candidate petitioning process where an individual third-party candidate can collect a lower threshold of verified nomination papers—3,000—to run for U.S. Senate or Governor in the hope of reaching 4% of the vote to establish "party" status in the subsequent general election (*see* RSA 652:11 and RSA 655:42, I) does not insulate HB 1542 from constitutional scrutiny. Courts have repeatedly rejected any such argument. *See, e.g.*, *McLain*, 637 F.2d at 1165 ("A candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the election process."); *Blackwell*, 462 F.3d at 592 (same); *Citizens to Establish a Reform Party in Ark. v. Priest*, 970 F. Supp. 690, 699 (E.D. Ark. 1996) ("Such an arbitrary classification makes it unreasonably difficult for

proponents to advance new political parties while allowing independent candidates to be placed on the ballot with even less public support.").

The notion that the individual candidate petitioning process cannot be used as a replacement to the party-petitioning process was also echoed in *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009):

> [The party petitioning process] is the only means by which an organization can gain recognition and reap the undeniable benefits of official party status *prior to an election*. In other words, no matter how successful the grassroots effort, a hopeful party must recruit a candidate of sufficient stature and means to mount a reasonably successful race for Governor (or President) before it can get into the General Assembly game. But strong candidates with statewide approval and money are not exactly a dime a dozen, and nothing in the statutory scheme suggests that a candidate-centric approach should precede a petition-based approach. More lenient qualifications for individual independent candidates … does not make up for a constitutionally deficient petition process."

Id. at 153-54 (emphasis added). Thus, the individual candidate petitioning process is not a viable alternative in this case even if it the Court considers alternatives in examining HB 1542's constitutionality.[20]

B. There Is No Legitimate State Interest Justifying The Onerous Restrictions Imposed By HB 1542. Thus, the Law Fails Under Any Standard of Review.

The State cannot present a legitimate regulatory interest—let alone a significant or compelling regulatory interest—justifying the onerous restrictions imposed by HB 1542, nor can the State show that HB 1542 is remotely tailored to effectuate any regulatory interest the State may have. Accordingly, under any standard of review, the law fails.

The State's purported interests in enacting HB 1542 have been a moving target in this case,

[20] The individual candidate petitioning process also divests the Libertarian Party of control over its candidates. Under this process, there is nothing to stop multiple candidates competing for the same office and who reach the signature threshold to each place the phrase "Libertarian Party" aside their names, thus impacting the brand of the Party and causing individuals not endorsed by the Party to compete with individuals actually endorsed by the Party. This would surely increase, not decrease, voter confusion. For example, in 2008, the Libertarian Party had two presidential candidates on the ballot in New Hampshire who obtained ballot access through the individual candidate petitioning process, though only one was nominated at the Party's convention. *See* Babiarz Depo. 72:12-73:6, 76:21-78:15, 135:14-22 (noting that party-petitioning process allows Party to "at the last minute … say this is our candidate based on what happens at the convention") (Ex. G to Biss. Aff., ¶ 8).

but the legislative record identifies *one and only* interest actually justifying the law: to reduce the number of invalid nomination papers which, due to death or relocation, might arise if they are submitted earlier. But, as explained in more detail below, this rationale was correctly rejected in *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009), where the Court held that this interest was "nonsensical" because any interest in addressing lower "verification rates" of nomination papers due to death or relocation is borne by the Party, not the State. Additionally, the evidence establishes the date of the signature has no impact on the ability of Supervisors of the Checklist to verify nomination papers. In an attempt to avoid *Block*'s fatal decision, both the State and the RNC have scrambled to manufacture post hoc justifications for the law. Because strict scrutiny applies, this Court cannot even consider these rationales, thus rendering summary judgment in favor of Plaintiff appropriate. *See Jernigan v. Crane*, No. 4:13-cv-00410 KGB, 2014 U.S. Dist. LEXIS 165898, at *47 (E.D. Ark. Nov. 25, 2014) (strict scrutiny disallows "generalized, post hoc, and litigation-reactive justifications").[21] And, as explained below, even if the Court considers these made-up rationales, they too are nonsensical and do not justify HB 1542's onerous burdens.

