No. 15-2068

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LIBERTARIAN PARTY OF NEW HAMPSHIRE
Plaintiff-Appellant,

v.

WILLIAM M. GARDNER, NH Secretary of State, in his official capacity,
Defendant-Appellee

On Appeal from the United States District Court
For the District of New Hampshire

BRIEF OF APPELLANT, LIBERTARIAN PARTY OF NEW HAMPSHIRE

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CORPORATE DISCLOSURE STATEMENT

Libertarian Party of New Hampshire has no parent corporation nor is there any publicly held corporation that owns 10% or more of its stock.

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Pursuant to Local Rule 34, Libertarian Party of New Hampshire submits that oral argument would assist the Court in its deliberations and disposition of this matter, and, therefore, requests oral argument.

I. JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon 28 U.S.C. § 1331 because the action arose under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. On August 27, 2015, the district court entered judgment in favor of the Defendant in accordance with the Memorandum and Order on Motion for Summary Judgment. JA 1. On September 14, 2015, the Libertarian Party of New Hampshire filed a timely Notice of Appeal. JA 2-4. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from a final order of the district court.

II. STATEMENT OF THE ISSUE

Did the district court commit error in ruling that a newly-enacted New Hampshire law requiring nomination papers to be signed during the same year as the general election was not an impermissible ballot access restriction in violation of the First and Fourteenth Amendments to the United States Constitution?

III. STATEMENT OF THE CASE

A. Statement of the Facts

1. The Third Party Recognition Process In New Hampshire

In New Hampshire, a political organization can obtain access to the ballot, and thus field a slate of candidates, "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."[1] In other words, in order to run a slate of candidates on the general election ballot, a third party must submit nomination papers signed by registered voters equaling three percent of the total votes cast in the prior general election.[2]

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[1] 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. RSA 652:11.

[2] A political organization may attain party status for future elections via a more circumspect route not applicable to this litigation. 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. If that candidate obtains at least 4 percent of the vote in the general election, the party of the independent candidate will be formally recognized during the next general election and be able to nominate a slate of candidates via the primary process. RSA 652:11. No third party in New Hampshire has become a recognized "party" by vote under RSA 652:11 since the law was modified in 1997 by raising threshold from 3 percent to 4 percent.

Add. 64. A registered voter may sign only one valid nomination paper during each election cycle. RSA 655:40-a. Only the Libertarian Party of New Hampshire ("LPNH") has successfully completed the party petitioning process under RSA 655:40-a, which occurred during the 2000 and 2012 general election cycles. Efforts by other political organizations to complete this process have failed. JA 6-11 (LPNH Int. Resp.).

Nomination papers must be submitted for certification to the Supervisors of the Checklist in each town or city[3] where each signatory is registered to vote no later than the Wednesday five weeks before the primary. RSA 655:41, I. These officials must certify the validity of the nomination papers no later than two weeks before the primary. Id. Political organizations then pick up the certified nomination papers from the cities and towns and file the papers with the Secretary of State by the Wednesday before the primary. RSA 655:43. Because the New Hampshire primary takes place on the second Tuesday in September, the statutory scheme establishes an early August deadline for submission of nomination papers to the cities and towns. RSA 653:8; 655:41, I; Add. 64.

Traditionally, the time frame for a political organization to collect signatures to satisfy the three percent threshold ran for a period of 21 months--from the date of the prior general election to early August of the year of the

[3] There are 221 towns and 13 cities in New Hampshire.

general election for which the organization sought party status. JA 7 (Scanlan Tr. 7:7-21).

However, in 2014, the New Hampshire Legislature passed HB 1542 which added to RSA 655:40-a the following language: "Nomination papers shall be signed and dated **in the year of the election**." (emphasis added). Because nomination papers must be filed by early August, HB 1542 requires third parties to collect the required number of nomination papers within a window of seven months from January 1 until early August of the election year. RSA 653:8, 655:40-a; Add. 65.

At the request of the New Hampshire Secretary of State's Office, the legislature passed HB 1542 as a "housekeeping" bill with little discussion by voice vote and without any evidence presented as to why limiting the petitioning process to seven months was necessary. The one and only justification for the law in the legislative record is to cull out "stale" nomination papers that the Secretary of State's Office, at the time, claimed were more difficult to verify due to death or relocation of the voter. JA 44-66. When the House Election Law Committee referred the bill to the full House, the Committee explained:

> This 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**.

Add. 65 (emphasis added).

> Representative Melanie Levesque, one of the bill's sponsors, stated:
>
> > When a third party attempts to collect nominating papers, they normally would start right after the general election. This could lead to signatures that could be two years old, and very difficult to verify. Collecting these papers in the same year of the election **facilitates verification**, although limiting the time in which to collect signatures.

Id. (emphasis added). Before the House Election Law Committee, Deputy Secretary of State David Scanlan added that the law would "make[] the process more defined." JA 45.

After this litigation began the New Hampshire Attorney General's Office presented a new post hoc justification for the law in its Motion to Dismiss that was not considered by the legislature—namely, that the bill was required in relation to a purge of the voter registration list that take place very ten years pursuant to RSA 654:39. Doc. 9-1 at 9-10. When answering interrogatories requesting a description of all state interests the State claims HB 1542 advances, the Secretary of State's office ignored this "purge" rationale, instead proffering new additional rationales for the law that similarly were never considered by the legislature:

> In order to obtain ballot access a political organization should be able to 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 [sic]

> ability to read and understand the ballot. The 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 signatory has either passed away, moved, or has otherwise been disqualified.

Add. 66 (emphasis added).

At deposition, the State's witness, Deputy Scanlan disavowed each of these justifications for the law. Deputy Scanlan testified that: 1) the January 1 start date was arbitrary; 2) there was no evidence that signatures obtained in the year prior to the election were more difficult to verify than signatures obtained during the year of the election; 3) HB 1542 had no relation to the voter registration purge; and 4) there were no additional costs to the State when LPNH obtained ballot access in 2012. JA 23-24, 28, 33, 34-35 (Tr. 15:7 to 17:17; 60:12 to 62:10; 33:16-19; 56:11-21).

2. LPNH

The Libertarian Party is a prominent third party in the United States. Add. 66. LPNH 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. LPNH 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). JA 15-16.

3. The 2012 Petition Process

As stated above, LPNH qualified for ballot access under the party-petitioning process in 2000 and 2012.[4] Add. 67. Based on voter turnout in the 2010 general election, qualifying for ballot access in 2012 by nomination papers required third parties to collect 13,843 valid signatures. Id. However, when collecting signatures for an election, LPNH generally assumes a validation rate of 75% because some signers prove to be ineligible or are otherwise rejected due to alleged irregularities or technical errors. Accordingly, LPNH, like any other organization, must collect a larger number of unverified or "raw" signatures. In 2012, it sought to collect approximately 19,000 total signatures in order to reach the 13,843 threshold. JA 9; Add. 68.

LPNH 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. JA 88, 89, 115 (Tomasso Tr. 33:5-17, 37:2-18, 142:19-143:9) (LPNH 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." In July 2011, the Libertarian National Committee ("LNC") voted five to two to

[4] LPNH held "party" status during the general elections of 1992, 1994, and 1996. The Libertarian Party is the only third party to have obtained "party" status under RSA 652:11 since 1979. JA 73.

allocate $28,000 to LPNH to support the petitioning process. Add. 68. LPNH was required by the LNC to demonstrate that it had sufficient local resources to justify the investment in a state with only four electoral votes. Trial Tr. 35-37. LPNH invested these funds in paid petitioners who are necessary "in conducting a successful petition drive of this magnitude" and charge from approximately $1 to $2 per signature in an off election year.[5] Add. 68. LPNH obtained 13,787 raw signatures between August 1 and September 23, 2011. Add. 69.

By September 23, 2011, the $28,000 allocated from the LNC was exhausted. LPNH changed gears and focused on obtaining the remaining signatures by relying on local volunteers and some petitioners paid from LPNH funds. Between roughly late September 2011 and July 2012, LPNH collected approximately 5,000 raw nomination papers. Add. 70. At that time, LNC allocated an additional $4,000 for paid petitioners that resulted in obtaining sufficient signatures to satisfy the 19,000 "raw" threshold by the August 2012 deadline. JA 10; Add. 70.

Not including certain out of pocket expenses, LPNH spent approximately $40,000 on the 2012 petition drive. Add.70.

The process of collecting signatures is not a function of pure mathematics. In 2000 and 2012, the signature-collection process required substantial financial

[5] During an election year, the costs of paid petitioners increase due to the competition for their services. JA 110 (Tomasso Tr. 122:12 to 123:12).

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 indoors, thus necessitating the need for outside petitioning. JA 9.[6]

During this process, LPNH continuously monitored the verification rate 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. For instance, during the 2012 cycle, LPNH kept a running spreadsheet of signatures obtained by municipality and submitted nomination papers as early as November/December 2011 in order to test the verification rate. JA 193-220 (Spreadsheets); JA 90 (Tomasso Tr. 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

[6] 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. JA 12.

planned."); see also JA 157, 164-165 (Babiarz Tr. 88:2-88:23, 116:16-117:4).

Until LPNH finished collecting enough nomination papers, the Party did not engage in substantive campaigning and electioneering, and any funds raised went only to petitioning. This was for an obvious reason: campaigning and electioneering would have been irrelevant if the Party did not obtain enough petitions to secure ballot access. JA 12-14.

This is, of course, not to say that, while the Party invested all its resources in petitioning, some of the Party's individual candidates did not 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. 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 individual 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 of affiliating with LPNH. 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. JA 12-14.[7]

Based on voter turnout in the 2014 elections, LPNH would need to submit approximately 14,800 valid nomination papers to qualify for the 2016 general election ballot. Factoring a 75% validation rate, approximately 20,000 raw signatures would be needed to satisfy this requirement. LPNH estimates that funding a paid petition drive would cost approximately $50,000 due to increase costs associated with hiring paid petitioners during an election year. Add. 71.

B. Relevant Procedural History

HB 1542 became effective on July 22, 2014. The same day, LPNH filed a civil action in the Federal District Court for the District of New Hampshire seeking 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 HB

[7] During the 2000 general election cycle, approximately 9,800 verified nomination papers were required for LPNH 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. JA 6-11. The petitioning process in 2000 was similar to the process in 2012. The Party began collecting nomination papers in approximately April 1999. See May 1999 Ballot Access News Newsletter (Doc. 37-5); LPNH Oct. 1999 Newsletter and Convention Materials (Doc. 37-16). 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." JA 159-160, 162 (Babiarz Tr. 96:18-97:2, 106:2). As in 2012, LPNH was able to complete the petitioning drive a week or two before the August 9, 2000 deadline. JA 6, 9-10.

1542—violates the First and Fourteenth Amendments and a permanent injunction enjoining its enforcement.

On September 22, 2014, the State moved to dismiss the complaint for failure to state a claim. LPNH objected, and the district court denied the motion on December 30, 2014.

The parties engaged in expedited discovery and filed cross motions for summary judgment. On June 18, 2015, the court held a hearing on the motions, and on July 13, 2015, the court conducted an evidentiary hearing regarding LPNH's allegations that the petitioning process was burdensome before HB 1542's adoption. The Republican National Committee ("RNC") also filed a Motion to Intervene that was denied; however, the RNC was permitted to file an amicus brief in support of HB 1542's constitutionality and participate at oral argument on the motions for summary judgment.

On August 27, 2015, the district court issued a Memorandum and Order finding that HB 1542 did not violate the First and Fourteenth Amendments. Accordingly, the court denied LPNH's motion for summary judgment and granted the State's cross motion for summary judgment. This Order is presented for review.

IV. SUMMARY OF THE ARGUMENT

HB1542, which requires nomination papers to signed during the same year as the general election, is an impermissible ballot access restriction that must be enjoined because it violates of the First and Fourteenth Amendments to the United States Constitution.

Ballot access restrictions are reviewed under a "flexible sliding scale" adopted by the United States Supreme Court in Anderson v. Celebrezze, 460 U.S. 780 (1983). Barr v. Galvin, 626 F.3d 99, 109 (1st Cir. 2010). Under the Anderson test:

> [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. In 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 must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.

