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

REPLY BRIEF OF APPELLANT, LIBERTARIAN PARTY OF NEW HAMPSHIRE

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Dated: April 20, 2016

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I. INTRODUCTION

The Libertarian Party of New Hampshire ("LPNH") appeals the Memorandum and Order ("Order") of the Federal District Court for the District of New Hampshire upholding as constitutional HB 1542. HB 1542 was enacted by the New Hampshire legislature in 2014 and requires nomination papers for a political organization to appear on the general election ballot to be signed during the same year as the general election.

On February 19, 2016, LPNH filed its brief explaining that under the test adopted by the United States Supreme Court in Anderson v. Celebrezze, 460 U.S. 780 (1983), HB 1542—like the identical law struck down in Block v. Mollis, 618 F. Supp. 2d. 142 (D.R.I. 2009)—imposes unconstitutional burdens on a third party's First and Fourteen Amendment rights because the newly-enacted January 1 start date to collect signatures: (i) impermissibly shortens the time frame to collect and submit nomination papers; (ii) burdens LPNH's ability to meaningfully campaign and electioneer during the general election year; and (iii) forces LPNH to "sit on the sidelines" during the odd year before the general election. LPNH also argues that the State of New Hampshire failed to present a "precise interest" of sufficient legitimacy and strength to justify the law in light of the severe burdens HB 1542 imposes.

On March 24, 2016, the State of New Hampshire filed its brief arguing that HB 1542 is constitutional. The Republican National Committee ("RNC") filed an amicus brief in support of HB 1542 on March 31, 2016. Instead of defending the district court's Order, the State largely focuses on facts not found by the district court when arguing that HB 1542 imposes a "reasonable and nondiscriminatory burden." The State also largely ignores the record before the district court when attempting to justify the State's interest in the law.

II. BURDENS

When reviewing a ballot access restriction, the 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." Anderson v. Celebrezze, 40 U.S. 780, 789 (1983). The district court determined that HB 1542 creates a burden that, "although not severe, is more than trivial," thereby necessitating a more "searching review than mere rational basis scrutiny" to justify the State's professed interest in the law.[1] Add. 93 n. 11; see also Add. 83 ("for several reasons, this new burden, although not trivial, is also not severe"); Add. 91

[1] As discussed in LPNH's opening brief, the District of Rhode Island described an identical Rhode Island law one of "the most onerous in the nation, so a least a strong argument can be made that the restriction is on the severe side." Block v. Mollis, 618 F. Supp. 2d. 142, 151 n. 11 (D.R.I. 2009). Like the law in Block, HB 1542 is among the most restrictive ballot access laws in the country concerning the start date for third parties to begin collecting nomination papers necessary to obtain ballot access in advance of an election.

("I conclude that HB 1542 imposes only a reasonable and nondiscriminatory, and not a severe, burden on ballot access"). Although LPNH disagrees with the district court's determination regarding the degree of the burden imposed, there can be no dispute the district court found that the law imposes a burden on third parties seeking ballot access in the general election.

As with its arguments before the district court, the State minimizes the obvious burdens imposed by HB 1542's January 1 start date. In fact, the State does not argue that this Court should adopt the finding of the district court that the burden imposed, while not severe, is "more than trivial," thus necessitating a more "searching review than mere rational basis scrutiny." Rather, the State attempts to distract this Court from HB 1542's obvious burdens by focusing almost exclusively on its claim that the law is only burdensome on LPNH because the Party lacks sufficient "public support" to collect the signatures required by law within its seven-month time frame. State's Brief at pp. 19-30; Id. at p. 21 (arguing that LPNH's difficulty "was due to LPNH's lack of support in New Hampshire"). This "public support" argument is a red herring, misses the mark, and can be easily dismissed.