1. The Secretary of State's Actual Purported Interest in Reducing the Number of Invalid Nomination Papers Was Correctly Rejected By *Block*.

There is one and only genuine justification for HB 1542: to improve the verification rate by causing political organizations to not submit "stale" signatures that, due to death or relocation, may not ultimately be verified by the municipal Supervisors of the Checklist. According to HB 1542's legislative history, this bill "*will reduce the number of invalid signatures, due to death or relocation, which might arise if signatures are submitted earlier*." *See* HB 1542 Leg. History, Gardner Ex. 1/Scanlan Ex. 1, at LPNH 422 (*Exs. C and E* to Biss. Aff., ¶¶ 4, 6) (emphasis added).

[21] The same is true if the Court concluded that the burden on the Plaintiff is "significant," thus triggering intermediate review. *See United States v. Virginia*, 518 U.S. 515, 533 (1996)

In April 2, 2014 testimony before the Senate Public and Municipal Affairs Committee introducing HB 1542, one sponsor called HB 1542 a "housekeeping" bill. She testified as follows: "The reason for this is when a third party would try to achieve nominating papers, they would start right after the election. *So you would have signatures that may be two years old but were very difficult to verify. So having it in the same year of the election makes it easier to verify. It does limit that time frame, but it allows for verification*." *See* Apr. 2, 2014 Senate Testimony (0:53) (*Ex. I* to Biss. Aff., ¶ 10) (emphasis added); HB 1542 Leg. History, Gardner Ex. 1/Scanlan Ex. 1, at LPNH 429 (*Exs. C and E* to Biss. Aff., ¶¶ 4, 6).

The Secretary of State's Office propounded this same rationale in discovery. In interrogatory responses, Secretary of State William Gardner explained that "[t]he time frame for collecting signatures in the current statute makes it less likely that the supervisors of the checklist will be asked to review petitions where the signator[y] has either passed away, moved, or has otherwise been disqualified." *See* Sec. of State Int. Resp. No. 8, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4). At deposition, Deputy Secretary David Scanlan explained that HB 1542 was proposed, in part, because some municipal Supervisors of the Checklist notified the Secretary of State's Office that "they had a high number of invalid" nomination papers because voters "were simply not on the checklist." *See* Scanlan Depo. 8:6-13, 11:15-20 (*Ex. B* to Biss. Aff., ¶ 3). However, Mr. Scanlan could not provide any details regarding these communications or even identify who expressed these concerns. Moreover, the Secretary of State's Office maintains no records, memoranda, letters, emails or any documentation memorializing such alleged concerns.

This is not a legitimate rationale for at least five reasons. *First*, this rationale was explicitly (and correctly) rejected by the U.S. District Court for the District of Rhode Island in *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009). Applying the *Anderson/Burdick* analysis, the *Block* Court determined that "*under any level of scrutiny*, the State has come forward with no

legitimate regulatory interest whatsoever that would necessitate placing this enormous speed bump on the path to party recognition [in creating a January 1 start date for party petitioning]." *Id.* at 151 (emphasis added). There, the State presented a sole justification for the January 1 start date—"its interest in ensuring that petition signatures are valid; for example, that the signatories are not voters who have moved or died." *Id.* In Rhode Island, the state performs a voter registration "clean up" in which it deletes or adds names of voters who have changed address or their registration status. *Id.* at 151-152. The State claimed that allowing collection of signatures in an off-year would result in a third party "working off the outdated list—so the likelihood that signatures are invalid is increased." *Id.* at 152. The Court correctly characterized this justification as "nonsensical":

> First, what is described as the so-called State interest is really a Moderate Party interest—if anyone is to be harmed by use of a 'stale' voter list in the collection process prior to January 1, 2010, it is putative party seeking the signatures. If an organization wishes to work off data that may not be current, it does so at its own risk. Moreover, using the old list *simply means some greater margin may be needed to cover the potentially larger number of invalid signatures. But that is the party's problem, not the Board of Elections'* …. In other words, the process is self-regulating: if the new party is worried that it will get stale signatures by starting too early, then it will wait. It does not need an artificial statutory date to make it do so.