460 U.S. at 789.

HB 1542 added language to RSA 655:40-a prohibiting LPNH or any third party from collecting 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. The law imposes a severe burden on the rights of third parties because the newly enacted January 1 start date: 1) impermissibly shortens the time frame to collect and submit nomination papers; 2) burdens

LPNH's ability to meaningfully campaign and electioneer during the general election year; and 3) forces LPNH to "sit on the sidelines" during the odd year before the general election. In the alternative, at the very least, the law imposes a greater burden than determined by the district court, thereby requiring heightened scrutiny along the Anderson sliding scale. Indeed, when considering the exact same Rhode Island law, the district court observed the January 1 start date was at the least on the "severe side." Block v. Mills, 618 F. Supp. 2d, 142, 151 n.11 (D.R.I. 2009).

The State of New Hampshire failed to present a "precise interest" of sufficient legitimacy and strength to justify the law in light of the burdens imposed and the stated necessity to burden LPNH's right to ballot access. The actual justifications for the law considered by the legislature and proffered by the State during discovery were either abandoned or not considered as sufficiently weighty by the district court. In the end, the district court credited a post hoc justification, current public support, without any evidentiary support that the justification advances the stated interest.

Although the district court correctly stated the Anderson test, it erred when applying it by both understating the burden imposed by HB 1542 and overstating the State's interest in the law. Accordingly, the judgment of the district court must be reversed, and judgment should be granted in favor of LPNH.

V. THE ARGUMENT

A. Standard of Review

The Court of Appeals reviews a summary judgment order de novo, applying the same criteria as the district court. Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89 (1st Cir. 2013); Vineberg v. Bissonnette, 548 F.3d 50, 55 (1st Cir. 2008). On an appeal from cross-motions for summary judgment, the standard does not change. Roman Catholic Bishop, 724 F.3d at 89.

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). If the moving party satisfies this burden, the nonmoving party must then "produce evidence on which a reasonable finder of fact . . . could base a verdict for it; if that party cannot produce such evidence, the motion must not be granted." Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 94 (1st Cir. 1990).

On cross motions for summary judgment, the standard is applied to each motion separately. See Am. Home Assurance Co. v. AGM Marine Contractors, Inc., 467 F.3d 810, 812 (1st Cir. 2006).

B. The *Anderson* Test

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. Because "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. Therefore, "[n]ew parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties we have had in the past." Williams v. Rhodes, 393 U.S. 23, 33 (1968). As the United States 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 District 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.

Against this background, the Supreme Court has recognized ballot access restrictions implicate two overlapping constitutional rights steeped in the First and Fourteenth Amendments: "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams, 393 U.S. at 30. "Both of these rights … rank among our most precious freedoms." Id. Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Id.

These rights implicate the formation of political organizations and parties because "voters can assert their preferences only through candidates or parties or both." Anderson, 460 U.S. at 787. "The right to vote is heavily burdened if that vote may be cast only for major-party candidates at a time when other parties or candidates as clamoring for a place on the ballot." Id. (internal quotations omitted).

Although voting rights are fundamental, not all ballot restrictions "impose constitutionally-suspect burdens." Id. at 788. "[A]s a practical matter, there must

be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Id. (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)). State schemes regulating the mechanics of the electoral process including the selection or eligibility of candidates "inevitably affects—at least to some degree" the right to vote and associate. Id.

No "litmus-paper test" can resolve these countervailing forces. Id. at 789. Rather, when balancing these "competing interests … the Supreme Court has developed a flexible sliding scale approach for assessing the constitutionality of such restrictions." Barr v. Galvin, 626 F.3d 99, 109 (1st Cir. 2010) (internal quotation omitted). In Anderson v. Celebrezze, the Supreme Court 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. In 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 must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.

460 U.S. at 789. Under this flexible standard, "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." Burdick

v. Takushi, 504 U.S. 428, 434 (1992). At one end of that sliding scale, where such rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." Id. (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)); Barr, 626 F.3d at 109. In short, strict scrutiny applies. At the far other end that scale, if the law imposes only "reasonable, nondiscriminatory restrictions … the State's important regulatory interests are generally sufficient to justify the restrictions." Burdick, 504 U.S. at 434 (internal quotations omitted). And courts should pay special attention to restrictive ballot access laws that impact the presidential election. See Anderson, 460 U.S. at 794-95 ("Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest.").

As correctly found by the district court, Anderson balancing is not an "either/or" proposition where the burdens imposed by the regulation are either "severe" (triggering strict scrutiny) or "reasonable and nondiscriminatory" (triggering more deferential review). Add. 91-94. And the district court was correct that, to date, the Supreme Court has not "designated any specific lesser level of scrutiny" to apply when a ballot access restriction imposes a burden within the continuum between the two extremes. Add. 92. However, it is clear that, consistent with Anderson's "sliding scale approach," the scrutiny applied to a ballot access restriction intensifies as the burdens imposed by the restriction

increase. Indeed, Anderson itself instructs the State must identify a "precise interest" justifying the burden that must be scrubbed to test its "legitimacy" and "strength," as well the "necessity" to burden a fundamental constitutional right. 460 U.S. at 789. "Put differently, the state must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth." Ohio State Conference of N.A.A.C.P. v. Husted, 768 F.3d 524, 545 (6th Cir.), stay granted, -- U.S. --, 135 S.Ct. 42 (2014).

The challenged law must be assessed within the factual context of the particular State's election scheme. Burdick, 504 U.S. at 441-442; Husted, 768 F.3d at 546 ("The test directs courts to weigh the burdens imposed on voters in a particular state …"). The "past history" of a third party's ability to gain access under the challenged scheme is relevant, although not necessarily dispositive. See Storer v. Brown, 415 U.S. 724, 742 (1974); Stone v. Board of Election Com'rs for City of Chicago, 750 F.3d 678, 682-83 (7th Cir. 2014). And even if compliance with a ballot access restriction is "possible," this does not detract from the court's focus in determining whether the burdens of compliance are undue and properly justified relative to the governmental interests asserted. See Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 592 (6th Cir. 2006) ("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 v. McGuffage, 921 F. Supp. 2d 888, 897, 900 (N.D. Ill. 2013) ("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."); see also 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.").

As with other areas of heightened scrutiny, the Court may only consider particular interests put forward by the State and may not invoke its own justifications for the law.[8] Cool Moose Party v. Rhode Island, 183 F.3d 80, 88

[8] The district court noted that in Crawford v. Marion County Election Board, 533 U.S. 181 (2008), a "majority of the Court's members appeared to disavow the application of specific and discrete levels of scrutiny to non-severe restrictions."

(1st Cir. 1999). "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" Anderson, 460 at. 789-790 (quoting Storer, 415 U.S. at 730)).

C. HB 1542 Imposes a Severe Burden or, at the Very Least, a Burden on the "Severe Side"

The seven-month period to collect and present signatures to local Supervisors of the Checklist equaling three percent of the votes cast in the prior general election imposed by HB 1542 places severe burdens on LPNH's ability to gain ballot access under RSA 655:40-a. Thus, strict scrutiny applies, and the law must be declared unconstitutional because HB 1542 is not "narrowly drawn to advance a state interest of compelling importance." Burdick, 504 U.S. at 434; see also Timmons v. Twin Cities Area New Party, 520 U.S 351, 358 (1997). Indeed, the only justification for HB 1542 contained in its legislative history—culling stale signatures from the voter list—was abandoned below by the State (i) based upon the absence of any evidence supporting the justification and (ii) after it learned the same justification was proffered in support of an identical Rhode Island ballot access law and was rejected "under any level scrutiny" in Block, 618

Add. 92-93 (citing Justice Stevens' plurality opinion joined by Chief Justice Roberts and Justice Kennedy and Justice Souter's dissenting opinion joined by Justice Ginsberg). However, the five justices joining these opinions accepted a flexible balancing test "comparable to intermediate scrutiny" in contrast to the "two-track approach" referenced by Justices Scalia, Thomas and Alito. Guare v. State, 167 N.H. 658, 667 (2015) (applying intermediate scrutiny to an unreasonable, but not severe, voting law).

F. Supp. 2d at 151. Moreover, as the Block Court correctly concluded, this type of restrictive law imposing a January 1 start date for collection is an "aberration compared to most other states" given the unique burdens it imposes. Id.[9]

In the alternative, even if the Court of Appeals agrees with the district court that HB 1542 does not impose a severe burden, when applying the Anderson balancing test, it should find the burden is more substantial than acknowledged by the district court. Add. 91 ("I conclude that HB 1542 imposes only a reasonable and nondiscriminatory, and not a severe, burden on ballot access"). On this point, Block is instructive.[10]

Indeed, the Rhode Island law was the same as the New Hampshire law on review in this matter. In Block, the Moderate Party challenged, inter alia, a January 1 start date for collecting signatures to qualify for the ballot.[11] 618 F.

[9] JA 189-192 (50-State Survey). 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.

[10] In the matter below, the district court read Block far too narrowly by focusing only on the proffered justification for the law and claiming the decision "does not bear on this case, since Rhode Island sought to justify the challenged restriction there solely on the basis of the state's claimed 'false positive' interest." Add. 94-95 n. 12. As discussed in the main text, the district court ignored that Block was also highly critical of the burdens imposed by the Rhode Island law.

[11] The Moderate Party also challenged a 5% signature threshold which the district court determined was constitutional. Block, 618 F. Supp. 2d at 149-150. LPNH does not challenge the 3% threshold required under New Hampshire law.

Supp. 2d at 144. Similar to New Hampshire, the Rhode Island scheme limited the time frame from January 1 to August 1 to collect signatures and submit them to local officials for verification. Id. at 151. During the litigation, Rhode Island conceded the statute was "very stringent" and the "January 1 start date and resulting limited time window is an aberration compared to most other states." Id. at 149, 150. Because the proffered justification for the law was not supported "under any level of scrutiny" the court did not formally decide whether the law was a "severe" burden. Id. Nevertheless, the court observed the "Rhode Island scheme is probably the most onerous in the nation, so at least a strong argument can be made that the restriction is on the severe side" id. at 151 n. 11, and found the law to be an "enormous speedbump on the path to party recognition." Id. at 151. Because the Rhode Island law is identical to HB 1542, the same should hold true here.

The same burdens existing in Block are present in this matter. The newly enacted January 1 start date: 1) impermissibly and arbitrarily shortens the time frame to collect and submit nomination papers; 2) burdens LPNH's ability to meaningfully campaign and electioneer during the general election year; and 3) forces LPNH to "sit on the sidelines" during the odd years before the general election. Id. at 151-154; Add. 77. Additionally, in contrast to Block, where the Moderate Party had no prior experience attempting to gain access to the ballot,

LPNH submitted an extensive record based upon the 2000 and 2012 petition drives of the burden existing under RSA 655:4-a prior to the imposition of the January 1 start date and the resulting additional burden imposed by HB 1542.

1. The Start Date

HB 1542's January 1 start date severely burdens LPNH by compressing the time period from 21 months to approximately seven months for the Party to collect the 3% threshold of verified nomination papers. By law, nomination papers must be submitted for certification to the Supervisors of the Checklist in every town or city where each signatory is registered for review by early August—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. JA 6-11; JA 86-87 (Tomasso Tr. 28:13-29:19).

But, in reality, this compressed time period is much shorter than seven months under HB 1542. For example, given New Hampshire's harsh winter months, petitioning cannot begin in earnest until mid-March because the more efficient places for successful, high-volume petitioning are outside. As LPNH Party Chair 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.

JA 105 (Tomasso Tr. 104:1-10); JA 162-163 (Babiarz Tr. 107:14-109:6).[12] 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. JA 8-9; see also Jones, 921 F. Supp. 2d at 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

[12] Mr. Tomasso further explained that, if the weather in a future petition drive is anything approximating the weather in January and February 2015, collecting signatures, even by paid professionals, will be "prohibitive." JA 106 (Tomasso Tr. 106:2-13).

"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 1) manually organizing and sorting, by municipality, the thousands of "raw" nomination papers received and 2) 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. The work this process entails on the eve of the early August deadline is enormous, presents logistical challenges, and can take hundreds of 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 five months—from mid-March to late July. JA 8-9.

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. JA 141-142 (Babiarz Tr. 24:16-22, 25:5-14). Old home day parades typically take place in mid to late August while county fairs take place in September and October. Elections in New Hampshire's

13 cites take place in November. A significant number of campaign events occur outdoors and draw crowds during the New Hampshire Presidential primary season—the bulk of which occurs during the year before the general election. JA 114 (Tomasso Tr. 137:15-138:5); JA 163-164 (Babiarz Depo. 110:16-113:6). All of these events become nullities under HB 1542.