The question before this Court under Anderson is not whether LPNH has sufficient public support in New Hampshire, but whether HB 1542 imposes onerous burdens on third parties and whether those burdens are justified. See

Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 591-95 (6th Cir. 2006) (examining inherent burdens of ballot access restriction independent of "support" of the plaintiff third party challenging the law). The State's argument makes the Anderson burden analysis a self-fulfilling prophecy. According to the State, if LPNH can comply with the law, it is not burdensome.[2] If LPNH cannot comply with the law, it is not because the law is burdensome, but rather because the party lacks "public support." Under the State's argument, it is difficult to envision how a restrictive ballot access law—even if it saddles struggling third parties with obvious and onerous burdens—could ever be deemed unduly burdensome sufficient to trigger heightened scrutiny. Under this theory, any burdens imposed

[2] Even if LPNH could comply with HB 1542, that would not be dispositive in determining whether HB 1542 is unduly burdensome. Despite the RNC's claim to the contrary, see RNC Br. at 11-12, "the fact that an election procedure can be met does not mean the burden imposed is not severe." See Libertarian Party of Ohio, 462 F.3d at 592 ("The fact that the LPO could comply with all of the requirements, and had done so in the past, the State contends, is evidence that the burden imposed is not severe. We find this argument equally unpersuasive."); see also 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."); 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.").

by a restrictive ballot access law, no matter how severe, are simply a product of the impacted third party's inability to gain political support, not the law itself. If the State is correct—and it is not under Anderson—states would effectively have carte blanche to enact burdensome ballot access laws. The circular nature of the State's argument should not be lost on the Court. It is laws like HB 1542—passed without any consideration of the burdens its places on third parties—that further entrench the two-party system and cause third parties to struggle.

Judge Smith's decision in Block also rejects the State's effort here to mask the burdens of HB 1542 under the guise of "party support." There, the Court concluded that the law constituted an "enormous speedbump on the path to party recognition" even though the Moderate Party (i) had far less support in Rhode Island than LPNH has in New Hampshire and (ii) was described by the State of Rhode Island as "a few people sitting around a coffee table in Barrington [Rhode Island]." See Block, 618 F. Supp. 2d at 145. As the Block Court described the Moderate Party:

> In the 2008 election, the Moderate Party formally, if modestly, entered the world of Rhode Island politics. It endorsed thirteen candidates for the state General Assembly and held two fund-raising events. The PAC was used as a fund-raising vehicle to receive donations and support candidates whom the Moderate Party endorsed. To date, it has raised between six and eight thousand dollars. The Moderate Party issues press releases through its website and allows citizens to register; approximately 600 have registered to date. It recently ran a local radio advertisement. There is no Moderate Party office and no paid staff, though Mr. Block refers to 40-50 of the registered individuals as "activists" who have expressed willingness to perform work

on the organization's behalf.

Id. Thus, in Block, the law was correctly struck down because it, like HB 1542, simply could not be justified despite the modest support of the Moderate Party in Rhode Island.

The State's "public support" argument is largely a rehash of an argument presented below that was appropriately not adopted by the district court in its findings. This argument is also factually incorrect. For example, the State argues that LPNH's lack of public support is demonstrated by the facts that (i) there are no Libertarians in the New Hampshire legislature and (ii) there are few individuals registered as LPNH members. State's Brief at p. 7. However, this is a function of state law that presently precludes individuals from registering to vote as a Libertarian. In New Hampshire, a "party" is a political organization which at the preceding general election received at least 4 percent of the total number of votes cast for governor or United States Senate. RSA 652:11. An "undeclared voter" is any "voter who is registered as a member of no political party." RSA 652:16-a. Thus, currently in New Hampshire, a voter only has the option to register as a Republican, Democrat, or "undeclared" voter.

This was not always the case. LPNH held party status after the 1992, 1994 and 1996 general elections when the threshold set forth in RSA 652:11 was 3 percent. LPNH Brief at p. 8 n. 4. Since 1997, when RSA 652:11 was amended by