Id. (emphasis added).[22]

[22] In *Block*, the Court explained that "under any level of scrutiny, *the State has come forward* with no legitimate regulatory interest whatsoever that would necessitate placing this enormous speedbump on the path to party recognition." *Block*, 618 F. Supp. 2d at 152 (emphasis added). Even if the regulation in *Block* could be perceived as reasonable and non-discriminatory, this statement did not misapply the *Anderson* standard. *First*, the *Block* Court was merely mirroring language from *Anderson* stating that the Court must, even in evaluating reasonable/non-discriminatory restrictions, "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. Indeed, this analysis under *Anderson*—even for reasonable/non-discriminatory restrictions—is not fully congruent with the rational basis standard of review used in other contexts. *See Price v. N.Y. Bd. of Elections*, 540 F.3d 101, 108-09 (2d Cir. 2008) (reviewing U.S. Supreme Court precedent and stating that a court is not to apply "pure rational basis review" by considering "every conceivable basis which might support the challenged law," but instead, to "actually weigh the burdens imposed on the plaintiff against the precise interests put forward by the State, [taking] into consideration the extent to which those interests make it necessary to burden the plaintiff's rights" (citations and internal quotation marks omitted)); *see also FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (under traditional rational basis review, those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it). *Second*, nowhere in *Block* does the Court suggest that the evidentiary burden is on the state. The Court's statement, rather, suggests that there was no conceivable basis for the challenged law *other than the justification proffered by the*

As in *Block*, if a political organization like the Libertarian Party wishes to collect nomination papers during the odd-numbered year before a general election, it does so at its own risk. Using "old" nomination papers simply means that some greater margin may be needed to cover the potentially larger number of invalid nomination papers. Even if "old" signatures cause a lower verification rate (which there is no evidence of), that is the Party's problem—not the problem of the State or the municipal Supervisors of the Checklist. And, most importantly, the benefit of additional time for collecting nomination papers more than outweighs the marginal burden to the third party of collecting a few more nomination papers. In other words, as in *Block*, the process is self-regulating: if the third party is worried that it will get stale nomination papers by starting too early, then it will wait. It does not need an artificial statutory date to make it do so.

Second, the State already has a regulation directly aimed at this issue: the check on the validity of nomination papers by the Supervisors of the Checklist in each town or city where each signatory was registered at the time of the signing. *Block*, 618 F. Supp. 2d at 152 ("[T]he State already has a regulation directly aimed at this issue: the check on the validity of signatures by the local boards of canvassers."). One need not fear a party petition tainted by invalid signatures because it is precisely the role of municipal Supervisors of the Checklist to check the validity of those signatures. Hence, the process is specifically designed to guard against this perceived evil.

Third, the January 1 start date is completely arbitrary. *See* Scanlan Depo. 15:14-23 (the January 1 date was "deemed to be an appropriate time"), 17:1-17, 35:1-36:1 (testifying that he just had a "general sense"), 39:18-40:11 (*Ex. B* to Biss. Aff., ¶ 3). In discovery, the State has provided no evidence supporting the assumption that the percentage of invalid nomination papers obtained by petition somehow decreases if nomination papers are collected before January 1 of the general

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State and that existed in the legislative record. Thus, because the only conceivable justification was the one proffered by the State and, because that justification could be summarily rejected, the law was unconstitutional.

election year. In fact, no such studies were even conducted. Sec. of State Int. Resp. No. 9, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4) (admitting that no studies or statistical analysis was done to support this assumption); *see also Block*, 618 F. Supp. 2d at 152 ("No evidence … was offered to support the proposition that the percentage of invalid signatures obtained by petition somehow decreases if signatures are collected after the voter database is updated."). Nor has the Secretary of State's Office examined whether signatures that pre-date January 1 of the general election are somehow more difficult to verify than signatures that post-date January 1. *See* Sec. of State Int. Resp. No. 10, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4) (admitting that no studies or statistical analysis was done to support this assumption); Gardner Depo. 27:5-18 (no concerns raised to him by municipal officials that pre-January 1 nomination papers were more difficult to verify) (*Ex. D* to Biss. Aff., ¶ 5). In short, the entire premise upon which HB 1542 is based is pure conjecture.[23]