Given this compressed time frame, LPNH 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. JA 10-11.

This burden is borne out by the 2012 (and 2010) petition process detailed, supra, in section III.A.3, where LPNH started the petition process in July 2011 after a significant infusion of funds from LNC, hired necessary paid petitioners, periodically checked verification rates and spent countless hours of volunteer time to cross the finish line in August 2012.

The district court responded to this hefty record of burden largely with mathematics, and while minimizing the unique burdens imposed by a January 1 start date for collection nomination papers:

> Both the Supreme Court and the First Circuit … have repeatedly upheld petition requirements comparable to HB 1542 in both the number of

> petitions required and the length of time allowed to collect them. These precedents effectively foreclose any argument that the petitioning window provided by HB 1542 is too short on its face.

Add. 78. Respectfully, the district court is wrong in both its approach to weighing burden and in its conclusions. The cases cited in the Order, many of which pre-date Anderson and its sliding scale approach, are distinguishable based on differing election schemes in each state, the factors considered in those cases that were not applied below, and the particularized record of burden in this matter.

In Jenness v. Fortson, 403 U.S. 431, 442 (1971), the Supreme Court upheld a Georgia law requiring candidates to collect petitions from five percent of eligible voters. However, this holding was specifically premised on "the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." Id. at 442. In contrast, a New Hampshire voter may only sign one petition per election cycle thereby limiting the pool of potential signers in a year when more than one party seeks ballot access. RSA 655:40-a. Additionally, while the Georgia law had a 180-day window to collect signatures, the law did not impose an arbitrary start date on the collection process as does HB 1524. Finally, and perhaps most significantly, the specific challenge in Jenness was the 5% signature requirement and **not** (i) the 180-day window to collect those signatures and (ii) the burdens imposed where this window was located in the general election calendar. Jenness,

403 U.S. at 434, 438 ("Secondly, they say that when Georgia requires a nonparty candidate to secure the signatures of 5% of the voters before printing his name on the ballot … it violated the Fourteenth Amendment"). Accordingly, there was no record of the burdens imposed by the 180-day time frame and its placement in the general election calendar, as well as no specific finding that the 180–day window was constitutional. Id. at 438-442; compare Block 618 F. Supp. 2d at 149-156 (upholding 5% threshold but striking down January 1 start date).

In American Party of Texas v. White, 415 U.S. 767, 783, 786 (1974)—which also pre-dates Anderson—the Supreme Court upheld a Texas ballot qualification law requiring support by voters numbering at least 1% of the total vote for governor in the prior general election. The Texas law contained various requirements, including a petitioning process that was challenged by the plaintiffs. Id. at 779-780. However, the Texas scheme was also substantially dissimilar to the New Hampshire law. In Texas, there was a two-step process to satisfy the 1% requirement. Id. at 776-778. First, a third party was required to hold precinct nominating conventions and prepare a list of all participants for submission to the Secretary of State. Id. at 778. If the party satisfied the 1% threshold via convention participation, it obtained ballot access. Id. If the party did not satisfy this threshold, it then had 55 days to circulate supplemental petitions to obtain additional signatures. Id. The sum total of voters who attended the convention

and who signed petitions was counted to satisfy the 1% requirement. Id. Important to the analysis was evidence in the record that third parties including two plaintiffs qualified for the ballot under the challenged scheme in the 1972 election. Id. at 783-84. Based upon this record, the law was upheld.

The district court also cited language from Storer v. Brown, 415 U.S. 724, 740 (1974), another pre-Anderson case—"[**s]tanding alone**, gathering 325,000 signatures in 24 days would not appear to be an impossible burden"—while also acknowledging the case was remanded for additional findings. Add. 78-79 (emphasis added). The phrase "standing alone" is key because the Supreme Court looked far beyond a pure mathematical approach observing law was a "substantial burden" and that the unresolved record suggested the law could be "too great a burden" for independent candidates. Storer, 415 U.S. at 740. When identifying factors for the district court to consider on remand, it included the question of whether a "reasonably diligent independent candidate" could be expected to satisfy the statutory requirement. Id. at 742. When considering this "inevitable question for judgment … [p]ast experience will be a helpful, if not always an unerring guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." Id.

In Barr v. Galvin, 626 F.3d 99 (1st Cir. 2010), the issue before the First Circuit was 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 to obtain ballot access but was not the party's nominee. Although Massachusetts law contains a deadline when petitions must be submitted, there is no artificially imposed start date and no 60-day period to collect signatures under Massachusetts law. Accordingly, the issue of burden and the governmental justification in the signature-collection process was not even before the First Circuit in Barr.

Finally, the district court's reliance on Stone v. Board of Election Com'rs for City of Chicago, 750 F.3d 768 (7th Cir. 2014) is also misplaced, especially where it does not address the burdens imposed by an arbitrary start date. Add. 79. In Stone, the plaintiffs challenged a requirement to gather 12,500 signatures within 90 days to place a candidate's name on the ballot for mayor of Chicago and other offices. 750 F. 3d at 679-680. Applying the Anderson test, the Seventh Circuit upheld the law.[13] Id. at 684-685. When weighing burden the Court noted: "[B]allot access history is an important factor in determining whether restrictions impermissibly burden the freedom of political association." Id. at 682.

[13] Stone does contain language "Ninety days does not strike us as an excessively short time to collect 12,500 signatures …. We previously saw no problem with a ninety-day window to collect 25,000 signatures." Add. 79 (quoting Stone, 750 F.3d at 684). However, the language omitted by the ellipses—"particularly when this schedule applies equally to every candidate"—is significant. Unlike the Chicago law, HB 1542 does not apply to every candidate or party.

Considering that "since 2005, a good number of candidates have been able to satisfy Chicago's ballot requirements" and that nine candidates, including one of the plaintiffs, satisfied the requirement for the 2011 election, the Court found law was not burdensome. Id. at 682-683, 684-685.

Inconsistently describing these cases as "not dispositive" and "binding precedent," the district court overly relied on perceived numerical "benchmarks" to determine the time frame allowed by HB 1542 was "objectively reasonable." Add. 79, 81. Not only are the cases distinguishable for the reasons discussed above, important themes emerge from these cases not considered by the district court. American Party of Texas, Storer, and Stone to varying degrees all considered ballot access history within particular states when weighing the burden of the law at issue, concluding, in part, that the laws were not overly burdensome because third parties (including actual plaintiffs) routinely satisfied the challenged requirements. The district court ignored the monumental evidence of the burden to comply with RSA 655:40-a in 2000 and 2012 before HB 1542 was enacted and that **no** other third party has ever successfully obtained ballot access in New Hampshire using the petition process.

And imposing further burdens on the party-petitioning process is particularly significant because the party-petitioning process at issue here has evolved to be the only meaningful way for third parties to gain ballot access since

1997.[14] In Block, the Rhode Island Secretary of State's Office itself conceded the identical Rhode Island scheme was an "aberration" that Judge Smith concluded was on "severe side." Block, 618 F. Supp. 2d at 151 n.11. Indeed, Jenness, American Party of Texas, and Storer were each cited by Rode Island in Block, yet Judge Smith rejected both their applicability and the notion that the constitutionality of a January 1 start can be reduced to a "math problem." 618 F. Supp. 2d at 148-154.

Additionally, every case involved a state with large population centers dwarfing the largest cities and towns in a rural state like New Hampshire.[15] Far more voters can be canvassed in a single hour at South Station or along the Embarcadero than in a single say day in Concord, New Hampshire. The record below is stoked with evidence of the burden of collecting signatures in a rural state without large population centers. None of the cases (or the district court for that matter) discusses the administrative burden imposed by disbursing the signed petitions to 221 towns and 13 cities as a prerequisite to ballot access under the restrictive New Hampshire scheme.

Additionally, the district court's dismissal of characteristics unique to New Hampshire is not persuasive and, in fact, is belied by the record. New

[14] No third party has been able to obtain ballot access through the individual-candidate process since 1997. See supra note 2.

[15] Jenness: Atlanta; American Party of Texas: Dallas, Houston, San Antonio; Storer: San Francisco, Los Angeles; Barr: Boston; Stone: Chicago.

Hampshire's winter conditions make petitioning in January, February and March particularly difficult. JA 8-9. The district court was "unpersuaded by this argument" largely because LPNH obtained over 1,000 signatures in December 2011 (while collecting few signatures in January and February of 2012 due to the weather). Add. 80. Any New Englander knows a typical December is not as harsh as the winter months of January and February. And December 2011 was unseasonably mild with an average high temperature 6.3 degrees above normal and .59 inches of snow for the entire month. See http://www/usclimatedata.com/climite/concord/new-hampshire/united-states/usnh0045/201.

Similarly, the district court failed to acknowledge how the shortened schedule bars LPNH from canvassing voters for signatures at politically active events in the summer and fall of the odd year before the election—for example, fall fairs, outdoor primary events, and city elections. Add. 81-83. The statistics from the 2012 drive establish this is a particularly fertile time to collect signatures both because it is a politically active season and because the cost associated with paid petitioners is much lower in the odd year. JA 193-219. The point is not whether there is a "constitutional obligation to allow third parties to collect signatures are every public event that occurs in" New Hampshire. Add. 82. Rather, the point is that striking the ability to collect signatures during a period

when the state has major political events and during city elections where significant portions of the state's population lives imposes a burden that is severe or, in the alternative, is much higher along the flexible sliding scale than recognized by the district court. The court erred in simply viewing the January 1 start date as a math problem, without significant consideration of the unique burdens it imposes in New Hampshire.

2. The Burden of Limiting Campaigning During an Election Year

Further demonstrating that HB 1542 cannot simply be viewed as a math problem, its January 1 start date for collecting nomination papers creates the unique burden of putting LPNH at a distinct disadvantage compared to the two major parties in New Hampshire during the election year. The law effectively compels LPNH to complete the petitioning process from mid-March to late July, which are critical months prior to the election. HB 1542 prevents LPNH 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 and already have ballot access—are free to engage in campaign activities during the general election year. JA 7-8.

As recognized in Block, the January 1 start date "hampers the ability of a political organization to compete in a meaningful way in an election year leading up to the actual election date." 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 all the months during the entire election year, not just the final lead up to the 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 (emphasis added).

The district court concluded this burden "although not trivial, is not severe," add. 283, because: 1) political organizations qualifying for the ballot under HB 1542 still have all of September and October to campaign before the November election; 2) third-party organizations and candidates can campaign while petitioning; and 3) major-party candidates must go through the primary process to have their names placed on the ballot. Add. 83-87. The first two conclusions, which are interrelated, are not supported by the record, while the third conclusion impermissibly conflates the major-party primary process (where the major party already knows that it will be able to run an individual candidate on the November ballot regardless of which candidate wins the primary) with the petitioning process (which must be fulfilled in order for a third party to obtain ballot access and even run an individual candidate).

It is obvious that HB 1542 does not restrict a third party that qualifies for

ballot access to campaign in September and October in the lead up to the general election. Add. 83. Equally obvious is that the law restricts a third party's ability to campaign **prior** to September of the election year because HB 1542 forces third parties to expend resources on the signature collection process from January through July of the election year, rather than expending limited resources on campaigning, recruiting candidates, or preparing for the general election. A party cannot meaningfully complete these tasks it does not know if it will be on the ballot.

The district court discounted this burden, stating it "do[es] not accept LPNH's underlying premise that campaigning cannot begin until the petitioning requirement is fulfilled" and claiming that the record "suggests that petitioning, although perhaps not fully equivalent to campaigning, still offers third parties and their prospective candidates an opportunity to interact with the public and promote their views." Add. 84. In reaching this conclusion, the district court failed to understand the record as a whole and rather relied on selective snippets of testimony while at the same time failing to understand the import of LPNH's testimony in the context of the broader time frame for petitioning existing prior to HB 1542.

Principally, what the district court failed to consider is that "interacting" with a voter as part of 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 LPNH a chance to be on the ballot.

In recognition of this reality, the record demonstrates that LPNH actually **discourages** its volunteer petitioners from campaigning and 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 …. 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 . . . .
>
> … 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.

JA 103, 109-110 (Tomasso Tr: 95:1-96:6, 120:3-121:1). In short, by necessity, when one petitions, volume—not votes—is critical. JA 8.