raising the threshold from 3 percent to 4 percent, only the Democratic and Republican parties have satisfied this definition for the last 18 years. Id. at p. 3 n. 2. Thus, since 1998, voters have only been able to register as Democrats or Republicans, or as "undeclared." This impact is best explained by John Barbiarz, the Libertarian Party's 2012 candidate for Governor: "I was registered in—as Libertarian in New Hampshire when there was the opportunity to register as Libertarian in New Hampshire. Once we lost party status and unable to register as Libertarian, I've registered as undeclared …" JA 156 (Barbiarz Depo. 83:1-5). Thus, even the Libertarian candidate for governor is currently prohibited from registering as a Libertarian under New Hampshire law. Moreover, since at least 2008, there are more "undeclared voters" registered in New Hampshire than voters registered as Democrats or Republicans. See http://sos.nh.gov/NamesHistory.aspx. As of the 2014 general election, approximately 43% of voters in New Hampshire are "undeclared." JA 15 (LPNH Int. Answer No. 6). State law precludes these voters from registering with a third party even though that voter's sympathies may lie with the Libertarian Party, the Green Party, or any other third party.

The State also makes a contradictory argument regarding the import of paid petitioners and their relationship to public support for the Libertarian Party. State's Brief at pp. 8-11. The State argues that when LPNH attempted to petition with unpaid volunteers, it was largely unsuccessful, thus demonstrating lack of public

support. Id. at pp. 22-23. But this is undermined by the State's additional argument that the success of paid petitioners during the 2012 election cycle demonstrates that it is not burdensome to collect signatures within a shortened time frame. Id. at pp. 9-11, 21-22. Of course, when paid petitioners successfully collected signatures on behalf of LPNH, those signatures reflected real New Hampshire voters, ranging in the thousands, who supported LPNH's attempt to obtain ballot access in the general election. The relative lack of success of LPNH volunteers (who have day jobs and other personal responsibilities) in collecting signatures as compared to the higher success rate of paid petitioners does not demonstrate lack of support within the State; rather, it establishes that petitioning is a skill and that paid professionals are much better at it than volunteers no matter how fervent their beliefs may be. This is why the "paid petitioner" industry exists in the first place.

Contrary to the general theme of the State's argument, the 2012 election results also demonstrate that LPNH has public support within the State of New Hampshire. Having completed the petitioning process in August 2012, the Party was able to run a slate of candidates during the 2012 election, including the following:

- Gary Johnson/Jim Gray [President/Vice President]: 1.2% (8,212 votes)
- John Babiarz [Governor]: 2.8% (19,251 votes)
- Brendan Kelly [Congress District 1]: 4.2% (14,521 votes)

- Hardy Macia [Congress District 2]: 4.4% (14,936 votes)
- Howard Wilson [Executive Council District 1]: 4.8% (6,403 votes)
- Michael J. Baldassarre [Executive Council District 3]: 4.5% (6,182 votes)
- Kenneth E. Blevens [Executive Council District 4]: 4.7% (5,705 votes)
- Richard Kahn [Senate District 14]: 5.9% (1,466 votes)
- Rich Tomasso [Senate District 16]: 3.3% (921 votes)
- Ian Freemen [Cheshire House District 16]: 10.1% (1,488 votes)
- Stephen Stefanik [Hillsborough House District 16]: 9.9% (633 votes)
- Aidan Ankarberg [Strafford House District 5]: 4.7% (112 votes)

JA 15 (LPNH Int. Resp. No. 6). The support LPNH received was strong "down ticket" and was especially impressive given that, during the 2012 general election, voters were not permitted to register as "Libertarian." Id.

Such levels of support also demonstrate that LPNH has the ability to contribute to public debate and impact the outcome of elections, including the Presidential election. In an important swing state that could tip the balance of power in both the presidential election and United States Senate, it is no surprise the RNC attempted to intervene in this case and now files an amicus brief in an attempt to keep a center right competitor off the ballot. See Anderson, 460 U.S. at 801-02 (no governmental interest exists in protecting existing parties from competing with independent or third party candidates); see also Libertarian Party of Ohio, 462 F.3d at 594 ("it is important to note that the state's interests in regulating an election cannot trump the national interest in having presidential candidates appear on the ballot in each state").

