UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

PLAINTIFF'S CONSOLIDATED (I) OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND (II) REPLY TO DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Libertarian Party of New Hampshire ("Party") hereby submits its consolidated (i) Opposition to Defendant Secretary of State's Cross-Motion for Summary Judgment and (ii) Reply to Defendant's Objection to Plaintiff's Motion for Summary Judgment.

The memoranda filed by Defendant Secretary of State and *amicus* Republican National Committee ("RNC") confirm that, under any standard of review, the sentence "Nomination papers shall be signed and dated in the year of the election" in House Bill 1542 (hereinafter, "HB 1542") violates the First and Fourteenth Amendments. Nowhere in these briefs is there an attempt to distinguish this case from *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009)—a case which held that an identical law (i) was an "enormous speedbump on the path to party recognition" and (ii) "hamper[ed] the ability of a political organization to compete in a meaningful way in an election year leading up to the actual election date." *Id.* at 151-52. Neither the State nor the RNC contest that HB 1542, like the law struck down in *Block*, places its new compressed time frame for collecting nomination papers squarely within the general election cycle when the major parties are

engaging in general election campaigning. This Court must reach the same obvious and common sense conclusion that the *Block* Court reached, especially where the Party has produced actual evidence of burden based on its prior experience during the 2000 and 2012 general elections—evidence which did not exist in *Block* where the Moderate Party had never even gone through the party-petitioning process. Tellingly, the State has also abandoned the very rationale for HB 1542 presented by the Secretary of State's Office before the legislature—namely, to cull out "stale" nomination papers due to death or relocation—and now asks this Court to rely upon made-up, *post hoc* justifications for the law, including justifications that the Secretary of State's Office never even mentioned in its interrogatory responses. As explained below and in Plaintiff's Motion for Summary Judgment, this Court cannot even consider these made-up rationales because heightened scrutiny applies. And even if this Court does consider them, they fail under any standard of review. HB 1542 is unconstitutional and must be enjoined.[1]

I. HB 1542 Places A Severe Burden On Plaintiff's Right To Ballot Access, Justifying Strict Scrutiny Review.

HB 1542's burdens are real, severe, and indistinguishable from those in *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009), where the Court held that an identical law placed an "enormous speedbump on the path to party recognition" and "hamper[ed] the ability of a political organization to compete in a meaningful way in an election year leading up to the actual election date." *Id.* at 151-152. Here, the burdens imposed by HB 1542 are obvious and would compromise the ability of any third party to obtain ballot access. Like the law in *Block*, HB 1542 not only compels the Party to petition in the middle of the general election season while the major parties are campaigning, but it also forces the Party to "sit on the sidelines" for the entire odd-numbered year before the general election year. *See Block*, 618 F. Supp. 2d at 150 (noting

[1] In the interest of providing a complete record, Plaintiff has included in the record all the remaining deposition exhibits used in the depositions of Libertarian Party members Rich Tomasso and John Babiarz.

contention that analogous Rhode Island law requires the Moderate Party to "sit on the sidelines" for a full calendar year before the collection period commences on January 1). Simply put, if an identical law was an "enormous speedbump on the path to party recognition" in *Block*, then surely HB 1542 must be viewed as placing the same severe burden on the Party here.

While the State attempts to dispute the legal conclusion of whether HB 1542 imposes a severe burden on the Libertarian Party,[2] the core facts of this case are undisputed and plainly indicate the onerous nature of the law. These undisputed facts are as follows[3]:

- As in *Block*, HB 1542 reduces the time for third parties to collect nomination papers from 21 months to 7 months. It is difficult to collect nomination papers during the winter

[2] For example, the State attempts to argue that "one of the main reasons the LPNH started so early … was to be sure that they collected their nomination papers before any other political organization that might seek party-wide ballot access." *See* State's Br. at 6, 15; *see also* RNC Br. at 19. The Party does not dispute that this was a reason influencing the Party's decision to begin collecting nomination papers in July 2011. However, the Party made clear at deposition that the primary reason for starting as early as possible in 2011 was because it needed as much time as feasible to collect nomination papers. *See* Tomasso Depo. 33:5-17, 37:2-18, 142:19-143:9 (the Party started collecting in late July 2011 because otherwise "it wasn't going to get completed"; "the sheer volume that we needed was … the primary reason we started as early as we did"; "primary reason" for starting in July 2011 was that "we needed that much time") (Ex. F to Biss. Aff., ¶ 7). In any event, the reasons for the Party's decision to start collecting nomination papers in July 2011 is a separate issue from the burden imposed by HB 1542. Regardless of the Party's motivations, it is not disputed that the Party needed until late July 2012 to successfully complete the collection process. Moreover, whether the start date for collecting is January 1 of the general election year or the date after the prior general election, a third party will be motivated to collect nomination papers as soon as possible in order to avoid competition from other third parties. *See id.* at 142:23-144:7. In fact, truncating the time frame to seven (7) months only increases the burden because there is a shorter time frame to collect valid signatures.