Moreover, petitioning and campaigning cannot be viewed as analogous because, in today's political landscape, LPNH, like other minor political parties seeking ballot access or advocacy groups seeking to certify a ballot question, rely on outside professional petitioners to collect signatures. These individuals are not necessarily associated with LPNH and are focused on numbers, not policy. JA 110, 117 (Tomasso Tr. 122:16-123:12, 150:19-151:9). The record establishes that these paid petitioners, who have the most interaction with voters, are hired to obtain signatures, not to campaign.

LPNH does not campaign or engage in significant electioneering, campaigning, or candidate fundraising during the petitioning process for another simple reason: the 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 (Doc. 37-10); 2011-12 LPNH Meeting Minutes (Doc. 37-11); JA 86 (Tomasso Tr. 28:13-21). Thus, when LPNH 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. JA 8.

Given the vast differences between petitioning and campaigning, it is apparent that, as the Block Court correctly held, 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").

It may be true that in infrequent circumstances in 2000 and 2012 some Libertarian candidates used the petitioning process, in part, as voter outreach or early campaigning. Add. 84. However, in these election cycles, LPNH was able to start petitioning in the summer of the year before the election and monitor verification rates as the process unfolded. Trial Tr. 54-58. Given this wider window of opportunity, LPNH had the ability to assess how close it was to the 3% signature requirement so that candidates had some confidence that if they awaited the party petitioning process that their names would appear on the ballot. Id. at 55. In contrast, with the January 1 start date, there is a limited window to collect signatures, less time to submit papers to assess verification rates, and no real ability to assess whether the Party will successfully complete the process. Id. at 56-57. In this atmosphere, there is especially no time for campaigning because the prospect of obtaining ballot access is even more uncertain.

Finally, the district court concluded LPNH "overlooks the fact that the major parties must meet their own ballot-access requirement **during the election year** by holding primaries." Add. 85 (emphasis added). Respectfully, this is simply factually incorrect. The major parties obtain ballot access two years prior to the election year and do not expend **any** election year resources obtaining ballot access. RSA 652:11. Regardless of who wins the primary, the major party—unlike a third party going through the petitioning process—already has ballot access in the general election. Put another way, while major party **candidates** must navigate the primary process, this is not the same as a **third party** expending election year resources to obtain **party-wide** ballot access and run a slate of candidates. Even to the extent the processes are comparable—which they are not—major party candidates are still campaigning during the primary process, a benefit which carries over to the general election cycle if they win their primary election. See Storer, 415 U.S. at 735 ("The direct party primary … is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process …"). While this major party campaigning is occurring during the primary, LPNH is relegated to petitioning. Accordingly, the burden HB 1542 places on third parties is not coterminous with the challenges facing major party candidates competing in a primary, and the district court's comparison of the two disparate processes is not

supported in fact or law. See Anderson, 460 U.S. at 801 ("[s]ometimes the grossest discrimination can lie in treating things that are different as though they are exactly alike) (quoting Jenness, 403 U.S. at 442).

3. Compelled Idleness in the Off year

HB 1542 forces LPNH to "sit on the sidelines" the entire year before the general election. Block, 618 F. Supp. 2d at 150 (noting Rhode Island law required Moderate Party to "sit on the sidelines" for a full calendar year before the collection period commenced on January 1). Unconvincingly, the district court discounted this burden as "minor at best and not severe" because even with the January 1 start date, LPNH can plan election year activities, recruit volunteers and raise funds for paid petitioners during the off year. Add. 88. In this regard, the district court stands in stark constant with Supreme Court precedent recognizing that when political activities 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 and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." Anderson, 460 U.S. at 792. The same holds true here. "Without justification, a January 1 start date unduly silences would-be signers in [New Hampshire] at a critical stage of the democratic process." Block, 618 F. Supp. 2d at 156.

4. Collective Evaluation of the Burden

The record establishes the three individual burdens identified above individually are severe, or in the alternative, are at least on the "severe side." Block, 618 F. Supp. 2d at 151, 151 n. 11. Nevertheless, the collective nature of the burdens must also be assessed. Add. 88 (citing Storer, 415 U.S. at 738-39). The record from the 2000 and 2012 election cycles illustrate the difficultly in complying with the 3% threshold in New Hampshire over the course of a 21month window, a feat only accomplished by LPNH.

The record also establishes that with HB 1542 in force, LPNH will not go through the party-petitioning process in the future due to the limited time frame and cost prohibitive nature of the endeavor. See JA 11; JA 104, 105-106, 108-109 (Tomasso Tr. 97:4-5, 104:23-105:15, 116:6-117:15). As Mr. Tomasso explained, 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 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. JA 104 (Tomasso Tr. 97:14-20).

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. JA 109, 110 (Tomasso Tr. at 118:23-119:20, 122:16-123:12) (explaining how paid petitioners charge more closer to the election); JA 167 (Babiarz Depo. 125:1-12) (explaining added costs imposed under HB 1542). 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 newly compressed time period.

Instead of weighing the burdens presented by this evidence, the district court "[f]or the purposes of broadly estimating the burden imposed by HB 1542 [determined that] it is fair to express that collective burden in rough dollar terms," add. 89, and concluded that an expenditure of $50,000 to comply with HB 15542 while "not trivial" is not severe. Add. 90. The district court cites no precedent for weighing the collective burden imposes by HB 1542 strictly in terms of dollars and cents. The reason is plain: there is none. While $50,000 may be a drop in the bucket for the major parties and super PACs that spend millions of dollars in elections—a reality which has created a movement against the excessive use of money in politics—this amount is enormous for a small party like LPNH. The burdens imposed by HB 1542 are not pure functions of mathematics or money. The law presents significant logistical obstacles infringing upon intangible voting and associated rights guarded under the First and Fourteenth Amendments. These

rights cannot be brushed aside based upon a finding that "[f]or better or worse, in modern political terms, $50,000 is a relatively small amount of money." Add. 90.

The individual and collection burdens imposed by HB 1542 is severe. Without any particularized record of burden from past petitioning efforts, the Block court determined an identical law was at least "on the severe side." 618 F. 2d at 151 n. 11. For these reasons, the district court committed reversible error when "conclud[ing] that HB 1542 imposes only a reasonable and nondiscriminatory burden, and not a severe, burden on ballot access." Add. 91. Because the district court understated the burden imposed by HB 1542, it also overstated the justification proffered in support of the law.

D. The "Precise Interest" Considered by the District Court is a Post Hoc Justification Lacking "Legitimacy" and "Strength" and is Not "Necessary" to Burden LPNH's Rights

Severe ballot access restrictions are reviewed for strict scrutiny. Burdick, 504 U.S. at 434 ("regulation must be narrowly drawn to advance a state interest of compelling importance") (internal quotations omitted). Because the only justification for HB 1542 contained in its legislative history—culling stale signatures from the voter list—was abandoned by the State below and rejected as "nonsensical" in Block, HB 1542 must be declared unconstitutional upon a finding that the burden imposed by the law is severe. However, even if the burden

is less than severe, the Anderson balancing test requires reversal of the decision below and judgment in favor of LPNH.

The district court determined HB 1542 did not impose a severe burden and therefore did not apply strict scrutiny. Add. 30. The court also stated that because the burden is "more than trivial," under Anderson a more "searching review than mere rational-basis scrutiny" was required. Add. 93 n. 11. While LPNH agrees with this stated standard, the district court, in practice, improperly applied a rational basis review standard that was far too deferential to the State given the burdens imposed by HB 1542.

As discussed above, supra V. B., Anderson provides for a "flexible sliding scale approach for assessing the constitutionality" of ballot access restrictions. Barr, 626 F.3d at 109. The Court must "identify and evaluate the **precise interest** put forward by the State as justifications for the burden imposed by its rule." Anderson, 460 U.S. at 789 (emphasis added). The Court must determine the "**legitimacy**" and "**strength**" of the interest asserted and "must also consider the extent to which those interests make it **necessary** to burden the plaintiff's rights." Id. (emphasis added); see also Husted, 768 F. 3d at 545 ("Put differently, the state must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth").

The "precise interest" advanced by the State to justify HB 1542 was a moving target throughout the litigation. The **only** justification for the law in the legislative history is to cull out "stale" nomination papers that were allegedly more difficult to verify by Supervisors of the Checklist due to death or relocation of the voter. At deposition, Deputy Secretary of State David Scanlan, admitted there was no evidence that nomination papers signed in the off year were more difficult to verify than nomination papers signed during an election year. In fact, Deputy Secretary Scanlan agreed the administrative burden was exactly the same regardless of when the signature was obtained. See supra, III. A. 1. Once again, this exact justification was rejected as irrational in Block. 618 F. Supp. 2d at 151. As a result, the only justification for the law contained in the legislative history was abandoned by the State.

A second justification for HB 1542 was advanced by the State in its Motion to Dismiss. There, the State claimed the law was necessary in relation to a purge of the voter registration list that takes places every ten years pursuant to RSA 654:30. Doc. 9-1 at 9-10. At deposition, Deputy Scanlan testified that HB 1542 was not enacted for and not related to this purpose. JA 28 (Tr. 33:16-19).

A third justification for the law was first advanced by an intervenor, the RNC and later adopted by the State when moving for summary judgment--aligning the start date for collecting signatures for political organizations with the

start date for collection of signatures for candidates. Doc. 41-1 at 23. This interest was not previously disclosed in discovery and was not considered by the district court as sufficiently weighty to warrant consideration. Add. 94 n. 12.

Finally, after the close of discovery, the State, stumbled upon a fourth justification for HB 1542 in its summary judgment pleadings—"Finally, requiring nomination papers to be dated in the year of the election ensures that the support for the political organization is current." Doc. 41-1 at 23. Reframed as "current support" to avoid "ballot clutter," it was this fourth interest first identified nearly a year after the law was enacted that the district court considered when applying the Anderson test.[16] Add. 94-102. However, given prior precedent, the record and this post hoc justification for the law, the "legitimacy" and "strength" of the interest is weak, as is the "necessity" of burdening LPNH's rights. Anderson, 460 U.S. at 789.

It is not disputed the State has a legitimate interest in avoiding ballot clutter by limiting ballot access to those organizations that demonstrate a modicum of support through the party petitioning process. Add. 95-96. However, the 3%

[16] The district court relegated its analysis of Block to a single footnote. Add. 94-95 n. 12. However, when upholding the 5% threshold, Judge Smith cited the **same** cases relied upon by the district court that the petitioning process serves as a proxy for threshold popular support to obtain ballot access. Block, 618 F. 2d. at 149-150. With popular support at issue in the case on the 5% threshold, it is telling Rhode Island did not argue that gaging current support was an interest advanced by its January 1 start date. Id. at 151-152.

threshold, which is justified under the case law and was not challenged in this case, measures and satisfies this "precise interest" of demonstrating a modicum of support. The arbitrary and burdensome January 1 start date does not. See Block, 618 F. Supp. 2d at 154-155 (in striking down January 1 start date, concluding that, "despite the State's concern, the floodgates will remain closed to frivolous organizations that lack public support because of the still-stringent 5% signature requirement and 'one and done' framework whereby to retain its status, a party must effectively run a candidate for Governor or President or continuously demonstrate support via petition in every election cycle"); see also 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.").

In arguing for rational basis review, the State cited **no** record evidence to support the "current support" justification in less than a page of analysis tacked on

at the end of its brief. Doc. 41-1 at 21-22, 23-24; Add. 30. However, because rational basis does not apply, the record must contain some information of sufficient weight to justify the law. Add. 92. Here, this is none. As discussed above, current support was not identified as justification for the law in the legislative history, and the record is clear the legislature never considered it. Nor did Deputy Scanlan identify current support as a basis for the law at deposition. In fact, Deputy Scanlan testified the January 1 start date was totally arbitrary and not tied to any studies regarding election efficiency or its impact on any third parties. JA 23-24 (Tr. 15:7 to 17:7). No elected official and no one at the Secretary of State's Office considered current public support as a basis for imposing the January 1 start date. There is no evidence in the record that HB 1542 was enacted to advance (or actually advances) the "precise interest" of measuring current public support before gaining ballot access.

Nor does the alleged interest in avoiding ballot clutter justify the law. The State did not specifically identify this interest when moving for summary judgment. Doc. 41-1 at 21-24 (identifying interests). When answering interrogatories, the Secretary of State made passing reference that "a political organization should be able to 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 [sic] ability to read and

understand the ballot." Add 67 (emphasis added). However, at deposition Deputy Scanlan testified there was **no** increased cost to the State when LPNH obtained ballot access in 2012, JA 33 (Tr. 56:11 to 56:21), and therefore there is no legitimate interest here.