The Moderate Party in Block is a far cry from LPNH here. Despite onerous ballot access laws in New Hampshire, LPNH nonetheless (i) has been involved in state politics for approximately four decades, (ii) currently has hundreds of members despite current state law which bars voters from registering as "Libertarians," (iii) obtained party-wide ballot access in 2012 by collecting more than 19,000 "raw" nomination papers, which translated into approximately 15,000 verified nomination papers signed by New Hampshire voters who supported LPNH's attempt to obtain ballot access, and (iv) is the only third party in New Hampshire to have successfully completed the party-petitioning process. See JA 6-11 (LPNH Int. Resp. No. 2). The thousands of Granite Staters who cast over 77,000 votes for Libertarian Party candidates running for state office during the 2012 general election would surely disagree with the State's contention that the Party has little support in New Hampshire. See JA 14-16 (LPNH Int. Resp. No. 6).

The State and the RNC also contend that LPNH candidates can, while they are petitioning, freely campaign before the Party completes its petition drive, just as major party candidates can campaign "before they have successfully obtained their party's nomination in the primary election in September." See State's Br. at 25; see also RNC Br. at 15-16. This ignores three basic realities: (i) major-party primary candidates are not required, like third-party candidates, to also engage in petitioning that will dispositively determine their candidacy (while primary

candidates of major parties get the benefit of campaigning in a primary election run by the State); (ii) major parties already have party-wide ballot access regardless of who wins their parties' respective primaries[3]; and (iii) LPNH candidates—unlike major party primary candidates who are actually competing in a primary election—have no public election to campaign for until early September when the Party is informed by the Secretary of State's Office that it has collected sufficient signatures and can now run its slate of candidates. It should go without saying that primary elections provide significant benefits to the major parties by allowing candidates to gain name and issue recognition with the public before they obtain a party's formal nomination.

It is also a fiction to assume that major party candidates—especially those running for President and U.S. Senate—are not campaigning for the general

[3] The RNC compares the tens of thousands of dollars LPNH would need to obtain ballot access to the fact that the 2012 Republican nominee for Governor in New Hampshire, Ovide Lamontagne, spent over $1 million in a contested primary to obtain the Republican party gubernatorial nomination. See RNC Br. at 20. This is comparing apples to oranges. These funds were, of course, not used for the Republican Party's general ballot access in 2012. Regardless of how much money Mr. Lamontagne spent (or whether he even ran), the Republican party already had access to the gubernatorial ballot during the 2012 general election. In fact, this $1 million worth of expenditures only highlights the burdensome nature of HB 1542. While Mr. Lamontagne was campaigning and getting his message out during the summer of 2012, the Libertarian Party was burdened by the petitioning process during this critical time period. While tens of thousands of dollars may be peanuts to the Republican Party with millions of dollars at its disposal and lawyers on retainer, it is preclusive to LPNH.

election until after the entire primary election process is formally completed.[4] Primary elections are often not meaningfully contested, thereby allowing major party candidates to devote most of their resources to the general election (e.g., Governor Maggie Hassan's 2014 gubernatorial campaign, Hassan's 2016 Senatorial campaign, Senator Kelly Ayotte's 2016 Senatorial campaign, Congresswoman Ann McLane Kuster's 2014 congressional campaign, President Barack Obama's 2012 presidential campaign, etc.). While the major parties have a significant head start in these general election races, LPNH is left to engage in petitioning activities before it even knows it has a general election to campaign for.

[4] Obviously, the time period between March and July of the general election year—the same time period when third parties are collecting nomination papers under HB 1542—is an important time for political parties to engage in campaigning and electioneering for the general election. This is evidenced by the campaign activities of the major parties during that time. For example, the RNC's own presidential candidate in 2012, Mitt Romney, was effectively the Republican Party nominee well before the state primaries ended and before the late August 2012 party convention. The RNC itself named Mr. Romney the "presumptive nominee" in April 2012. See Michael A. Memoli, "RNC Officially Names Mitt Romney the Party's 'Presumptive Nominee,'" Los Angeles Times (Apr. 25, 2012), available at http://articles.latimes.com/2012/apr/25/news/la-pn-rnc-officially-names-mitt-romney-the-partys-presumptive-nominee-20120425. Thus, in 2012, while Mr. Romney was campaigning for the general election from April to late July, LPNH was collecting nomination papers. President and Democratic nominee Barack Obama had been campaigning for the general election since well before April 2012. Id. ("The Obama campaign and the Democratic National Committee have been working hand-in-hand for more than a year at this point, and have dozens of field offices and paid staff fanned out in key battleground states.").