As another example, the State cites a December 2011 email from Richard Winger in an attempt to show the Party's purported lack of support. *See* State's Br. at 7. But the State fails to even reference Mr. Tomasso's response to Mr. Winger's email and Mr. Tomasso's testimony at deposition explaining this exchange. As Mr. Tomasso explained: "[Mr. Winger] does not work for the national party. He's not on the national committee. So I was clarifying his misunderstanding of the situation on the ground here in New Hampshire. I mean, for example, he said all the signatures Darryl [Bonner] collected are just sitting around. And I pointed out to him that everything's been already submitted for certification. So my recollection is he just—he just had some bad information about what the situation was in New Hampshire, and I was correcting him. I was probably a bit frustrated when I wrote this at the time …. But he [Mr. Winger] … again, I just think he had—he had bad information about what was going on in New Hampshire. And so this was to—to clarify to him and the other people who were cc'd to—indicating that—where we were and what we had been doing, just to make sure—make sure that the interested people had a better idea of what was going on in New Hampshire at the time." *See id.* at 83:13-85:7.

[3] Both parties in this case have filed motions for summary judgment. When cross motions for summary judgment are filed, each motion is examined separately, and the Court can grant summary judgment in favor of the Plaintiff while simultaneously denying summary judgment for the Defendant because the Defendant has not met its burden. As the First Circuit explained in *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274 (1st Cir. 2006): "The movant for summary judgment has the initial burden of demonstrating the absence of disputed issues of material fact. One party may be able to meet its burden on its motion for summary judgment even if the other party does not meet its burden on its cross-motion. Moreover, the facts relied on by one party in order to prevail on its motion may well be different than the facts relied on by the other party in order to prevail on its cross-motion." *Id.* at 282 n.6.

months (i.e., January and February), as evidenced by the Party's drop off in nomination papers collected during those months. *See* LPNH Int. Resp. No. 3 (*Ex. H* to Biss. Aff., ¶ 9). Thus, the time frame, in practice, is compressed further to approximately 5 months.

- As in *Block*, this compressed time frame is placed squarely within the general election cycle when major party candidates are campaigning.

- Thus, if HB 1542 remains in effect, the Party will be collecting nomination papers squarely during the general election cycle when the major parties are engaging in campaigning and electioneering, thus giving major parties a head start because they need not go through the party-petitioning process.

- 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, as evidenced by the campaign activities of the major parties during that time. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9). 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* Apr. 25, 2012 Los Angeles Times article (*Ex. NN* to Supp. Biss. Aff., ¶ 14). Thus, in 2012, while Mr. Romney was campaigning for the general election from April to late July, the Libertarian Party 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.").[4]

- Campaigning during the odd year for an elected office to be voted on during the general election is ineffective because of the remoteness to that election. Thus, during the odd year under HB 1542, acceptable petitioning is not permitted and campaigning for the general election would be ineffective, thus requiring the Party to "sit on the sidelines" during the

[4] The State contends that Libertarian Party candidates can, while they are petitioning, freely campaign before the Party completed the drive (and before they are not actually formal candidates), 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 17. This ignores two 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, and (ii) Libertarian Party candidates, unlike major party primary candidates who are actually competing in an election, have no public election to campaign for until the Party reaches the signature threshold. Primary elections, in fact, 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 conclude, as the RNC appears to argue in its brief, that major party candidates are not campaigning for the general election until after the entire primary election process is formally concluded in September. *See* RNC Br. at 20-22, 10. Primary elections are not always meaningfully contested, thereby allowing major-party candidates to devote all their resources to the general election (e.g., Governor Hassan's 2014 gubernatorial campaign, Congresswoman Ann Kuster's 2014 congressional campaign, President Barack Obama's 2012 presidential campaign, etc.). And, even if a presidential primary is contested, it is not uncommon for the presidential primary process to be effectively decided by April of the general election year. *See* Apr. 25, 2012 Los Angeles Times article (*Ex. NN* to Supp. Biss. Aff., ¶ 14).

odd year. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

- If a third party seeks to engage in petitioning, it takes considerable resources, whether in the form of using volunteers or hiring professional paid petitioners. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); *see also* State's Br. at 18 (noting the effectiveness of paid petitioners).