Case law instructs that "past history" of a state's ballot access scheme is relevant. See Storer, 415 U.S. at 742; Stone, 750 F.3d at 682-683. There is no history of "ballot clutter" in New Hampshire elections. LPNH is the **only** third party to satisfy the party petitioning process under RSA 655:40-a (2000 and 2012) or to obtain party status under RSA 652:11 since 1979. Aside from LPNH's efforts in 2000 and 2012, the two major parties have dominated the New Hampshire ballot during each general election for nearly 20 years. The Supreme Court has also noted that there is little nationwide evidence of ballot clutter even in states with low petitioning thresholds. Williams, 393 U.S. at 33. While recognizing the legitimate regulatory burden that could be caused by "multitudinous fragmentary groups" on the ballot the Court cautioned that "theoretically imaginable" or "remote" dangers cannot justify limiting ballot access due to concern for ballot clutter. Id. Such dangers were advanced by the State (at the last minute) and accepted by the district court.

LPNH does not argue "that states cannot modify their ballot-access regulations until actual voter confusion or distracting frivolous candidacies occur"

as stated by the district court. Add. 101 (citing Munro v. Socialist Workers Party, 479 U.S. 189 (1986)). LPNH does argue that under Anderson balancing when weighing the legitimacy and sufficiency of the challenged law there must be some evidence that the law was actually enacted to address the specific interest advanced by the state. Anderson, 460 U.S. at 789; Husted, 768 F.3d at 545 Here, there is none.

In other areas of heightened scrutiny, post hoc justifications may not be considered when determining the constitutionality of a state statute. In United States v. Virginia, 518 U.S. 515, 533 (1996), Justice Ginsburg described intermediate scrutiny in the gender discrimination context as follows, "The burden of justification is demanding and it rests entirely on the State. The State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented post hoc in response to litigation." Id. (internal citations and quotation marks omitted). Other courts applying the Anderson flexible sliding scale consider the middle range at least "comparable to intermediate scrutiny." Guare, 167 N.H. at 667 (citing Crawford and Ohio State Conference of N.A.A.C.P.). Such review requires consideration of only the actual justifications considered by the legislature when enacting the law. Id. In the alternative, under

heightened scrutiny, justifications not considered by the legislature, but made up by lawyers, deserve less deference when determining the legitimacy and sufficiency of the interest and the necessity for burdening a party's constitutional rights.

Finally, the "current support" rationale is not credible because the State already accepts "support" pre-dating January 1 of the election year when it provides "party" recognition to a "major" party whose nominee polls at least 4% of the vote for U.S. Senate or Governor in an election held **24 months previously**. RSA 652:11. This under inclusivity fatally undermines this manufactured governmental interest. Showtime Entm't, LLC v. Mendon, 769 F.3d 61, 73 (1st Cir. 2014) (under inclusivity "reveals significant doubts that the government indeed has a substantial interest that is furthered by its proffered purpose"). Perhaps even worse, such a rationale is blatantly discriminatory because it embraces "stale" support for major parties obtaining party status by vote under RSA 652:11, while rejecting "stale" support obtained by third parties seeking to obtain party status under RSA 655:40-a. The State never proffered a reason—other than its desire to do so—to make this arbitrary and discriminatory distinction in determining whether support is sufficiently "current."

The district court addressed LPNH's "discrimination" argument by opining that 1) "[t]his one-percent difference is a legitimate legislative approximation of

potential erosion of support during the year following an election" and 2) alternatively, "the legislature could also reasonably conclude that actually casting a vote for a candidate at an election demonstrates more enduring support than signing a nomination paper." Add. 97 n.13. This holding is not only without any factual basis, but only confirms the discriminatory nature of the State's "current support" rationale. First, this explanation was not even argued by the State in this litigation, nor is there evidence in the record or legislative history to support this theory. Indeed, the court's statement as what the "legislature could … reasonably conclude" in the absence of any argument (or, for that matter, evidence) from the State is completely speculative and further demonstrates the court's flawed rational basis approach to this case that Anderson expressly disavows. Cool Moose Party, 183 F.3d at 88 (court can only consider interests put forward by the state; "[w]e will not invoke justifications out of whole cloth on the State's behalf"). Second, under New Hampshire law, the 3% party-petitioning process and the 4% major party-support process are each **equally valid** methods of obtaining party-wide ballot access using varying degrees of prior "support." But the district court's rationale treats these methods unequally—namely, by favoring "noncurrent" major party support while disfavoring "noncurrent" third party support. This is, by definition, discriminatory against third parties, especially given the fact that a petitioning third party may not have had the opportunity to

even compete in the prior election. Third, there is simply no evidence to justify the district court's discriminatory and arbitrary assumption that party support by vote (which favors the major parties who have already obtained ballot access) should be treated with more power than party support by nomination paper. In fact, a person's support by nomination paper is a powerful statement, especially when that signatory (unlike a voter who can vote for candidates from different parties in an election) is now prohibited from nominating another third party. Fourth, there is no evidence to suggest that a person who signs a party petition in, for example, October of an odd year is any more or less likely than a voter who voted for a certain candidate in a previous general election to change their mind concerning party support at the time of the next general election. Finally, the district court's holding is tantamount to concluding that the State can discriminate against the support obtained by third parties using the party-petitioning process because that party can, alternatively, run an individual candidate for Governor and U.S. and, if that candidate obtains the 4% threshold, it will now be permitted to use less "current" support for the next general election. Block, however, rejected this argument. Block, 618 F. Supp. 2d at 153-54 ("But the details of a petition process added as an 'alternative' do not circumvent constitutional scrutiny just because they exist in addition to other ballot access provisions that may be constitutional in their own right."). In short, the district court's assumption was

untethered to any evidence in the record and is, itself, discriminatory in favor of major parties.

The district court "decline[d] to apply any specific and discrete level of scrutiny to HB 1542 and instead evaluate[d] the State's interest in supporting the law under the Anderson balancing framework." Add. 93. By ignoring the actual justification for the law and accepting a justification proffered at the eleventh hour without evidentiary support, the court did exactly what it professed not to do—it applied rational basis review.

VI. CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed, judgment should be entered on behalf of LPNH and this Court should enjoin HB 1542 as violative of the First and Fourteenth Amendments to the United States Constitution.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of the Libertarian Party of New Hampshire complies with the type limitations in Rule 32(A)(5) and the word limitation set forth in Rule 32(A)(7)(B)(i) of the Federal Rules of Appellate Procedure. The Libertarian Party of New Hampshire's Brief consists of 13,909 words.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Libertarian Party of New Hampshire

v.

William M. Gardner, Secretary of State of the State of New Hampshire, in his official capacity

Case No. 14-cv-322-PB
Opinion No. 2015 DNH 164 P

MEMORANDUM AND ORDER

Political organizations can gain access to the New Hampshire general-election ballot either by receiving at least four percent of the total votes cast for Governor or U.S. Senator in the preceding election or by submitting nomination papers signed by enough of the State's registered voters to equal at least three percent of the total votes cast in the prior election. In 2014, the New Hampshire state legislature amended the State's ballot-access laws to require nomination papers to be signed during the same year as the general election. In this action, the Libertarian Party of New Hampshire ("LPNH") contends that the new same-year requirement is an impermissible ballot-access restriction that violates the

First and Fourteenth Amendments to the United States Constitution.

I. BACKGROUND[1]

A. The Same-Year Nomination Papers Requirement

Candidates for political office in New Hampshire typically gain access to the general-election ballot by winning their party's primary election.[2] Only political organizations that qualify as "political parties" under New Hampshire law, however, hold primaries. To qualify as a "political party," a political organization must receive at least four percent of the total votes cast for Governor or U.S. Senator in the preceding election. N.H. Rev. Stat. Ann. § 652:11. Rather than participate in the primary process, other political organizations that seek to place their candidates on the

[1] The facts summarized in this section are undisputed. I draw them from both the summary judgment record and evidence and testimony taken during an evidentiary hearing that I held in this action on July 13, 2015. Evidence admitted during that hearing is cited in this Memorandum and Order as either "Def.'s Ex." Or "Pl.'s Ex." Summary judgment exhibits are cited by their docket number.

[2] New Hampshire also allows individual candidates to run unaffiliated with any political organization by submitting a specified number of nomination papers. See N.H. Rev. Stat. Ann. §§ 655:40, 655:42, III.

general-election ballot - which I will call "third parties" for the sake of convenience - must submit enough nomination papers signed by New Hampshire registered voters to equal three percent of the total votes cast in the prior general election. See N.H. Rev. Stat. Ann. §§ 655:40-a, 655:42, III. A registered voter may sign only one valid nomination paper during each election cycle. N.H. Rev. Stat. Ann. § 655:40-a.

To qualify for the general-election ballot, third parties must submit the requisite number of nomination papers to local election officials in the towns or wards where each signer is registered to vote no later than the Wednesday five weeks before the primary. N.H. Rev. Stat. Ann. § 655:41, I. Local officials must then certify the validity of all nomination papers no later than two weeks before the primary. Id. Because the New Hampshire primary falls on the second Tuesday in September, this requirement effectively establishes an early August deadline for the submission of nomination papers. See N.H. Rev. Stat. Ann. §§ 653:8, 655:41, I.

In July 2014, the New Hampshire legislature passed House Bill 1542 ("HB 1542"), which amended Section 655:40-a to provide that "[n]omination papers shall be signed and dated in the year of the election." N.H. Rev. Stat. Ann. § 655:40-a (emphasis

added). Because nomination papers must be filed by August, the new law requires third parties that seek to access the general-election ballot to collect the requisite number of nomination papers within a window of roughly seven months, extending from January 1 until early August of the election year itself. See N.H. Rev. Stat. Ann. §§ 653:8, 655:40-a.

The record contains few details that explain why the legislature passed HB 1542. When the House Election Law Committee referred the bill to the full House, it explained:

> This 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.

Doc. No. 37-3 at 13.

Representative Melanie Levesque, one of the bill's sponsors, observed before the bill's passage:

> When a third party attempts to collect nominating papers, they normally would start right after the general election. This would lead to signatures that could be two years old, and very difficult to verify. Collecting these papers in the same year of the election facilitates verification, although limiting the time in which to collect signatures.

Id. at 20 (minutes summarizing testimony).

After this litigation began, LPNH submitted interrogatories to the State that requested, among other things, a "descri[ption of] all state interests that [the State] claim[s] HB 1542 advances." Id. at 62. In response, the State said:

> In order to obtain ballot status a political organization should be able to 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 [sic] ability to read and understand the ballot. The 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 signatory has either passed away, moved, or has otherwise been disqualified.

Id.

B. LPNH

The Libertarian Party is a prominent third party in the United States. Describing its philosophy as "live and let live," it favors a limited government that respects "the right of each person . . . to engage in any activity that is peaceful and honest." Doc. No. 36-1 at 6-7. LPNH constitutes the national Libertarian Party's institutional presence in New Hampshire. It claims that it "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." Id. at 7.

LPNH, however, has struggled recently to garner widespread support in New Hampshire. Richard Tomasso, the current state chairman of LPNH, estimates that only about 150 New Hampshire residents are registered members of the national Libertarian Party, and fewer than that are registered members of LPNH itself. See Doc. No. 37-6 at 4 (Tomasso Dep. at 9:7 – 11:6). Only about twelve people attended LPNH's last party convention in March 2015. Id. (Tomasso Dep. at 11:22 – 12:1). LPNH identifies no current member of the New Hampshire legislature as one of its members. Id. (Tomasso Dep. at 18:21 – 19:7).

LPNH last qualified for ballot access in New Hampshire as a formal political party in 1996, when the threshold required to avoid the nomination papers requirement stood at three rather than four percent of votes cast in the previous general election. Since then, it has qualified for ballot access under the nomination papers process twice, in 2000 and again in 2012.

Based on voter turnout in the 2010 general election, qualifying for ballot access in 2012 by nomination papers required third parties to collect 13,843 valid signatures.[3] But

[3] The record contains much less information about the 2000 ballot-access drive, and the parties emphasize the 2012 drive as the principal example of LPNH's experience in meeting the nomination papers requirement. Therefore, I focus here on the

because some signers inevitably prove to be ineligible, rendering the nomination papers that they sign invalid, any organization that runs a petition[4] drive must collect a larger number of unverified, or "raw," signatures to ensure that it will obtain enough valid signatures. For this reason, LPNH sought to collect approximately 19,000 total signatures during the 2012 drive, which assumed a seventy-five percent petition validity rate.