It will not know if its candidates will be on the ballot until early September.[5]

Finally, the State bizarrely claims that LPNH had no intention of obtaining ballot access for the 2016 general election. State's Brief at pp. 11-12. The evidence cited by the State does not support this contention. As Party Chair Rich Tomasso stated clearly at his April 2015 deposition, LPNH understandably had put all party-petitioning efforts—including fundraising for those efforts—on hold until this litigation ends, as the outcome of this litigation would dictate whether the Party would even go through the party-petitioning process during the 2016 general election. As he explained: "[R]ight now, we—we couldn't start petitioning until January 1 if the law stands. So … until this litigation's resolved, there is sort of a big question mark of when we can actually start if we decide to go with this option." JA 104 (Tomasso Depo. 100:13-16). As LPNH repeatedly explained in discovery, the outcome of this litigation would likely be dispositive as to whether LPNH would even go through the party-petitioning process in the future given the severe burdens HB 1542 imposes. See JA 6-11 (LPNH Int. Resp. No. 2); JA 104, 105-06, 108-09 (Tomasso Depo. 97:4-5, 104:23-105:15, 116:6-117:15); JA 166, 169 (Babiarz Depo. 121:11-122:4, 134:18-135:1).

[5] The State appears to acknowledge that petitioning is fundamentally different than campaigning in its brief when it claims that, "when a political organization seeks a voter's signature on a nomination petition, it simply asks a registered voter to give the party a chance to be on the ballot." See State's Br. at 37. Indeed, petitioning and campaigning and fundamentally different activities, and petitioning is neither a replacement for nor an equivalent to campaigning. See LPNH Brief at p. 39-40.

This has turned out to be the case. Because the district court upheld HB 1542 in its August 2015 order, LPNH abandoned the party-petitioning process for the 2016 general election because it could not petition in 2015; instead, the Party hopes to successfully complete the individual-candidate petitioning process which only requires a 3,000 nomination paper threshold to place a gubernatorial or U.S. Senate candidate on the ballot (yet does not allow the party to run an entire slate of candidates until the next general election only if that candidate reaches the 4 percent threshold). See Libertarian Party of Ohio, 462 F.3d at 592 ("the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other") (citations omitted). This is likely a harbinger for things to come. If LPNH—New Hampshire's largest and most prominent third party—cannot endure HB 1542's burdens, then who can? HB 1542 will effectively render the party-petitioning process a dead letter.[6]

The burdens of HB 1542 go far beyond its compressed seven-month time frame for petitioning. This case is not, as the State and the RNC suggest, simply a math problem concerning how many signatures need to be collected in a given time period. Like the analogous laws imposing an early end date to complete

[6] Moreover, if it was true that LPNH had no intention of using the party-petitioning process to obtain ballot access, LPNH would not have instituted the suit, the State would not have stipulated LPNH has standing to litigate the claim, and the district court would not have ruled in an expedited manner in advance of the 2016 general election.

petitioning that have been repeatedly struck down, this January 1 start date creates unique and onerous burdens to third parties in New Hampshire that are now forced to "sit on the sidelines" during the odd year and then petition squarely during the general election cycle when the major parties are engaging in campaigning. See, e.g., Anderson, 460 U.S. at 786-806 (striking down early deadline to submit petitions); Libertarian Party of Ohio, 462 F.3d at 589-91 (same – filing deadline one year in advance of general election); Citizens to Establish a Reform Party of Ark. v. Priest, 970 F. Supp. 690, 697-98 (E.D. Ark. 1996) (concluding that a January deadline prevented minor parties from finding volunteers, attracting media coverage and recruiting supporters, all of which impacted its ability to appear on the ballot); McLain v. Meier, 637 F.2d 1159, 1163-64 (8th Cir. 1980) (same – June deadline 90 days in advance of primary); Cal. Justice Comm., 2012 U.S. Dist. LEXIS 150424, at *22 (same – early qualification deadline). The only other court to address a January 1 start date—Block—correctly struck it down in light of these obvious burdens. This Court should as well.