- Only the Libertarian Party has successfully gone through the party-petitioning process in New Hampshire, and no third party in New Hampshire has become a recognized "party" by vote under the RSA 652:11 since this law was modified in 1997. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

- In both 2000 and 2012, the Party began the nomination paper collection process well before January 1 of the general election year. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

- In both 2000 and 2012, the Party needed until the early August deadline to successfully complete the petitioning process. By that time, the major parties had already engaged in significant campaigning and electioneering in advance of the general election. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

- Signatures from paid professional petitioners cost more during the general election year than during the odd year before the general election due to competition for such paid resources in other states. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Tomasso Depo 118:23-119:20, 122:16-123:12 (*Ex. F* to Biss. Aff., ¶ 7); Babiarz Depo. 120:10-121:10, 142:20-143:15 (*Ex. G* to Biss. Aff., ¶ 8). For example, during the summer and fall of 2011, signatures collected by paid petitioning companies cost between $1.50 and $2.00 per signature. During July 2012, signatures from a paid professional collector cost approximately $3.00. *See* 2012 Petitioning Expenses Paid By National, Tomasso Ex. 10 (Ex. V to Biss. Aff., ¶ 23); LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).[5]

- The Republican Party, like the Democratic Party, did not need to spend any money on ballot access during the 2012 general election because they were "parties" under RSA 652:11 and, thus, were allowed to run a slate of candidates in 2012 without having to go through the party-petitioning process.[6]

[5] The State attempts to dispute this fact through pure speculation and without any evidence in the record. *See* State's Br. at 23. Of course, just because the State does not like a document or testimony does not mean it is disputed based on evidence in the record.

[6] The RNC attempts to discount this reality by stating that "the Republican nominee for [governor] spent $1,014,080.89 to secure general ballot access." *See* RNC Br. at 5; *see also* Sept. 19, 2012 Lamontagne Receipts and Expenditure disclosure (*Ex. MM* to Supp. Biss. Aff., ¶ 13). These funds, however, were not for the Party's "general ballot access" in 2012. Rather, these funds were for campaigning, electioneering, and fundraising as part of Ovide M. Lamontagne's primary campaign for the Republican gubernatorial nomination. Even if Mr. Lamontagne did not spend a dime on his primary campaign, the Republican Party would have had ballot access in 2012 and would have been able to run a gubernatorial candidate. 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.

- The Party's own internal manual informing members how to petition makes clear that petitioning is different from campaigning, stating the following: "Stay out of political discussions. You are out to collect signatures, not to convert people to Libertarianism."; "One good 'closer' for people who are hesitant to sign is to tell them that they are not really supporting the candidate or his ideas, just his right to be on the ballot." *See* 2001 Libertarian Political Action Materials (*Ex. Y* to Biss. Aff., ¶ 26). As one petitioner in New Hampshire explained the best way to petition: "I just launch right into it: 'Could I please have your signature to put a third party on the November ballot? *It doesn't obligate you or even mean that you support us*, but it will at least give voters a third choice in November.'" *See* LPNH Petitioning Emails from July 2011 to September 2012, at LPNH 11113 (Ex. M to Biss. Aff., ¶ 14) (emphasis added).

- Before the Party successfully completes the party-petitioning process, its candidates are not actually recognized candidates and are prohibited from running in the general election by the State. LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9).

- If HB 1542 remains in effect, the Party states that it is unlikely to use the party-petitioning process in the future and, instead, will rely on the individual-candidate petitioning process which provides no party-wide benefits immediately before an election. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Tomasso Depo. 97:4-5, 104:23-105:15, 116:6-117:15 (*Ex. F* to Biss. Aff., ¶ 7); Babiarz Depo. 121:11-122:4, 134:18-135:1 (*Ex. G* to Biss. Aff., ¶ 8).

- As in *Green Party of Arkansas v. Priest*, 159 F. Supp. 2d 1140 (E.D. Ark. 2001), HB 1542 operates to ban completely the formation or recognition of a political party in any odd-numbered year.

In an attempt to deflect attention from *Block* and the common sense burdens HB 1542 imposes, the State and the RNC have resorted to spending page after page arguing that any difficulty the Party has had in the past in collecting nomination papers was not due to the burdens placed by ballot access laws, but rather due to a "lack of funding and support within New Hampshire," especially given the Party's reliance on outside resources from the national party. *See* State's Br. at 14.[7] Even if true, this is a red herring and irrelevant. The question before this Court is not whether the Party has support in this state, but rather whether the burdens imposed by

[7] The notion that a local party's reliance on national resources somehow is an indicia of a lack of support is obviously incorrect, as the RNC's own involvement in this case reflects. Of course, the RNC's assistance of the New Hampshire Republican Party in this case does not suggest that the state Republican Party does not have local support. Ovide M. Lamontagne's 2012 gubernatorial primary campaign in New Hampshire also relied on out-of-state funds, which included holding an event at the Taj Hotel in Boston in September 2012. *See* Sept. 19, 2012 Lamontagne Receipts and Expenditure disclosure (*Ex. MM* to Supp. Biss. Aff., ¶ 13).