Fourth, the timing of the signature has no impact on the ability of the Supervisor of the Checklist to verify that signature. If a Supervisor of the Checklist is simply cross checking a nomination paper with the names on the centralized voter checklist, it would take no more time to cross check a nomination paper dated December 31 than a nomination paper dated January 1. And an unverified nomination paper does not take longer to identify than a nomination paper that will ultimately be verified because all the Supervisor of the Checklist is doing is ascertaining whether the name on the nomination paper is or is not in the centralized voter checklist. *See* Scanlan Depo. 61:8-62:10 (an unverified nomination paper takes "not much more" time to process because "[i]f the name is not on the list, it's not on the list") (*Ex. B* to Biss. Aff., ¶ 3).

[23] If anything, it would seem that creating a longer time window would ease any perceived administrative burden on municipal officials because petitions could be verified well in advance of any deadline and perhaps even on a rolling basis. Indeed, the limited case law on time constraints in this area suggests that the focus is most often on the closing date for submission of petitions—wherein a state asserts that it needs time to certify signatures and prepare a ballot—and not on the opening date of the time window. *See, e.g., McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980) ("North Dakota's filing deadline of June 1, more than ninety days before the primary election and more than one hundred fifty days before the general election is particularly troublesome.").

Finally, by refusing to allow signatures before January 1 of the general election year, the current New Hampshire scheme operates to ban completely the formation or recognition of a political party in any odd-numbered year. A similar regime was challenged and found unconstitutional in *Green Party of Arkansas v. Priest*, 159 F. Supp. 2d 1140 (E.D. Ark. 2001), where the plaintiffs sought recognition to participate in a special election in an odd-numbered year. Arkansas allowed petitions by parties seeking official recognition to be filed only in even-numbered, general election years. *Id.* at 1142. Much like New Hampshire currently, the organization could not begin collecting signatures until 150 days before. *See id.* The federal district court concluded:

> The burdens imposed by Arkansas's party recognition scheme are sufficiently severe as to require the application of strict scrutiny. Indeed, these burdens make it impossible for new and emerging political parties to gain recognition in odd-numbered years in time to participate in any special elections that might occur. As a result, Arkansas's party recognition scheme must be narrowly drawn to advance a compelling state interest.

Id. at 1144. Despite the Arkansas Secretary of State invoking the talismanic "significant modicum of support" rationale, the Court found the scheme unconstitutional under strict scrutiny, noting that "[s]uch arbitrary restrictions on political association fail even the test of rationality" and held that no compelling or even legitimate state interest was served. *Id.*

In sum, because Defendant's actual rationale is not legitimate (let alone compelling), the Court should enjoin enforcement of the January 1 start date. This Court need not go further.

2. The State's Manufactured, Post Hoc Justification In Preventing "False Positives" Is Without Basis.

In an attempt to avoid *Block*, the State has manufactured a new justification for the law. As explained by the State in its Motion to Dismiss, the rationale is *not* to cause parties to submit a higher percentage of verified nomination papers, but rather to prevent Supervisors of the Checklist from verifying nomination papers signed by people who (i) are purportedly likely to have died or

relocated by the early August submission deadline and (ii) should have previously been removed from the centralized voter checklist due to this death or relocation, but were not:

> New Hampshire law requires verification of checklists only once every 10 years. See RSA 654:39. While there is a process for the checklists to be updated when the supervisors of the checklists are notified of changes of addresses or deaths, see RSA 654:36-b, and :37, it can reasonably be assumed that not every death or relocation is reported. As a result, the checklists likely include some names of voters who have moved or died, and nomination papers containing those invalid signatures would not be identified during the certification process.

See State's Mot. to Dismiss at 9 (Doc. No. 9-1).[24] Put another way, where the true rationale for the bill before the legislature was that the centralized voter checklist was ***correctly*** causing some voters to not be verified due to death or relocation (thus, lowering the verification rate), this post hoc rationale assumes that the checklist is "stale" and not properly updated, thus causing individuals who have moved or died to ***incorrectly*** become verified.