III. THE STATE'S *POST HOC*, SHIFTING JUSTIFICATIONS

The State misstates LPNH's arguments regarding the proper standard for assessing the state's purported interests in HB 1542 and ignores the actual record before the court on this singular issue.

The Anderson test provides for a "flexible sliding scale approach for assessing the constitutionality" of ballot access restrictions. Barr v. Galvin, 626 F.3d 99, 109 (1st Cir. 2010). 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 then 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).

The district court found that HB 1542 did not impose a severe burden, but did impose a burden of sufficient magnitude to require more than rational basis review to uphold the law. Add. 93 n. 11. If this Court agrees that the burden imposed by HB 1542 falls within the poles of Anderson's "sliding scale approach," then it must resolve the issue of what evidence the State must proffer when identifying the "precise interest" justifying the law as the degree of scrutiny increases along with the law's burdens. This includes the question of whether post hoc justifications are appropriate if heightened scrutiny is required.

Because the rights to associate and to vote are fundamental, LPNH argues that, as with other areas of heightened scrutiny, post hoc justifications may not be considered when determining the constitutionality of HB 1542 given its burdensome nature. LPNH Brief at 54 (citing United States v. Virginia, 518 U.S.

515, 533 (1996)). However, LPNH's does not constrict its argument to intermediate scrutiny review as suggested by the State. LPNH argues that the burdens imposed by HB 1542 are severe, thus triggering strict scrutiny review. Alternatively, if this Court determines that the burdens are significant, but not severe, heightened intermediate scrutiny should apply where post hoc justifications still cannot be considered. And even if this Court does not apply pure intermediate scrutiny review and rather applies a level of review similar to that applied by the district court, it should find HB 1542 is unconstitutional, as did the district court in Block. This is one area in which the district court erred. Despite the district court's finding that HB 1542 requires more "searching review than mere rational basis scrutiny," the district court effectively (and incorrectly) applied rational basis review in its exceedingly deferential analysis, including by deferring to post hoc justifications that were manufactured by the lawyers tasked with defending HB 1542 in an effort to avoid the outcome in Block.[7]

[7] The RNC cites the following quote from Timmons v. Twin Cities Area New Party, 520 U.S. 351, 378 n.6 (1997) to argue that this Court can consider post hoc justifications: "the State is not required now to justify its laws with exclusive reference to the original purpose behind their passage." See RNC Br. at 24. However, this quote is from the dissenting opinion of Justice Stevens and Ginsburg, not the majority opinion. In any event, this conclusory statement says nothing about whether post hoc justifications are appropriate where the nature of the law's burden, as is the case here, warrants a higher degree of scrutiny under Anderson. Moreover, even if post hoc justifications were used by the Court in Timmons, that likely was because—unlike HB 1542—the restriction there was minimally burdensome, thus justifying a lower level of scrutiny. Given the

A. The State's Abandoned Justifications

The actual purpose of HB 1542 when it was considered by the legislature was to cull out allegedly stale signatures. As the legislative history explains, the law was designed to "reduce the number of invalid signatures, due to death or relocation, which might arise if signatures are submitted earlier [before January 1 of the general election year." JA 53 (legislative history). Block correctly rejected this justification as "nonsensical," explaining that "the process is self regulating: if the new party is worried that it will get stale signatures by starting too early, then it will wait. It does not need an artificial statutory date to make it do so." Block, 618 F. Supp. 2d at 152. As a result of the Block decision, the State has abandoned this justification for the law in this litigation. Indeed, in discovery, the State's witness, Deputy Secretary of State David Scanlon, testified that there is no evidence that nomination papers signed during in the odd year were more difficult to verify than nomination papers signed during the general election year. JA 34-35 (Scanlan Depo. 60:14-61:62:10).