HB 1542 are justified. This is amply demonstrated by *Block* itself where 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 the Libertarian Party 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 noted:

> 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 struck down despite the modest support of the Moderate Party in Rhode Island.

The Libertarian Party does not dispute that it, like the Moderate Party and other third parties throughout the country, has struggled to obtain support and that it has found petitioning difficult under the regime that pre-existed HB 1542. This struggle is hardly surprising given America's entrenched two-party system and the efforts the major parties have undertaken to decrease competition, including using their substantial resources to intervene in lawsuits like this one to support onerous ballot access restrictions. This struggle is the point of this litigation and demonstrates why this is an important civil liberties case. In the face of this perpetual struggle, HB 1542's needless compression of the time frame from 21 months to 7 months would compound this burden and make the prospect of small political parties gaining traction in New Hampshire even more remote.

Though the Libertarian Party acknowledges its challenges, discovery in this case nonetheless rebuts the notion that the Party is not a vibrant political organization with support in

this state. The Moderate Party in *Block* is a far cry from the Libertarian Party here. Despite onerous ballot access laws in New Hampshire, the Libertarian Party nonetheless (i) has been involved in state politics for approximately four decades, (ii) currently has hundreds of members, (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*, and (iv) is the only third party in New Hampshire to have successfully completed the party-petitioning process. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9). These facts are undisputed. The thousands of Granite Staters who cast over 77,000 votes for Libertarian Party candidates running for state office during the 2012 election would surely disagree with the State's contention that the Party has little support in New Hampshire. *See* LPNH Int. Resp. No. 6 (*Ex. H* to Biss. Aff., ¶ 9). The Party has garnered so much support in New Hampshire that the RNC in this case has attempted to intervene in a transparent attempt to avoid competing with the Party on the ballot. In this case, the Party seeks only an opportunity to play an active, robust role in the entire campaign process. *See also Block*, 618 F. Supp. 2d at 153-154 ("Society 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.").

The State and the RNC attempt to assemble a variety of cases to suggest that New Hampshire's new time window under HB 1542 is appropriate. *See* State's Br. at 13. But these cases do not address the specific placement of this time window within the election calendar. Here, the issue is not simply the compressed time window, but the fact that this time window is placed squarely within the general election cycle when the major parties are engaging in campaigning and electioneering. For example, 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 as suggested by the opposition briefs. Accordingly, the issue of governmental justification in the signature-collection process was not even before the First Circuit in *Barr*. Rather, the question was solely whether Massachusetts law should permit substitution. *See also American Party of Texas v. White*, 415 U.S. 767 (1974) (pre-*Anderson/Burdick* case not addressing start date for collection); *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 794 (11th Cir. 1983) (the Party did not challenge the start date but rather the number of signatures required, and other aspects of the law); *Stone v. Board of Elections Comm'rs for City of Chicago*, 955 F. Supp. 2d 886, 896 (N.D. Ill. 2013) (not addressing start date or placement of collection period during the general election cycle); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (pre-*Anderson/Burdick* case addressing 5% threshold requirement, not duration of collection period, start date for collection, or placement of the collection period during the general election season); *Green Party v. Martin*, 649 F.3d 675 (8th Cir. 2011) (challenge had nothing to do with start date and placement of time frame for petitioning); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740 (10th Cir. 1988) (under Oklahoma law, party has one year to collect signatures, which was not an issue in the case; issue was end date for submitting signatures); *but see Libertarian Party of Oklahoma v. Oklahoma State Election Bd.*, 593 F. Supp. 118 (W.D. Okla. 1984) (striking down 90-day time limit for finishing petition process).

Throughout their briefs, the State and the RNC also place significant emphasis on whether complying with the requirements of HB 1542 is possible. *See* State's Br. at 13, 19-20; RNC Br. at 6. But this Court's focus is not on "possibility"; rather, it is on 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."); *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.").

Before HB 1542, New Hampshire's ballot access laws were difficult enough to satisfy. HB 1542 will make that process far more difficult. The petitioning process and the new burdens HB 1542 imposes should not be viewed in the abstract, but rather as a series of requirements that real people need to comply with simply for the Party to become a choice for voters. The emails produced in this case demonstrate not only the difficulty of the petition-gathering process, but the dedication and commitment of the Party's volunteers. *See* LPNH Petitioning Emails from July 2011 to September 2012 (Ex. M to Biss. Aff., ¶ 14). Here is a small snapshot:

- December 15, 2011 Email from Party Chair Rich Tomasso Noting That Petitioning Is Dependent on Weather: "If it's snowing or raining or just plain freezing cold, forget about it, people won't stop to sign." *Id.* at LPNH-989.