This argument fails for multiple reasons. ***First***, this rationale is simply made up. It exists nowhere in the legislative record and was not used by the Secretary of State's Office as a justification for the bill before the legislature. This rationale is also not present in the Secretary of State's interrogatory responses, and the 10-year purge was expressly rejected as a justification by Deputy Secretary Scanlan at deposition. *See* Sec. of State Int. Resp. No. 8, Scanlan Ex. 3 (omitting this justification) (*Ex. C* to Biss. Aff., ¶ 4); *see also* Scanlan Depo. 33:8-19 (*Ex. B* to Biss. Aff., ¶ 3) (disavowing notion that 10-year purge was related to HB 1542's rationale). Thus, this post hoc rationalization can be disregarded given that heightened scrutiny applies.

Second, as explained in Part I.B.1 *supra*, there is no evidence in the record supporting the assumption that signatures dated before January 1 are more likely to reflect individuals who would

[24] The State conflates separate and distinct statutes with different purposes in advancing this argument. Once every ten years, the centralized voting list is purged of voters who did not vote in the prior two successive elections before the purge. *See* RSA 654:39. If this statute existed in isolation, the checklist would only be purged once every ten years. However, RSA 654:39 does not exist in isolation. Rather, under RSA 654:36-b and :37 the checklists are also updated upon reports received of a voter's change of address or death. Thus, the checklists are periodically updated several times every year and not merely once every ten years.

have died or relocated by the early August deadline. The January 1 deadline is arbitrary. *See* Scanlan Depo. 31:9-15 (*Ex. B* to Biss. Aff., ¶ 3); *see also Block*, 618 F. Supp. 2d at 152.

Third, there is no evidence in the record demonstrating that either the Secretary of State or any municipal clerk or Supervisor of the Checklist ever experienced a situation where a pre-January 1 nomination paper of a person who moved or died was going to be verified because the centralized voter checklist used to cross-check the nomination paper was outdated or "stale." As the Deputy Secretary of State testified at deposition, some municipal Supervisors of the Checklist had the opposite concern—that the checklist appropriately *did not contain* the names of signatories because they had moved or died, thus creating a lower verification rate. *See* Scanlan Depo. 8:6-13, 11:15-20 (*Ex. B* to Biss. Aff., ¶ 3). Simply put, there is nothing in the record evidencing that this is even a problem.[25] Indeed, Deputy Secretary Scanlan testified at length about how municipal clerks constantly update the centralized voter list on a regular basis with information concerning the death and relocation of voters. *Id.* at 25:8-29:19 (referencing RSA 654:36-b and RSA 654:37). For example, he explained that the checklist is updated by municipal clerks before town meeting and local elections in March and before elections by larger cities and towns in November. *Id.* Given this constant updating, the centralized voter checklist in New Hampshire is likely to be *more* accurate than the checklist in *Block*, where the Court concluded that the State's use of a two-year-old checklist was not a legitimate justification to impose a January 1 start date. *Block*, 618 F. Supp. 2d at 151-52. Moreover, the Secretary of State has produced no analyses or studies showing that the centralized voter list is even defective or that statutes designed to ensure its accuracy are not doing their job. *See* Sec. of State Int. Resp. No. 12, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4). In short, this made up justification is entirely speculative. *See Blackwell*, 462

[25] The New Hampshire City & Town Clerks Association did not formally support HB 1542. Instead, that organization tracked the bill as "watch." Municipal Clerk's Tracking Chart from 2013/14 Legislative Term, LPNH 1395 (*Ex. Z* to Biss. Aff., ¶ 27).

F.3d at 593 ("Reliance on suppositions and speculative interests is not sufficient to justify a severe burden on First Amendment rights.").

Fourth, even if the checklist is "stale"—which there is no tangible evidence of—this argument is nonsensical. For example, the voter registration list was last purged before the 2012 election. Assuming the law was in effect for the 2016 general election, nomination papers would be compared with a 4-year-old list regardless of whether names were collected in 2015 or 2016. Additionally, even under the State's theory, political parties collecting signatures in 2018 and 2020 will see their nominating papers compared to a list that has not been purged for 6 and 8 years respectfully. This example illustrates why Mr. Scanlan testified that the 10-year purge has nothing to do with the rationale behind HB 1542. *See* Scanlan Depo. 33:8-19 (*Ex. B* to Biss. Aff., ¶ 3).