Having abandoned the justification upon which the legislature relied in passing HB 1542, the State manufactured another justification for HB 1542 in response to this litigation in an attempt to avoid Block. At the motion to dismiss stage, the State's lawyers initially claimed before the district court that the law was

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burdens imposed by HB 1542, a higher degree of scrutiny is warranted here that prohibits the State from relying on manufactured after-the-fact justifications.

necessary in relation to a purge of the voter registration list that takes place every ten years pursuant to RSA 654:30. See State's Sept. 22, 2014 Mot. to Dismiss, at pp. 9 (Doc. No. 9-1) (arguing that law was necessary because "New Hampshire law requires verification of checklists only once every 10 years"). However, in discovery, this second justification was rejected by Deputy Scanlon, who testified that HB 1542 was not related to this purpose. JA 28 (Scanlan Depo. 33:8-19) (disavowing notion that 10-year purge was related to HB 1542's rationale). As a result, the State declined to advance this argument at summary judgment, and does not advance this justification on appeal as well. The State's justifications for HB 1542 have been a moving target throughout this case.

B. Aligning the Party-Petitioning Process With the Individual-Candidate Petitioning Process

The next governmental justification proffered by the State is that HB 1542 aligns the start date for collecting signatures for political organizations with the start date for collection of signatures for individual candidates. See State's Br. at 38; RNC Br. 27-28. Notwithstanding the fact that the district court declined to consider this justification, the State and the RNC proffer it as a justification on appeal. However, there is no evidence in the record that the legislature enacted HB 1542 for this purpose; indeed, the alleged interest was not even disclosed in the State's interrogatory responses when it was asked why HB 1542 is necessary. JA 74 (Sec. of State Int. Resp. No. 8); see Hartford Cas. Ins. Co. v. McJ Clothiers, 54

Fed. App'x 384, 388 (4th Cir. 2002) ("[W]here parties do not disclose, in response to interrogatory requests, opinions to which witnesses will testify, the undisclosed testimony is inadmissible.").

Additionally, the signature requirement for political organizations and the signature requirement for candidates are not analogous; in fact, they are worlds apart. Based on voter turnout in the 2014 elections, LPNH would need to submit approximately 14,800 verified nomination papers to qualify for the 2016 general election ballot. Add. 71. In contrast, individual candidates for president, United State senator or governor only require 3,000 verified nomination papers, and candidates for the United States Congress only need 1,500 verified nomination papers. RSA 655:42, I, II; see Libertarian Party of Ohio, 462 F.3d at 592 (noting differences between party petitioning and individual-candidate petitioning).

Conformity for conformity's sake without any identifiable government need is also not a legitimate governmental interest. The district court correctly appeared skeptical of this rationale at oral argument: "I don't know that you [Plaintiff's counsel] need to spend a lot of time on alignment because to the extent alignment is a justification, mere alignment is not sufficient to justify very much of a burden. That they have a law that unreasonably burdens the requirement to get on as an individual candidate doesn't justify extending that unreasonable burden to a party that wants to get on as a party. I don't think alignment—it's an argument, but I

don't think by itself could justify very much of a burden." Tr. of June 18, 2015 Oral Argument at 134:22-135:6 (Doc. No. 51).

Despite the RNC's conclusory assertion, there was no confusion among municipal clerks that would justify a change in the petitioning start date for political parties. See RNC Br. 27-28. Indeed, the State does not argue that RSA 655:40-a was in any way ambiguous as to when parties could collect nomination papers prior to HB 1542's passage. Deputy Secretary of State David Scanlan testified clearly that, prior to passage of HB 1542, a January 1 start date only applied to individual candidates and that parties could collect nomination papers before this date. *See* JA 21 (Scanlan Depo. 7:7-10). It is undisputed that not a single clerk, municipal official, or Supervisor of the Checklist expressed any "confusion" to anyone after 2009 concerning whether party petitions pre-dating January 1 of the general election year could be accepted. It is also undisputed that all LPNH's verified nomination papers collected in 2011 were verified without incident by local officials. And even if the legislature had considered this interest (which it did not), the more narrowly tailored approach would be to amend the 2009 law to remove the January 1 start date regarding individual candidate petitions rather than making the party-petitioning process more difficult.