- March 8, 2012 Email from Party Chair Rich Tomasso to Party Supporters: "As I'm sure

> you are aware, the biggest challenge facing any Libertarian candidate is getting on the ballot. We have that challenge here in NH as we aim to finish our petition drive." *Id.* at LPNH-1049.

- April 29, 2012 Email from Mr. Tomasso: "Quite frankly I doubt I will have the time to update the count before the convention[.] I have a hundred things left to do before I leave, including round up of some volunteers for local elections immediately after the convention." *Id.* at LPNH-1102.

- May 9, 2012 Email from One Petitioner Copying Mr. Tomasso: Noting "the humiliating third-party experience of standing in the rain, begging voters for their signatures on increasingly soggy petitions. It is unacceptable that we have to jump through such hoops." *Id.* at LPNH-1113-1118.

Finally, it is necessary to correct the State's false assertion that the Party "has no intention of pursuing a party-wide petition effort for the 2016 general election." *See* State's Br. at 16. As Party Chair Rich Tomasso stated clearly at deposition, the Party understandably has put all party-petitioning efforts—including fundraising for those efforts[8]—on hold until this litigation ends, as the outcome of this litigation will dictate whether the Party will even go through this process. 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." Tomasso Depo. 100:13-16 (*Ex. F* to Biss. Aff., ¶ 7). Indeed, as the Party explained in discovery, the outcome of this litigation is likely dispositive as to whether the Party will even go through the party-petitioning process given the severe burdens HB 1542 imposes. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); Tomasso Depo. 97:4-5, 104:23-105:15, 116:6-117:15 (*Ex. F* to Biss. Aff., ¶ 7); Babiarz Depo. 121:11-122:4, 134:18-135:1

[8] Of course, there is no point to fundraising in 2015 for a petitioning drive when the Party's decision to undergo the party-petitioning process is dependent on the outcome of this litigation. The State also contends that the Party could simply fundraise during the odd-year and use those proceeds to petition during the general election year. *See* State's Br. at 18. This only highlights the significant burdens of HB 1542 because more proceeds are needed to collect petitions the closer that collection period is to the general election. As Mr. Tomasso explained at deposition "[b]allot access isn't a sexy fundraising topic" and it is difficult to raise funds for petitioning:

> [A]s far as fundraising goes, it's not—you know, you're not raising money for a candidate. You're not raising money to fight the state. You're not raising money for, you know, a building—things that traditionally are much better. I mean, you're—you're essentially raising money for paperwork. And so it's not—it's not as—as easy a sell in—in general.

See Tomasso Depo. 152:7-14 (Ex. F to Biss. Aff., ¶ 7).

(*Ex. G* to Biss. Aff., ¶ 8). It would be an entirely futile exercise for the Party to begin collecting nomination papers now only to have those papers rendered invalid if HB 1542 is upheld. Of course, if the law is enjoined, the Party hopes to use the party-petitioning process in future elections, just as it did in 2012. *See* LPNH Int. Resp. No. 2 (*Ex. H* to Biss. Aff., ¶ 9); VC ¶ 2. In sum, the Party is not "sitting on its hands," but is instead spending considerable time and energy litigating this case for its right to engage in a party-petitioning process that is fair and justified. One need only look at the volume of documents the Party has produced in this case—over 1,400 pages of materials—to see the seriousness with which it takes this case and the resources it will spend to vindicate its constitutional rights.

Accordingly, HB 1542 imposes a severe burden on ballot access and, therefore, strict scrutiny applies.

II. Alternatively, HB 1542 Places A Significant Burden On Plaintiff's Right To Ballot Access, Justifying Heightened Scrutiny.

Alternatively, even if this Court does not conclude that the burdens imposed on the Party are severe, the burdens placed by HB 1542 are clearly, at the very least, "significant" or "substantial," thus triggering heightened scrutiny. This is consistent with the First Circuit's jurisprudence. For example, *Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010) explains the "flexible 'sliding scale' approach for assessing the constitutionality of [election] restrictions." *Id.* at 109. The State does not appear to dispute that this Court may apply heightened or intermediate scrutiny if it views HB 1542 as a significant or substantial burden on ballot access. The RNC also concedes the point. *See* RNC Br. at 25. Indeed, the application of heightened scrutiny is hardly novel, as the U.S. Supreme Court has "avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis," under which "the scrutiny varies with the effect of the regulation at issue."