Finally, there is no legitimate state interest in imposing burdens on the Libertarian Party's ability to collect nomination papers simply because the checklist is believed to be "stale" or because the State chooses to purge its voter registration list only once every ten years. If the voter list is actually stale, the burden should not be placed on the Libertarian Party for any perceived deficiencies in the checklist-updating process. Indeed, the more tailored approach would be for the State to improve the purportedly flawed centralized voter list, rather than saddle third parties with burdens that effectively preclude them from meaningfully participating in the democratic process. There is no evidence in this case that the Secretary of State's Office even considered this more narrowly tailored alternative. *See Anderson*, 460 U.S. at 806 ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.").

3. The Manufactured, Post Hoc Justification To Regularize The Party-Petitioning Process With A 2009 Law Concerning the Individual Candidate Petitioning Process Also Fails.

In yet another post hoc rationale for HB 1542 that bears no nexus to the bill's legislative

record, both the State and RNC now claim that HB 1542 is necessary to reconcile the party-petitioning process with a 2009 law, HB 623, that changed RSA 655:40 to prohibit individual candidates from collecting nomination papers before January 1 of the general election year. As the RNC explained in its Motion to Intervene: "[T]he 2014 amendment simply aligned the requirements of two election statutes governing the same subject matter. In regularizing the requirements, the amendment eliminated a point of ***potential*** confusion, not just for local and state election officials charged with the labor-intensive process of reviewing nomination papers, but also for all participants in New Hampshire's general elections." *See* RNC Mot. to Intervene at p. 1-2 (Doc. No. 30-1) (emphasis added); *see also* Scanlan Depo. 9:4-10 (noting prior change in law with respect to individual candidate petitioning as a justification) (*Ex. B* to Biss. Aff., ¶ 3).

This rationale too can be summarily rejected. *First*, this is also a made up, post hoc justification. Not once did the Secretary of State's Office or HB 1542's sponsors mention before the legislature that the purpose of HB 1542 was to address confusion concerning the party-petitioning process and the 2009 change in the law governing individual candidate petitioning. *See* Apr. 2, 2014 Senate Testimony (*Ex. I* to Biss. Aff., ¶ 10).

Second, this argument conflates two processes—the individual candidate-petitioning process and the party-petitioning process—that are, as explained in Part I.A.5 *supra*—different and provide contrasting benefits. There is no inherent governmental interest—even under the guise of eliminating "confusion"—to change the party-petitioning process to conform to the individual candidate petitioning process when the change itself does not justify impacting the party-wide petitioning process. Indeed, the party-petitioning process is a much more massive undertaking than the individual candidate petitioning process, thus justifying additional time to complete this process. Thus, if the interest is, as the RNC and State now belatedly claim, to mirror the party-petitioning process to the January 1 start date imposed on the individual candidates in

2009, then the correct analysis here would continue to be to (i) examine why the January 1 deadline is purportedly necessary to apply to the party-petitioning process, and (ii) examine whether that interest sufficiently justifies the restriction on party-wide ballot access made in 2014. As explained above, under either the Secretary of State's *actual* rationale for HB 1542 or the various post hoc rationales proffered in this case, the law fails. *See* Part I.B. 1-2 *supra*.

Third, there is no evidence that "chaos" was created by the fact that, during the 2012 general election, individual candidate petitions needed to be dated after January 1 of the general election, while party petitions could be dated any time after the prior general election. Surely, if such "chaos" existed, the Secretary of State and Deputy Secretary of State would have testified to it at deposition. They did not. Nor is there evidence that the law was "confusing" prior to HB 1542.[26] During the implementation of the 2012 general election, the law governing individual candidates (RSA 655:40) versus political organizations (RSA 655:40-a) was absolutely clear that the January 1 start date only applied to individual candidates under RSA 655:40. In July 2011, the Secretary of State himself concluded (and presumably informed municipal clerks and Supervisors of the Checklist) that the party petitions did not need to be signed during the date of the general election year consistent with the then-version of RSA 655:40-a. There was no "confusion" during the 2012 general election, as the Party's verified nomination papers collected in 2011 were all counted. Even if there was "confusion," it would not have been due to any ambiguities in the language of RSA 655:40-a and RSA 655:40, but rather due to a misreading of an unambiguous law. And, at least until HB 1542 was enacted in 2014, the reason for this distinction between individual candidate petitions (under RSA 655:40) and party petitions (under RSA 655:40-a) was obvious: more time is needed to collect nomination papers for party-wide ballot access because the