LPNH began its 2012 petition drive in late July 2011 after the Libertarian National Committee (the "LNC"), the governing board of the national Libertarian Party, agreed to give $28,000 to LPNH to support its drive. LPNH spent those funds on paid professional petitioners because, it explains, "paid support – including professional petitioners – is a necessity in conducting a successful petition drive of this magnitude."[5] Doc.

2012 drive and not on the 2000 drive. I note, however, that the 2000 drive appears to have been similar to the 2012 drive in most material respects: LPNH began its drive early, in mid-1999, and finished only "a couple weeks before" the August 2000 deadline. See Doc. No. 37-8 at 7.

[4] The term "petitions" is often used as shorthand for "nomination papers" in this context, including by the parties to this action.

[5] The record suggests that paid petitioners are often more effective than volunteers for several reasons, including

No. 37-8 at 6. LPNH gathered 13,787 raw signatures between August 1 and September 23 of 2011, the vast majority of which were collected by the paid petitioners, who charged anywhere from $1 to $2 per signature during that period. In other words, LPNH gathered nearly seventy percent of the raw signatures it sought to collect within a 77-day period, largely relying on funds it received from the LNC.

After September 23, 2011, the initial $28,000 infusion from the LNC ran out. LPNH lacked its own funds to hire paid petitioners on any significant scale, so it aimed instead to finish the petition drive by relying on volunteers supplemented by any paid petitioners that it could afford with its limited resources. But this strategy met with limited success. Although the intervening months between September 2011 and the August 2012 deadline offered at least two promising opportunities for petition collection – the Presidential primary in January 2012, and town elections in March 2012 – LPNH struggled to recruit even a handful of volunteers to collect petitions on either occasion. See Doc. No. 37-6 at 30 (Tomasso Dep. at 115:12-13) (explaining that LPNH "manage[d] to get a

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financial motivation and professional experience.

couple people out for" the January Presidential primary); Def.'s Ex. Z (March 2012 email from Tomasso reporting that LPNH "had very poor turnout for help on town election day").

Between roughly September 2011 and late July 2012, LPNH collected only about 5,000 additional raw nomination papers. As the early August deadline loomed, the LNC decided to allocate an additional $4,000 to LPNH to hire paid petitioners and finish the drive. This final effort succeeded, and LPNH submitted its last nomination papers for verification just before the August 2012 deadline.

All told, LPNH spent roughly $40,000 of its own and the LNC's funds on the 2012 petition drive, although LPNH contends that this figure does not reflect certain out-of-pocket expenses. Most of these funds were spent on professional petitioners, who charged anywhere from $1 to $3 per signature for their services at various times during the drive. Although some of the paid petitioners charged more per petition as the deadline approached and the demand for their services rose, at least one paid petitioner continued to charge only $1 per signature as late as April 2012. See Doc. No. 37-6 at 21 (Tomasso Dep. at 78:15 - 79:7).

Based on voter turnout in the 2014 midterm elections, LPNH

will need to submit approximately 14,800 valid nomination papers to qualify for the 2016 general-election ballot. Assuming a validity rate of seventy-five percent, therefore, it will likely need approximately 20,000 total unverified nomination papers to meet the requirement. LPNH estimates that funding a paid petition drive for the 2016 election will cost roughly $50,000. Doc. No. 36-1 at 31. This figure is higher than the $40,000 cost of the 2012 drive, LPNH asserts, because the January 1 start date will limit petition collection to the election year itself, when paid petitioners charge more for their services.

C. Procedural History of This Action

LPNH brought this action against William Gardner, the New Hampshire Secretary of State, in July 2014 shortly after the General Court passed HB 1542. It seeks a declaration that the same-year requirement prescribed by HB 1542 is unconstitutional and an order enjoining the State from enforcing it. Doc. No. 1 at 16-17. The parties proceeded through an expedited discovery schedule and submitted cross-motions for summary judgment.[6] I

[6] In April 2015, the Republican National Committee (the "RNC") moved to intervene as defendants in this case. See Doc. No. 30. For reasons that I explained on the record during an April 20, 2015 hearing, I denied the RNC's request to intervene as defendants but permitted it to participate as an amicus curiae.

held a hearing for oral argument on the cross-motions on June 18, 2015. The parties have stipulated that I can resolve their dispute at the summary judgment stage.[7]

II. STANDARD OF REVIEW

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

[7] Although the parties agreed that this case could be resolved on cross-motions for summary judgment, I held an evidentiary hearing on July 13, 2015 to address LPNH's factual claim that the State's petitioning process was already burdensome even before HB 1542's adoption. Having heard the evidence that bears on this claim, I am satisfied that there is no genuine dispute as to any material facts that would prevent me from resolving this case on cross-motions for summary judgment.

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)). If the moving party satisfies this burden, the nonmoving party must then "produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it; if that party cannot produce such evidence, the motion must be granted." Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 94 (1st Cir. 1996); see Celotex, 477 U.S. at 323.

On cross motions for summary judgment, the standard of review is applied to each motion separately. See Am. Home Assurance Co. v. AGM Marine Contractors, Inc., 467 F.3d 810, 812 (1st Cir. 2006) (applying the standard to each motion where cross motions were filed); see also Mandel v. Bos. Phoenix, Inc., 456 F.3d 198, 205 (1st Cir. 2006) ("The presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review."). Hence, I must determine "whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Adria Int'l Group, Inc. v. Ferré Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).

III. ANALYSIS

Ballot-access restrictions implicate two separate, but related, constitutional rights that derive from the First and Fourteenth Amendments: "the right of individuals to associate for the advancement of political beliefs," and "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams v. Rhodes, 393 U.S. 23, 30 (1968). These rights extend to the formation of political parties because "voters can assert their preferences only through candidates or parties or both. . . . The right to vote is heavily burdened if that vote may be cast only for major-party candidates at a time when other parties or other candidates are clamoring for a place on the ballot." Anderson v. Celebrezze, 460 U.S. 780, 787 (1983) (internal quotation omitted).

At the same time, states have a strong interest in conducting orderly elections. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Storer v. Brown, 415 U.S. 724, 730 (1974). Thus, although every ballot-access regulation "inevitably affects" the rights of effective voting and

association, "the state's important regulatory interests [in conducting orderly elections] are generally sufficient to justify reasonable, nondiscriminatory restrictions." Anderson, 460 U.S. at 788. "This legitimate interest in reasonable regulation is based not only on 'common sense,' Burdick v. Takushi, 504 U.S. 428, [433 (1992)], but also on the [Constitution's] Article I reservation to the States of the power to prescribe 'Times, Places and Manner of holding Elections for Senators and Representatives.' U.S. Const., Art. I, § 4, cl. 1." Libertarian Party of Me. v. Diamond, 992 F.2d 365, 370 (1st Cir. 1993).

To balance these competing interests, "the Supreme Court has developed a flexible sliding scale approach for assessing the constitutionality of [ballot-access] restrictions." Barr v. Galvin, 626 F.3d 99, 109 (1st Cir. 2010) (internal quotation omitted). In its pathmarking ballot-access decision in Anderson v. Celebrezze, the Supreme Court explained how courts should apply this approach to determine the validity of challenged ballot-access restrictions:

> [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. . . . Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789. Under Anderson and its progeny, a restriction that imposes a "severe" burden on ballot access cannot survive unless it is "narrowly drawn to advance a state interest of compelling importance." Burdick, 504 U.S. at 434 (internal quotation omitted); see also Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); Barr, 626 F.3d at 109. In contrast, restrictions that impose reasonable and nondiscriminatory burdens on ballot access require only a "corresponding [state] interest sufficiently weighty to justify the limitation." Norman v. Reed, 502 U.S. 279, 288-89 (1992); see Anderson, 460 U.S. at 788. The outcome of this analysis depends heavily on the challenged restriction's factual context. See Anderson, 460 U.S. at 789 ("The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'") (quoting Storer, 415 U.S. at 730)).

Following Anderson and its progeny, therefore, I first consider whether HB 1542 imposes a severe burden on ballot access. After determining that the law instead imposes only a

reasonable and nondiscriminatory burden on LPNH's ability to access the ballot, I then identify the state interests that HB 1542 serves and conclude that those interests are sufficient to sustain the law against LPNH's challenge.

A. Burden Imposed by HB 1542

To establish its claim that HB 1542 imposes a severe burden on ballot access, LPNH first contends that its experiences during its 2000 and 2012 petition drives demonstrate that the State's petitioning process was already onerous before the same-year requirement was introduced. LPNH then argues that HB 1542 elevates this already-arduous burden into a severe one because it: (1) impermissibly shortens the time during which nomination papers may be collected; (2) improperly places the petitioning window squarely within the prime campaigning season that precedes the general election; and (3) forces third parties to "sit on the sidelines" during the year before the general election. I begin by addressing each of these asserted burdens individually. I then consider whether the nomination papers process viewed as a whole, including HB 1542, imposes a severe burden on third-party ballot access.

1. Compression of the Petition Collection Window

LPNH first objects to HB 1542 because, on its face, the law

shortens the collection window for nomination papers from 21 months to seven months. In LPNH's view, a seven-month petition-collection period is too short, especially considering that the period encompasses the winter months when, in its view, it is practically impossible to collect nomination papers.

Both the Supreme Court and the First Circuit, however, have repeatedly upheld petition requirements comparable to HB 1542 in both the number of petitions required and the length of time allowed to collect them. These precedents effectively foreclose any argument that the petitioning window provided by HB 1542 is too short on its face. In Jenness v. Fortson, for instance, the Supreme Court upheld Georgia's policy requiring third parties to collect petitions from five percent of all eligible voters over 180 days. 403 U.S. 431, 433, 438 (1971). The Court also upheld a much shorter petitioning period in American Party of Texas v. White, where the challenged Texas policy required third parties to collect petitions numbering one percent of actual votes cast in the last election – which, at the time, entailed 22,000 petitions – within 55 days. 415 U.S. 767, 783, 786 (1974). Similarly, in Storer v. Brown, the Court observed that, "[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden," although it remanded

that case for further factual development. 415 U.S. 724, 740 (1974). And in Barr v. Galvin, citing American Party of Texas, the First Circuit characterized a Massachusetts requirement to collect 10,000 signatures within 60 days as "modest" rather than severe. 626 F.3d 99, 110 (1st Cir. 2010); see also Stone v. Bd. of Election Comm'rs, 750 F.3d 678, 684 (7th Cir. 2014) ("Ninety days does not strike us as an excessively short time to collect 12,500 signatures . . . . We previously saw no problem with a ninety-day window to collect 25,000 signatures.") (citing Nader v. Keith, 385 F.3d 729, 736 (7th Cir. 2004)).

I recognize that the analysis of ballot-access restrictions is not bound by any "'litmus-paper test' that will separate valid from invalid restrictions," Anderson, 460 U.S. at 789, based solely on percentage thresholds and time limits. But these cases, although not dispositive, provide a consistent and useful set of benchmarks with which to evaluate the burden imposed by a shortened petition-collection window. See Norman, 502 U.S. at 295 (using Jenness five percent threshold as benchmark in evaluating Illinois ballot restriction); Munro v. Socialist Workers Party, 479 U.S. 189, 193-94 (1986) (citing Jenness and American Party of Texas as benchmarks in ballot-access cases). Taken together, these cases demonstrate that the

time allowed by HB 1542 on its face for petition collection is objectively reasonable, and LPNH cites no persuasive case to the contrary.

Instead, and reminding this Court of Anderson's fact-specific framework, LPNH argues that two unique characteristics particular to New Hampshire distinguish this case and render the petition-collection window prescribed by HB 1542 a severe burden on ballot access. First, LPNH maintains that New Hampshire's harsh winters preclude signature collection during the winter months, shortening the petitioning period even beyond what HB 1542 allows on its face. I am unpersuaded by this argument. Although snowstorms and bitter cold undoubtedly limit the ability of third parties to gather signatures on certain winter days, LPNH's own experience during its 2012 petition drive establishes that it is not impossible to collect petitions at all during the winter. See Doc. No. 37-20 at 24 (LPNH petitioning spreadsheet showing that LPNH collected over 1,000 signatures in December 2011). Moreover, even if adverse weather sometimes hinders petition collection during the winter, LPNH can use that time to advance its petition drive in other ways that do not require prolonged outdoor exposure, such as fundraising and volunteer recruitment. Finally, even if New

Hampshire winter did practically shorten the petitioning window to five months, as LPNH maintains, that five-month period would still fall within the benchmarks upheld by the Supreme Court and the First Circuit. Winter in New Hampshire, therefore, neither distinguishes the HB 1542 petition-collection window from binding precedent nor imposes a severe burden on ballot access.