Crawford v. Marion County Election Bd., 553 U.S. 181, 210 (2008) (Souter, J., dissenting).[9]

The New Hampshire Supreme Court in *Guare v. New Hampshire*, No. 2014-558, 2015 N.H. LEXIS 44 (N.H. Sup. Ct. May 15, 2015) recently applied intermediate scrutiny in a similar situation, explaining that "most cases" fall between the "two extremes" on the *Anderson/Burdick* sliding scale. *Id.* at *9 (quoting *Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012)). There, the Supreme Court struck down a New Hampshire law supported by the Secretary of State's Office that amended the voter registration form to confusingly and inaccurately state that a person domiciled in New Hampshire, but who did not meet the statutory definition of legal "resident," was required to comply with motor vehicle laws applying to legal "residents." The Court concluded that the added registration form language "could cause an otherwise qualified voter not to register to vote in New Hampshire." *Id.* at *13. Thus, under the *Anderson/Burdick* sliding scale framework, "the burden it imposes upon the fundamental right to vote is unreasonable," thereby necessitating intermediate scrutiny review. *Id.*

The *Guare* Court also noted other cases throughout the country applying heightened scrutiny to laws that significantly burdened the voting process. *Id.* at *14-15; *see also Gustafson v. Illinois State Bd. of Elections*, No. 06 C 1159, 2007 U.S. Dist. LEXIS 75209 (N.D. Ill. 2007) (explaining that "[c]hoosing among the degrees of scrutiny—ranging from strict to intermediate to

[9] As explained in Plaintiff's Motion for Summary Judgment, to the extent the Court deems HB 1542 reasonable and non-discriminatory, the *Anderson/Burdick* "sliding scale" framework deviates from traditional rational basis review. As the Second Circuit Court of Appeals has noted, a court is generally not to apply "pure rational basis review" by considering "every conceivable basis which might support the challenged law," but instead to "actually weigh the burdens imposed on the plaintiff against the precise interests put forward by the State, [taking] into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *See Price v. N.Y. Bd. of Elections*, 540 F.3d 101, 108-09 (2d Cir. 2008) (quoting *Burdick*, 504 U.S. at 434, and *Anderson*, 460 U.S. at 789); *see also Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008) ("However slight that burden may appear … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.") (internal quotations omitted); *Barr v. Galvin*, 626 F.3d 99, 109 (1st Cir. 2010) (even in assessing a reasonable, non-discriminatory restriction, noting that the Court must "conduct its inquiry by weighing the character and magnitude of the asserted injury to the complaining party's constitutional rights and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed.") (citing U.S. Supreme Court precedent) (internal quotations omitted).

rational basis—comes down to the severity of the burden being imposed on the right to vote"); *In re Contest of November 8, 2011*, 40 A.3d 684, 698 (N.J. 2012) (explaining that intermediate scrutiny "appears to have become the more commonly applied level of scrutiny" when analyzing the constitutionality of "requirements that candidates live in a district or municipality for a particular duration"); *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 545 (6th Cir. 2014) (applying intermediate scrutiny after noting that the overall burden imposed by the challenged law was "significant, but not severe"), *stay granted*, 135 S. Ct. 42 (2014).

III. Under Any Standard of Review Along *Anderson*'s "Sliding Scale," HB 1542 Is Not Justified.

The justification portions of the State's and the RNC's briefs—which are limited to only four (4) pages and two (2) pages, respectively—are sparse and again ignore *Block* entirely. In tacit recognition of the fact that the actual articulated justification for HB 1542 before the legislature—namely, to cull out "stale" nomination papers due to death or relocation—was specifically rejected in *Block* as being "nonsensical," the State has now abandoned this justification. Instead, the State and the RNC tellingly ask this Court to (i) examine reasons for the law that were simply made up as a response to this litigation and (ii) excuse the State from even having to "put forth evidence" to support these reasons. *See* State's Br. at 21; RNC Br. at 23. This fact is worth repeating: *the State has abandoned the very justification for the challenged law that the Secretary of State's Office presented before the legislature in 2014 and does not want to produce evidence to justify the law.* Thus, as in *Guare*, the Office of the Secretary of State's justifications for the challenged law now presented before the Court were "invented *post hoc* in response to [this] litigation." *See Guare*, 2015 N.H. LEXIS 44, at *19-20. For this reason alone, given that strict or heightened scrutiny applies, the law should be permanently enjoined because this Court cannot consider *post hoc* justifications. *See id.*; *see also Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H. 748,

762 (2007) (when applying intermediate scrutiny, "the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations") (internal quotations omitted).