[26] As Deputy Secretary Scanlan explained, prior to passage of HB 1542, a January 1 start date for party petitioning was not in place. *See* Scanlan Depo. 7:7-10 (*Ex. B* to Biss. Aff., ¶ 3).

amount of papers required to be collected is staggering and vastly outnumbers that number of nomination papers that individual candidates need to collect. *See* RSA 655:42 (3 percent threshold required for party petitioning, while 3,000 signatures required for individual candidate petitioning); *see also* Scanlan Depo. 59:20-60:2 (*Ex. B* to Biss. Aff., ¶ 3).

4. The State's Other Manufactured Justifications Also Fail.

In passing, the State has mentioned three other post hoc justifications for the HB 1542 that can also be summarily rejected by the Court because they exist nowhere in the legislative record. But if the Court considers them, they too fail. *First*, the Attorney General's Office has noted that the State has an interest in making sure that the Libertarian Party "makes a preliminary showing of a substantial measure of support as a prerequisite to appearing on the ballot." *Barr v. Galvin*, 626 F.3d 99, 111 (1st Cir. 2010); *see also Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Libertarian Party N.H. v. State*, 154 N.H. 376, 382-83 (2006). The Secretary of State's Office echoed this rationale in its interrogatory responses, stating that HB 1542's rationale is to ensure that third parties "show some reasonable level of support to justify the increased and significant cost of printing ballots and the additional complexity added to the ballot design impacting the voters ability to read and understand the ballot." *See* Sec. of State Int. Resp. No. 8, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4). Plaintiff does not dispute the legitimacy of this interest, but HB 1542 and its new compressed time frame for reaching the 3% signature threshold have nothing to do with ensuring that the Libertarian Party has a "some reasonable level of support." Here, meeting the 3% threshold would be sufficient alone to demonstrate a significant modicum of support without imposing artificial or draconian time restrictions that make that threshold even harder to achieve. *See Cal. Justice Comm.*, 2012 U.S. Dist. LEXIS 150424, at *22 ("Although California has a legitimate interest in limiting ballot access to bona fide parties to avoid voter confusion and to protect the integrity of the electoral process, *those concerns are far more relevant to support §*

5100's numerosity requirement than the timing requirement.") (emphasis added); *see also Jones*, 921 F. Supp. 2d at 899 ("However reasonable the 5% threshold under normal circumstances, when the state substantially reduces the time for compliance with signature-gathering requirements, it cannot just rest on the prior judicial approval of its arbitrary percentage."). And even if cost was a legitimate reason to suppress third parties' access to the ballot—which it is not[27]—Deputy Secretary of State David Scanlan testified at deposition that, during the 2012 election, the inclusion of the Libertarian Party on the ballot did not cost money because the "Other" column had space to fit third-party candidates. *See* Scanlan Depo. 56:11-21 (*Ex. B* to Biss. Aff., ¶ 3).

Second, the Attorney General's Office has also hinted that the State has a governmental interest in ensuring that support for a third party—in this case, in the form of verified nomination papers—is not "stale." However, it is arbitrary for the State to declare that signatures are not likely to be stale if collected on January 2 (about 10 months before Election Day) but much more likely to be stale if collected the previous year (perhaps no more than 11 months before Election Day). As it is now, the State accepts "stale" indications of support when it provides "party" recognition to an established party whose nominee polls at least 4% of the vote for U.S. Senate or Governor in an election held *24 months previously*. *See* RSA 652:11; *see also Showtime Entm't, LLC v. Mendon*, 769 F.3d 61, 73 (1st Cir. 2014) (underinclusivity "reveals significant doubts that the government indeed has a substantial interest that is furthered by its proffered purpose").