LPNH also argues that the shortened petition-collection window bars it from collecting signatures at certain prominent New Hampshire public events that take place during the fall before an election year. Although this observation is true as far as it goes, it does not establish any severe burden imposed by the shortened petitioning period. County fairs and certain city elections, which occur in the fall, may well provide promising opportunities for signature collection, but numerous public events that are equally promising still take place during the new petitioning period. For instance, third parties can collect signatures at local public gatherings within the new petitioning period like town meetings, which occur in the spring, and local farmers markets, which occur in the spring and summer. In Presidential election years, the Presidential primary, which takes place in January, offers third parties

another opportunity to ask registered voters for signatures.[8] These examples demonstrate that ample opportunity remains for third parties to collect signatures at public events within the petitioning period set by HB 1542. Beyond this, New Hampshire has no constitutional obligation to allow third parties to collect signatures at every public event that occurs in this State, however removed in time from the general election. The exclusion of fall public events from the new petitioning window, therefore, does not distinguish HB 1542 from Supreme Court and First Circuit benchmarks or otherwise constitute a severe burden on third-party ballot access.

2. Conflict Between Petitioning and Campaigning

LPNH next argues that HB 1542 imposes a severe burden on its ability to access the ballot because it places the petitioning period squarely within the campaign season preceding

[8] LPNH itself recognized the 2012 Presidential primary as a lucrative opportunity to collect signatures. Ultimately, however, LPNH was unable to capitalize on that opportunity, largely because many of its prospective volunteers chose to volunteer for Ron Paul's campaign instead. See July 13, 2015 Evid. Hr'g Tr., Doc. No. 52 at 2 (Tomasso testifying that LPNH was "competing [with the Ron Paul campaign] for a lot of the same mind share and people who shared our political beliefs."), 3 (Tomasso testifying that LPNH could not muster volunteers to collect signatures at polling places on Presidential primary election day in January 2012 because "a lot of them were working for the Ron Paul campaign.").

the general election. That placement, LPNH argues, imposes a severe burden because it forces third parties to focus exclusively on petitioning during a period that they would otherwise devote to campaigning, placing them at an unfair disadvantage compared to the major parties. But for several reasons, this new burden, although not trivial, is also not severe.

First, even assuming, as LPNH claims, that third parties cannot begin campaigning until they complete the petitioning process, the petitioning window that HB 1542 prescribes still leaves a significant amount of time available for general electioneering. Because the petitioning deadline falls in early August, political organizations that qualify for ballot access still have the entire period between the deadline and Election Day in early November to focus solely on campaigning, a period that includes all of September and October. As Rich Tomasso, LPNH's state chair, testified during his deposition, "the time immediately prior to the election is the most important time for campaigning." Doc. No. 37-6 at 8 (Tomasso Dep. at 26:6-8). HB 1542 does nothing to restrict third parties that qualify for ballot access from campaigning during this period.

Beyond this, however, I do not accept LPNH's underlying premise that campaigning cannot begin until the petitioning requirement is fulfilled. For one thing, the record does not support LPNH's position. Instead, it suggests that petitioning, although perhaps not fully equivalent to campaigning, still offers third parties and their prospective candidates an opportunity to interact with the public and promote their views. In a March 2012 email to solicit volunteers to collect petitions at town elections, for instance, Tomasso wrote, "If you want to run for office as a Libertarian, [town election day] is a great time to meet your voters and do some early campaigning." Def.'s Ex. V at LPNH-1052. An August 2000 LPNH newsletter comments that the petitioning process, which allows "thousands of voters . . . to meet Libertarian candidates and activists," provides the party "an effective outreach tool." Doc. No. 37-14 at 2. Moreover, the record also suggests that LPNH conducted at least some campaign activities during its 2012 petition drive before it had finished the petitioning process. LPNH itself concedes that it "did . . . have some candidates engage in campaigning prior to completing the petitioning drive" in 2012. Doc. No. 36-1 at 14. And John Babiarz, LPNH's former state chair and 2012 gubernatorial candidate, testified during his deposition

that he "had to focus [himself] on campaigning" rather than petitioning during that year's drive. Doc. No. 37-7 at 25 (Babiarz Dep. at 93:22). The record, in short, does not substantiate LPNH's assertion that the petitioning requirement forecloses campaigning until it is fulfilled.

LPNH offers an additional argument against the election-year petitioning window beyond its own claimed inability to campaign during that period. It maintains that the putative conflict between the petitioning period and campaigning season places third parties at an unfair disadvantage compared to the major parties. In effect, LPNH argues that the January 1 start date forces third parties to complete administrative busywork at a time during the election year when the major parties can direct their full attention to campaigning.

This argument overlooks the fact that the major parties must meet their own ballot-access requirement during the election year by holding primaries. New Hampshire holds its primary election on the second Tuesday of September in every election year, five weeks after the petition submission deadline and two weeks after the deadline for local officials to certify those petitions. N.H. Rev. Stat. Ann. §§ 653:8, 655:41, I. During election years, therefore, major-party candidates enjoy

no free pass to focus solely on the general election while third parties are trying to gather petitions. Instead, they must first compete in and win their party primaries, a process that does not end until well after the petitioning process concludes. The burden of a primary may differ qualitatively from that of a petitioning requirement, but it remains that major-party candidates face their own preliminary obstacle to the general-election ballot during the election year.[9] As the Supreme Court has explained, "there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." Jenness, 403 U.S. at 441. "Equality of opportunity exists [here], and equality of opportunity – not equality of outcomes – is the linchpin of what the Constitution requires . . . ." Werme v. Merrill, 84 F.3d

[9] During oral argument, LPNH suggested that comparing the petitioning process to the primary system is like "conflating apples and oranges," June 18, 2015 Arg. Tr., Doc. No. 51 at 4, because the Republican and Democratic Parties already know that their candidates will appear on the ballot even if they do not yet know who those candidates will be. But even if the major parties are guaranteed to have their candidates placed on the general election ballot, the primary still forces them to expend time, money, and effort during the election year on an endeavor other than the general election itself.

479, 485 (1st Cir. 1996).

For these reasons, the placement of the petitioning window within the election year is both reasonable and nondiscriminatory. I do not doubt that LPNH would rather spend its time and resources during an election year on campaigning instead of petitioning. But the same could be said of any political party, including the major parties, which would likely prefer to avoid the sometimes factious primary process and instead select their candidates and begin campaigning for the general election before September of the election year. The challenge that political parties of all sizes face to manage multiple tasks at once, even in an election year – to both walk and chew gum, so to speak – is a simple and essential fact of American political life, not cause for heightened constitutional scrutiny. See Am. Party of Tex., 415 U.S. at 782-83. That HB 1542 requires third parties to collect nomination papers during the election year, therefore, imposes no severe burden on third-party ballot access in this State.

3. Compelled Idleness During the Off Year

Finally, LPNH argues that HB 1542 imposes a severe burden on ballot access because it "forces [LPNH] to 'sit on the sidelines' for the entire odd-numbered year before the general

election year." Doc. No. 36-1 at 29. So far as it goes, it is true that HB 1542 precludes LPNH from collecting nomination papers during the off year. But it simply does not follow that the law completely "bar[s LPNH] from engaging in petitioning during the odd numbered year," id. at 29-30, as LPNH contends. Even with the January 1 start date in place, LPNH remains free to plan its election-year petition drive and recruit volunteers during the off year. More importantly, because paid petitioners are central to any petition drive, LPNH also remains free to raise funds for the drive during the off year that it can then spend on paid petitioning during the election year. LPNH's "sit on the sidelines" argument, therefore, articulates a burden that is minor at best and not severe in any event.

4. Collective Evaluation

As I have explained, none of these three grounds for LPNH's opposition to HB 1542 individually constitutes a severe burden on ballot access. The critical question, however, is whether the various burdens that HB 1542 imposes collectively cause the law as a whole to rise to that threshold. See Storer, 415 U.S. at 738-39.

Either characterizing or quantifying the aggregate burden that a ballot-access restriction imposes is a somewhat arbitrary

task. Ultimately, however – and as LPNH acknowledges – all petitioning requirements demand either a certain number of volunteer hours or a certain amount of money to pay professional petitioners to replace those volunteers. See Am. Party of Tex., 415 U.S. at 787 ("Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization."); Doc. No. 36-1 at 24 ("Without paid support, a petition drive cannot get off the ground because the Libertarian Party structure is not a large organization."). Certain qualitative characteristics of a ballot-access restriction might seem to evade easy quantification, but they still translate into either dollar amounts or the equivalent number of volunteer hours. The winter months, for instance, might make it more difficult for petitioners to collect signatures in public places during cold spells, increasing either the number of volunteer hours or the number of paid petitioners that will be required to gather petitions during those periods. Likewise, placing the petitioning window within an election year might require more funds because some paid petitioners might charge more during an election year than during an off year. For purposes of broadly estimating the burden imposed by HB 1542, therefore, it is fair to express that collective burden in rough dollar terms.

LPNH tacitly acknowledges this approach by stipulating that a successful petitioning drive in 2016 will cost $50,000, assuming that HB 1542 remains in force. See Doc. No. 37-6 at 26 (Tomasso Dep. at 97:14-16). As I have explained, I view that stated cost as an aggregate evaluation of the various burdens that flow from HB 1542. Although this stipulated burden is certainly not trivial, I cannot conclude that it qualifies as severe. In comparative terms, it is not dramatically more onerous than the $40,000 cost of the 2012 petition drive. See Doc. No. 36-1 at 25. Nor does it qualify as severe in its own right. The Republican 2012 gubernatorial nominee in New Hampshire spent over $1 million on that year's primary election alone, or around 20 times what LPNH expects its 2016 petitioning drive to cost.[10] For better or worse, in modern political terms, $50,000 is a relatively small amount of money. And even if raising that amount will prove infeasible for LPNH, the party remains free to collect nomination papers for free by recruiting and organizing sufficient volunteers.

[10] See "Statement of Receipts and Expenditures for Political Committees for Friends of Ovide 2012 Committee," Sept. 19, 2012 (available at New Hampshire Secretary of State website, http://sos.nh.gov/20120919comm.aspx?id=26519).

For these reasons, I conclude that HB 1542 imposes only a reasonable and nondiscriminatory, and not a severe, burden on ballot access.

B. Sufficiency of the State Interest

Because HB 1542 does not impose a severe burden on ballot access, strict scrutiny does not apply. See Burdick v. Takushi, 504 U.S. 428, 434, 439 (1992). The parties disagree about which level of scrutiny should control in light of this conclusion. Citing the New Hampshire Supreme Court's decision in Guare v. New Hampshire, --- A.3d ---, No. 2014-558, 2015 WL 2340003 (N.H. Apr. 22, 2015), LPNH argues that even if strict scrutiny does not apply, intermediate scrutiny is nonetheless appropriate. The State argues otherwise, citing the First Circuit's decision in Barr v. Galvin, 626 F.3d 99 (1st Cir. 1999), to contend that rational-basis review should control.

I disagree with both positions, although I acknowledge that this disagreement may be little more than semantic. As the First Circuit explained in Barr, the Supreme Court's ballot-access cases establish a "'sliding scale' approach for assessing the constitutionality" of ballot-access restrictions. 626 F.3d at 109. Under this approach, the strength of the interest that the state must demonstrate to justify a restriction rises or

falls depending on how burdensome the restriction is. See Burdick, 504 U.S. at 434 (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). It is true that severe ballot-access restrictions, which occupy the most onerous extreme on this continuum, call for strict-scrutiny review requiring the challenged restriction to "be narrowly tailored [to] advance a compelling state interest." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); see also Norman v. Reed, 502 U.S. 279, 288-89 (1992). But the Supreme Court has never designated any specific lesser level of scrutiny – whether rational basis, intermediate scrutiny, or any other standard of review – to analyze restrictions that do not impose severe burdens. Instead, in Burdick v. Taskushi, the Court applied Anderson balancing, rather than a discrete level of scrutiny, to a ballot-access restriction that it found to be not severe. See 504 U.S. at 434, 439-40 (holding that the "legitimate interests asserted by the State are sufficient to outweigh the limited burden" that the restriction under review imposed); see also Timmons, 520 U.S. at 363-64 (applying Norman "sufficiently weighty" standard to non-severe restriction). And in Crawford v. Marion County Election Board, 553 U.S. 181 (2008), a majority of the Court's members appeared to disavow the application of

specific and discrete levels of scrutiny to non-severe restrictions. See 553 U.S. at 191 (Stevens, J.) ("However slight th[e] burden may appear . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'") (quoting Norman, 502 U.S. at 288-89), 210 (Souter, J., dissenting) (observing that Court has "avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis").