In the face of undisputed evidence developed in discovery by Plaintiff, the State's brief has also now abandoned—and therefore waived—multiple manufactured, *post hoc* justifications for HB 1542 that the State presented earlier in the litigation. One of these now abandoned, made-up justifications is that the law is somehow necessary to prevent Supervisors of the Checklist from verifying nomination papers signed by people who (i) are purportedly likely to have died or relocated by the early August submission deadline and (ii) should have previously been removed from the centralized voter checklist due to this death or relocation but were not given that New Hampshire only has a voter purge once every 10 years. The State's waiver of this argument is not surprising. Deputy Secretary Scanlan, himself, rejected this rationale at deposition. *See* Scanlan Depo. 33:8-19 (disavowing notion that 10-year purge was related to HB 1542's rationale) (*Ex. B* to Biss. Aff., ¶ 3).[10]

After nearly one (1) year of litigation, the State has now settled on two *post hoc* justifications for HB 1542, which are baseless and will be addressed in turn.

A. The Made-Up, *Post Hoc* Justification That HB 1542 Is Necessary to Show Party Support.

The State contends that HB 1542 ensures that a third party makes a preliminary showing of support as a prerequisite to appearing on the ballot. *See* State's Br. at 22-23; *see also* RNC Br. at 24 (noting "support" rationale). It is not disputed that this rationale is made up in response to this litigation. This justification is also fatally undercut by the State's concession made pages earlier

[10] The State has also abandoned the *post hoc* justification that HB 1542 was necessary because "[a] voter who is only permitted to sign one nomination for a political organization is also more likely to remember signing a nomination petition for an organization in the year of the election if another organization also asks the voter to sign." *See* Sec. of State Int. Resp. No. 8, Scanlan Ex. 3 (Ex. C to Biss. Aff., ¶ 4).

that a voter's signing of a nomination paper "does not indicate support for the political organization." *See* State's Br. at 20. In any event, *Block* rejected the notion that a January 1 start date is related to any interest in ensuring that frivolous organizations that lack public support do not obtain ballot access. The *Block* Court explained that it was Rhode Island's 5% signature requirement, not the January 1 start date, that was tethered to the government's interest in ensuring that parties make a preliminary showing of support. As the Court noted:

> [D]espite 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.

Block, 618 F. Supp. 2d at 154. This contention has also been rejected elsewhere. *See Cal. Justice Comm.*, 2012 U.S. Dist. LEXIS 150424, *22 (striking down end date to submit signatures far removed from election on the grounds that "[a]lthough 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). As in *Block* and *Cal. Justice Comm.*, HB 1542's new compressed time frame has absolutely nothing to do with ensuring that the Libertarian Party has "some reasonable level of support." New Hampshire's 3% threshold requirement satisfies any state interest in ensuring that a party has support, not HB 1542's compressed time frame. The regime before HB 1542 already served this state interest where there was nothing that prevented a new party from meeting the numeric threshold based solely on the voter's support for that party's ability to access the ballot.

Similarly, the State's *post hoc* position that HB 1542 ensures that a third party's support is "current" is baseless, under inclusive, unsupported by case law, and amounts to transparent discrimination against third parties. This justification regarding the need for "current" nomination

papers must be rejected outright because it (i) exists nowhere in the discovery record of this case and (ii) was not even disclosed as a rationale for the law in interrogatory responses. *See* Sec. of State Int. Resp. No. 8, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4) (not mentioning need to ensure that party support is "current" as a basis for the law). It is one thing for the Attorney General's Office to disclose in discovery a rationale for HB 1542 that was not presented before the legislature, but it is another thing altogether for that Office to present a manufactured rationale at summary judgment that was never even disclosed in discovery. *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."). In any event, as explained in Plaintiff's Motion for Summary Judgment, it is arbitrary for the State to declare that signatures are likely to be "current" if collected on January 2 (about 10 months before Election Day) but less likely to be "current" if collected the previous year (perhaps no more than 11 months before Election Day). And such a rationale is not credible because the State already accepts "stale" indications of support when it provides "party" recognition to a party whose nominee polls at least 4% of the vote for U.S. Senate or Governor in an election held *24 months previously*. *See* RSA 652:11. This under inclusivity fatally undermines this made-up governmental interest. *See 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 has proffered no reason—other than its desire to do so—to make this arbitrary and discriminatory distinction in determining whether support is sufficiently "current."

B. The Made-Up, *Post Hoc* Justification That HB 1542 Is Necessary to Address "Confusion" Between The Party-Petitioning Process and the Individual-Candidate Petitioning Process.