Finally, the Secretary of State opined in Interrogatory responses that HB 1542 was also necessary because "[a] voter who is only permitted to sign one nomination for a political organization is also more likely to remember signing a nomination petition for an organization in

[27] *See Tashjian v. Republican Party*, 479 U.S. 208, 218 (1986) ("Even assuming the factual accuracy of these contentions … the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights …. While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.").

the year of the election if another organization also asks the voter to sign." *See* Sec. of State Int. Resp. No. 8, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4). The State has proffered absolutely no evidence to suggest that someone who signs a nomination paper on January 2, 2016 is more likely to subsequently remember than a voter who signed a nomination paper on December 31, 2015 that he cannot sign future nomination papers. This rationale is even more nonsensical because it is the obligation of the Supervisors of the Checklist, *not the individual voter*, to cross check whether a signatory has signed more than one nomination paper as part of the verification process. The signatory's memory is irrelevant. The nomination paper itself does not even inform signatories that they are ineligible to sign more than one nomination paper. *See* Nomination Paper (*Ex. AA* to Biss. Aff., ¶ 28). In fact, Mr. Tomasso testified that Supervisors of the Checklist routinely eliminate nomination papers where the signatory previously signed a nomination paper seeking ballot access for others. Tomasso Depo. 30:23-31:22 (*Ex. F* to Biss. Aff., ¶ 7).[28]

II. Plaintiff Has Been And Will Be Irreparably Harmed By The Law.

Plaintiff, its members, and members of the public will be irreparably harmed in the absence of a permanent injunction. Any loss of constitutional rights is presumed to be an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 21 (1st Cir. 2007) (applying *Elrod* to permanent injunction analysis); *Sindicato*, 699 F.3d at 15. If the State is permitted to continue enforcing HB 1542, Plaintiff and other "minor" parties will effectively be barred from collecting nomination papers prior to the general election year—which will impose a severe burden on their ability to obtain ballot access. Thus, Plaintiff and members of the public will be irreparably harmed by the

[28] It should also be noted that RSA 655:40-a's mandate that "[n]o voter shall sign more than one nomination paper which allows a political organization access to the state general election ballot" is also irrational, imposes significant burdens on the Libertarian Party, and likely is unconstitutional. *See Fontes v. City of Cent. Falls*, 660 F. Supp. 2d 244, 250-53 (D.R.I. 2009) (permanently enjoining Rhode Island law that invalidates second-filed signatures; calling the law "absurd" and without any legitimate interest, and noting that there was no "evidence demonstrating how the first to file rule eliminates chaos and clutter in elections").

loss of their First and Fourteenth Amendment rights if a permanent injunction is not granted.

III. The Balance Of Equities Favors Plaintiff.

Plaintiff's hardships if the injunction is not granted outweigh the State's interests if the injunction is granted. As explained above, HB 1542's continued enforcement will irreparably harm the Libertarian Party's constitutional rights. In contrast, the State will not suffer any hardship if the injunction is granted, especially where it has presented no evidence that HB 1542 is remotely necessary to further any legitimate, significant, or compelling governmental interest. Thus, the balance of hardships weighs in favor of Plaintiff.

IV. The Public Interest Is Served By The Granting Of A Permanent Injunction.

The granting of a permanent injunction will benefit the public interest. It is in the public's interest to protect constitutional rights, including First Amendment associational rights. *See Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988).

CONCLUSION

The January 1 deadline in HB 1542 is arbitrary. There is no evidence that signatures collected on July 1, 2015 would tend to be any less valid than signatures collected on or after January 1, 2016. As the *Block* Court pointed out, any risk of invalid signatures impacts the Party, not the State. These arguments failed in *Block*, and they should meet the same fate here. Plaintiff respectfully requests that the Court grant its motion.

Respectfully submitted,

LIBERTARIAN PARTY OF NEW HAMPSHIRE,

By and through their attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation,

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Dated: May 6, 2015

CERTIFICATE OF SERVICE

I, Gilles Bissonnette, hereby certify that a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). On the date of this filing, a copy of this document has also been sent by email to the following:

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