Thus, I decline to apply any specific and discrete level of scrutiny to HB 1542 and instead evaluate the State's interest supporting the law under the Anderson balancing framework.[11] To do so, I must consider the "precise interests put forward by the

[11] I recognize that the First Circuit applied rational-basis review to the law at issue in Barr. 626 F.3d at 110. I read that decision, however, to apply rational basis-review because the burden imposed by the challenged law was so minor that it did not warrant review of any greater rigor. See id. The First Circuit also applied rational-basis review in Werme v. Merrill, a pre-Barr decision, but it made this reasoning more explicit. See 84 F.3d at 485 ("Given the character and magnitude (or, more aptly put, lack of magnitude) of the alleged injury to the plaintiffs' First and Fourteenth Amendment rights, we conclude that the defendants need only show that the enactment of the regulation had a rational basis.") As I have explained, HB 1542 creates a burden that, although not severe, is more than trivial. Thus, under Anderson analysis, it requires a more searching review than mere rational-basis scrutiny to verify that the State's interest is "sufficiently weighty to justify the limitation," Norman, 502 U.S. at 288-89.

State as justifications for the burden imposed by" HB 1542, Anderson, 460 U.S. at 789, and determine whether those interests are "sufficiently weighty to justify the limitation," Norman, 502 U.S. at 289. I may only consider interests that the State identifies; I am not free, in other words, to validate the restriction based on hypothetical interests that the State does not invoke. Cool Moose Party v. Rhode Island, 183 F.3d 80, 88 (1st Cir. 1999).

The State offers several justifications for HB 1542 to meet its burden under Anderson balancing. Its strongest argument, however, appeals to its interest in maintaining an orderly ballot by requiring candidates to demonstrate a measure of public support before gaining ballot access.[12] The State

[12] The State also points to two other interests that, it argues, provide sufficient justification for HB 1542: first, avoiding confusion with the statutory provision for unaffiliated candidates to gain ballot access by collecting their own nomination papers, which had already been subject to a January 1 start date; and second, reducing the number of "false positives," or nomination papers accepted toward the requirement that were actually invalid because their signers had either relocated or died before the early August deadline for petition submission. I need not address these other interests, however, because the State's interest in requiring a demonstration of sufficient support independently justifies HB 1542. For that reason, Block v. Mollis, which involved a challenge against a Rhode Island ballot-access restriction similar to HB 1542, does not bear on this case, since Rhode Island sought to justify the challenged restriction there solely on the basis of the state's

explains that HB 1542 "require[s] a political organization to obtain the requisite number of nomination papers within a set time frame, thereby showing that the organization currently has the necessary level of popular support within New Hampshire" to gain ballot access. Doc. No. 41-1 at 22-23. This purpose, the State argues, comports with its broader interest in avoiding ballot clutter and overcrowding by limiting ballot access only to those organizations that demonstrate a basic level of support within New Hampshire. Id. at 22-23.

The State's asserted justification finds powerful and extensive support in both Supreme Court and First Circuit precedents, which establish that the State's broad regulatory interest in administering orderly elections includes a strong interest in avoiding ballot clutter. See Anderson, 460 U.S. at 788; Libertarian Party of Me. v. Diamond, 992 F.2d 365, 371 (1st Cir. 1993). "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic

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claimed "false positive" interest. See 618 F. Supp. 2d at 151-52 (D.R.I. 2009).

process at the general election." Jenness v. Fortson, 403 U.S. 431, 442 (1971). "The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not." Lubin v. Panish, 415 U.S. 709, 715 (1974); see also Am. Party of Tex. v. White, 415 U.S. 767, 782 (1974) (describing state's interest in requiring political organizations to "demonstrate a significant, measurable quantum of community support" as "vital"); Libertarian Party of Me., 992 F.2d at 371 (observing that support requirement "is meant to safeguard the integrity of elections by avoiding overloaded ballots and frivolous candidacies").

The State's strong and well-established interest in preventing ballot clutter by requiring political organizations to "make a preliminary showing of substantial support," Anderson, 460 U.S. at 788 n.9, provides sufficient justification for HB 1542. The law ensures that third parties placing candidates on the general-election ballot first obtain expressions of support from a relatively small but measurable number of New Hampshire voters within the election year itself. In other words, it requires third parties to garner not only "a

preliminary showing of substantial support," id., but a showing of support that will remain reasonably current and relevant at the time of the election itself.[13] Measuring the scale and currentness of community support through this process may not be "a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required the States to do the impossible." Am. Party of Tex., 415 U.S. at 786-87. As I have explained, the burden

[13] At oral argument and in its reply brief, LPNH suggested that the State's currentness argument renders HB 1542 facially discriminatory because New Hampshire accepts older election results as a sufficient showing of support from the major parties, which qualify for ballot access by receiving at least four percent of the vote for either Governor or U.S. Senator in the previous general election. See N.H. Rev. Stat. Ann. § 652:11. It is unconstitutional, LPNH contends, to demand same-year nomination papers from third parties to demonstrate the currentness of their support while also accepting the results of an election held two years earlier as a sufficient showing of support for the major parties. But the major parties, of course, must obtain at least four percent of votes cast at the previous general election to avoid the nomination papers requirement, while third parties need only collect nomination papers totaling three percent of that turnout. See N.H. Rev. Stat. Ann. §§ 652:11, 655:42, III. This one-percent difference is a legitimate legislative approximation of potential erosion of support during the year following an election. Alternatively, the legislature could also reasonably conclude that actually casting a vote for a candidate at an election demonstrates more enduring support than signing a nomination paper. In sum, this difference between major-party and third-party ballot-access qualification does not render HB 1542 facially discriminatory.

that HB 1542 imposes, although not negligible, is reasonable and nondiscriminatory. At bottom, it demands nothing more than a fair approximation of the threshold political support that the State is entitled to require of political parties that seek ballot access. Weighing the reasonableness of the restriction created by HB 1542 against the gravity of the State's asserted interest underlying the law, I conclude that the State's strong interest in "insist[ing] that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support," id. at 782, outweighs the burden that HB 1542 imposes on third parties.

LPNH concedes, as it must, that the State has at least an abstract interest in avoiding ballot clutter. See Doc. No. 36-1 at 47. For two reasons, however, it argues that HB 1542 does not legitimately advance that interest.[14] First, LPNH objects

[14] LPNH also protests that the State raised its interest in requiring a demonstration of sufficient and current support too late in this litigation for me to credit it. I agree that the State primarily relied on other asserted interests during the early stages of this litigation, although I note that it at least alluded to the ballot clutter interest in its responses to LPNH's interrogatories. See Doc. No. 37-3 at 62 ("In order to obtain ballot status a political organization should be able to 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 [sic] ability to read and understand the ballot."). Nevertheless,

that the preliminary-support justification for HB 1542 is a post hoc rationalization rather than the legislature's actual motivation for the law. If LPNH were correct in claiming that HB 1542 is subject to strict scrutiny, this argument might wield some force. But Anderson balancing, not heightened scrutiny, controls this analysis, and the Supreme Court's cases applying Anderson balancing have not barred states from invoking interests that either find scant support in the legislative history or otherwise look like post hoc justifications rather than actual motivations. In Crawford, for instance, the plaintiffs argued that the state's asserted interests justifying the challenged restriction were invalid because the restriction "was actually motivated by partisan concerns." 553 U.S. at 191. The Court considered those asserted interests under Anderson analysis nonetheless because they were "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process." Id.[15]; see also Tashijan

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both the State and the RNC fully briefed the sufficient support interest in their summary judgment submissions, and LPNH had a full opportunity to respond to this argument in its reply brief and at oral argument.

[15] Justice Scalia's concurrence in the judgment accepted the lead opinion's articulation of these state interests. See Crawford, 553 U.S. at 209.

v. Republican Party of Conn., 479 U.S. 208, 217-25 (1986) (considering multiple interests asserted by state without inquiring into whether those interests were actual or post hoc). Here, too, it is enough that HB 1542 furthers the State's undisputed interest in preventing ballot clutter.[16]

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[16] LPNH claims in passing that HB 1542 represents an "intentional effort to discriminate against the Libertarian Party." Doc. No 36-1 at 9 (capitalization modified). If, of course, the record supported this claim – if, for instance, direct evidence showed that members of either the General Court or either of the major parties intended HB 1542 to stifle LPNH or any other third party – then legislative motivation would be highly consequential. The record, however, contains no such evidence. To support its intentional discrimination claim, LPNH recounts how, before the 2012 LPNH petition drive began in summer 2011, Secretary Gardner initially believed that third-party nomination papers needed to be signed during the election year. See id. But after LPNH explained to him that the same-year restriction applied only to individual candidates and not to third parties under New Hampshire law at that time, he relented and told LPNH that the State would accept nomination papers signed in either 2011 or 2012. Id. at 10. After the 2012 election, however, in December 2013, Secretary Gardner's office endorsed the passage of HB 1542, which extended the same-year requirement to third parties. Id. LPNH points to no other evidence supporting its intentional discrimination claim.

I can discern no basis on which this account could support a reasonable inference of intentional discrimination against LPNH, and LPNH's brief provides no such explanation beyond merely recounting these facts. See id. at 9-10. More broadly, beyond its conclusory and undeveloped assertion at oral argument that the record as a whole suggests intentional discrimination against it, LPNH has offered no other sufficient basis for its intentional discrimination claim – nor could it, given the lack of any supporting evidence in the record. Thus, I treat LPNH's intentional discrimination claim as a nullity for purposes of

LPNH also argues that HB 1542 does not advance the State's interest in preventing ballot clutter because "[t]he regime before HB 1542" – namely, the existing three percent threshold unaccompanied by any same-year requirement – "already served this state interest." Doc. No. 43 at 16. Logically, however, this argument implies that states cannot modify their ballot-access regulations until actual voter confusion or distracting frivolous candidacies occur, a position that the Supreme Court rejected in Munro v. Socialist Workers Party, 479 U.S. 189 (1986). "To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions," the Court held there, "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." Id. at 195. For that reason, the Court's ballot-access doctrine permits state legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights."

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summary judgment.

Id. at 195-96. Thus, the relevant question here is whether the challenged restriction is itself reasonable and sufficiently justified by a regulatory interest, not, as LPNH suggests, whether the existing regulations preceding the restriction were already effective. As I have explained, HB 1542 imposes only a reasonable burden on ballot access that is outweighed by the State's interest in avoiding ballot clutter. Under Munro, that conclusion ends the matter, and the State need not make an additional factual showing of actual ballot overcrowding or voter confusion predating HB 1542 for the law to survive. See id.

IV. CONCLUSION

This case requires me to decide only whether HB 1542 violates the First and Fourteenth Amendments to the U.S. Constitution. For the reasons I have explained, I conclude that it does not.

Reasonable minds can and do disagree about the wisdom of this country's present two-party political structure, and there is little question that, for better or worse, HB 1542 promotes that structure to at least some degree by making it marginally more difficult for third parties to gain ballot access in New

Hampshire. But because HB 1542 does not breach any of the constitutional ballot-access boundaries that the Supreme Court has established, it is for the New Hampshire legislature to decide whether the law serves the interests of this State's voters.

HB 1542 prescribes a reasonable and nondiscriminatory ballot-access restriction that is justified by the State's interest in requiring political parties to demonstrate a sufficient level of support within the State. It is therefore not unconstitutional. Thus, I deny LPNH's motion for summary judgment (Doc. No. 36) and grant the Secretary's motion for summary judgment (Doc. No. 40). The clerk shall enter judgment accordingly and close the case.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

August 27, 2015

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