C. "Current" Party Support

Finally, as discussed in LPNH's brief, the state interest ultimately adopted by the district court—current support—was proffered at the eleventh hour without being disclosed in discovery. The justification of requiring that a political party's support be "current" appears nowhere as a rationale for HB 1542 in the State's interrogatories or at Mr. Scanlan's deposition where the State had an opportunity to explain why the law is needed.[8] JA 74 (Sec. of State Int. Resp. No. 8) (not mentioning "current" nature of support); JA 33 (Scanlan Depo. 53:2-18) (not mentioning "current" support). There is no evidence in the record that this justification was even considered by the legislature or the Secretary of State at the time HB 1542 was being considered. Neither the State nor the RNC dispute that this is a post hoc justification for the challenged law.

Nor is there any evidence in the record rendering a January 1 start date as a talisman for identifying current political support. Mr. Scanlon testified that the date was totally arbitrary and not tied to any studies regarding election efficiency or its impact on any third parties. JA 23-25 (Scanlon Depo. 15-17:7). There is also nothing in the record to suggest that a third party's support by petition in, for example, October of the odd year before a general election is any more likely to be

[8] Because the interest was not disclosed in discovery, LPNH had no opportunity to test the interest as it did with the initial two interests the State proffered and then abandoned after Mr. Scanlon's deposition.

fleeting by the November general election than the support that a major political party has received by vote in the prior election **two years before the general election**. In fact, in this instance, the support received by the third party would be **more current** than the support received by the major party in the prior election. Yet HB 1542 would ignore these petitions that reflect more current support for a third party, while crediting the staler support received by the major parties. The discriminatory nature of this regime against third parties is apparent, and HB 1542 should be struck down for this reason alone.

Even on appeal, the State cites nothing in the record—no testimony, no data, no reports, no articles, nothing—linking the January 1 start date with the proffered interest in assessing current support to avoid ballot clutter. Simply put, the State, despite being required to do so given the application of heightened scrutiny, "has provided no evidence that its registration procedure for minor parties in any way protects these interests." See Libertarian Party of Ohio, 462 F.3d at 594. The reality is that HB 1542 is not necessary to assess party support. As both the Block Court and Deputy Secretary Scanlan acknowledged, the three percent threshold for collecting signatures already serves this interest. Block, 618 F. Supp. 2d at 154-55; JA 33 (Scanlan Depo. 53:2:11) (noting that "the percentage of nomination papers that are required" is one way to assess whether a third party has a "reasonable level of support"); see also Cal. Justice Comm., 2012 U.S. Dist. LEXIS 150424, at *22

(law's numerosity requirement, as opposed to its timing requirement, serves the state's interests in limiting ballot access to only bona fide parties).

Cut to its core, the "current support" interest was created out of thin air by lawyers representing the State and the RNC in litigation to avoid the outcome in Block. No one considered current support as a justification for the law when it was being considered. The State does not cite the record in support of its proffered interest. This is because there is nothing in the record to support it. There is no need to speculate regarding the purpose of HB 1542. It was not propounded to gauge current public support in an effort to avoid ballot clutter. Based on the actual record before the Court, the precise interest relied upon by the district court has no "legitimacy" or "strength," and it is not "necessary" to burden LPNH's rights under the First and Fourteenth Amendments to the United States Constitution.

IV. CONCLUSION

This Court should vacate the judgment of the district court and declare HB 1542 unconstitutional. The State is not a "wholly independent or neutral arbiter" given that it is controlled by the political parties in power "which presumably have an incentive to shape the rules of the electoral game to their own benefit." Libertarian Party of Ohio, 462 F.3d at 587 (quoting Clingman v. Beaver, 544 U.S. 581 (2005) (O'Conner, J., concurring)). The RNC's involvement in this case

proves this point. Thus, it is vital that this Court protect the interests of third parties in New Hampshire that are not adequately represented in the political process. Here, HB 1542 cannot be justified. It was passed with no meaningful discussion by the legislature of its impact on third parties. It was passed by the legislature using a justification that had been struck down as "nonsensical" in the Block decision. And then, when faced with a legal challenge to this law relying upon Block, the State—with the help of the RNC—has changed the law's justification in an attempt to save it. But these shifting justifications only highlight how HB 1542 is unjustifiable. HB 1542 must be struck down.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 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 WITH RULE 32(a)

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,480 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman in Microsoft Word 2010.

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