The State also contends that HB 1542 is necessary to "align" the party-petitioning statute, *see* RSA 655:40-a, with the individual candidate petitioning statute, *see* RSA 655:40, because of alleged *"confusion" solely in the mind of Secretary of State William Gardner*. *See* State's Br. at 23. The State does not dispute that this rationale is made up in response to this litigation. The Secretary of State's Office also did not mention this rationale in its interrogatory responses and, thus, it is not an admissible rationale. *See* Sec. of State Int. Resp. No. 8, Scanlan Ex. 3 (*Ex. C* to Biss. Aff., ¶ 4) (no mention of need to align statutes or address "confusion"); *see also Hartford*, 54 Fed. App'x at 388. Moreover, this rationale is also absurd and contradicts the State's representations before this Court that (i) it would not rely on Secretary Gardner's testimony in this case and (ii) Secretary Gardner did not have any information "that Plaintiff cannot obtain through Deputy Secretary Scanlon." *See* State's Mot. for Pro. Order at 4 and Ex. C, Doc. Nos. 25 and 25-3 ("Secretary Gardner will not be used as either a fact or expert witness in this case."). Notwithstanding the fact that the State has cited no case where such a justification has been accepted as legitimate,[11] there is no evidence in the record of "confusion." Deputy Secretary of State David Scanlan—whose testimony, according to the Attorney General's Office, speaks for the Secretary of State's Office on this issue (Doc. No. 25)—testified clearly that, prior to passage of HB 1542, a January 1 start date for party petitioning was not in place and that a January 1 start date only applied to individual candidates. *See* Scanlan Depo. 7:7-10 (*Ex. B* to Biss. Aff., ¶ 3). The State does not argue that RSA 655:40-a was in any way ambiguous prior to HB 1542's passage. It is also undisputed that not a single clerk, municipal official, or Supervisor of the

[11] Courts have, instead, accepted as a legitimate justification addressing *voter* confusion, which is not applicable here. *See Kennedy v. Gardner*, No. C-96-574-B, 1998 U.S. Dist. LEXIS 23575, at *13 (D.N.H. June 5, 1998) ("States have a legitimate interest in regulating access to the ballot to reduce *voter* confusion and eliminate frivolous candidates.").

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 the Party's verified nomination papers collected in 2011 were verified without incident. If such "confusion" existed, the Secretary of State and Deputy Secretary of State would have testified to it at deposition. They did not.

Secretary Gardner was also never personally "confused," and he never testified that he was at deposition. The law was so clear that, in July 2011, the Secretary himself concluded that party petitions did not need to be signed during the date of the general election year after being made aware of RSA 655:40-a's terms. Secretary Gardner's testimony indicates that, rather than being confused, he did not like the fact that his "policy" of not accepting nomination papers dated before January 1 was inconsistent with RSA 655:40-a. *See* Gardner Depo. 10:22-11:7, 12:9-23, 17:3-22, 10:15-11:11 (stating "policy" of counting only nomination papers signed during the general election year) (*Ex. D* to Biss. Aff., ¶ 5). Even if there was "confusion" in the mind of Secretary Gardner—which there is no evidence of—it would not be due to any confusion in the law, but rather due to an apparent inability to understand a clear law governing the party-petitioning process.[12]

Finally, even if this rationale is accepted (which it should not be), HB 1542 is not a narrowly tailored way to address "confusion." The more narrowly tailored approach to address this fabricated interest in creating consistency between the party-petitioning statute, *see* RSA 655:40-a, and the individual candidate petitioning statute, *see* RSA 655:40, would be to amend

[12] The RNC also concocts a rationale for confusion that is untethered to any evidence either in this case or in the public record. For example, the RNC claims that HB 1542 somehow accommodates (i) "[m]embers of the public and other participants in the election process who wish to object" to a nomination paper under RSA 655:41 and may be confused and (ii) the fact that there is a "very limited window for objections to be received by the Secretary of State." *See* RNC Br. at 24. Not only does the record fail to indicate that a single member of the public (or Supervisor of Checklist) was confused by the law—because the law governing the party-petitioning process was clear before HB 1542—but HB 1542's impact on the start date for collection has nothing to do with the time frame and process for objecting to a nomination paper.

RSA 655:40—not RSA 655:40-a—to remove the January 1 start date for the individual candidate petitioning process. This would have accomplished the State's objectives in eliminating "confusion" without needlessly burdening a party's access to the ballot. Even if this rationale is accepted by this Court, the fact that this was never considered only highlights the discriminatory impact of HB 1542 on third parties.

The State's justifications for the law continue to be a moving target in this case. But no matter where that target lies, there is still no legitimate justification for HB 1542. It is unconstitutional.

CONCLUSION

Accordingly, for these reasons and the reasons in Plaintiff's Motion for Summary Judgment, this Court should (i) declare that the sentence "Nomination papers shall be signed and dated in the year of the election" in RSA 655:40-a violates the First and Fourteenth Amendments and (ii) issue a permanent injunction enjoining its enforcement. Plaintiff's Motion for Summary Judgment should be GRANTED and Defendant's Cross-Motion for Summary Judgment should be DENIED.

Respectfully submitted,

LIBERTARIAN PARTY OF NEW HAMPSHIRE,

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

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Dated: June 15, 2015

CERTIFICATE OF SERVICE

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

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