IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LIBERTRARIAN PARTY OF NEW HAMPSHIRE,
Plaintiff-Appellant,

v.

WILLIAM M GARNDER, in his official capacity,
Defendant-Appellee.

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

BRIEF FOR AMICUS CURIAE CENTER FOR COMPETITIVE DEMOCRACY

In Support of Plaintiff/Appellant and In Support of Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, amicus curiae certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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CONSENT TO FILING OF AMICUS

This Brief is filed with the consent of the Parties pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Amicus does not seek to participate in oral argument.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Center for Competitive Democracy ("the Center") was founded in Washington, D.C. in 2005 to strengthen American democracy by increasing electoral competition. The Center works to identify and eliminate barriers to political participation and to secure free, open and competitive elections by fostering active civic engagement in the political process. The Center has participated in numerous cases involving electoral barriers across the country as either amicus curiae or through direct representation. *See, e.g., Rogers v. Cortes*, 426 F. Supp.2d 232 (M.D. Pa. 2006), *aff'd*, 468 F.3d 188 (3d Cir. 2006) *cert. denied*, 552 U.S. 826 (2007) (Center files amicus brief with Supreme Court at certiorari stage).

Recently, for example, the Center filed the litigation that compelled the District of Columbia to rescind its residency and registration restrictions on petition circulators. *See Libertarian Party v. Danzansky*, No. 1:12-cv-01248-CKK (case dismissed as moot on December 30, 2014, following enactment of legislation

eliminating challenged restrictions). In that case, the District of Columbia conceded at the outset that its restrictions were clearly unconstitutional, and the Center agreed to stay the action to allow for the enactment of remedial legislation.

Even more recently, the Center won a judgment on behalf of several minor political parties and their supporters, which held Pennsylvania's ballot access requirements unconstitutional as applied to them. *See Constitution Party of Pa. v. Aichele*, No. 5:12-cv-02726-LS (E.D. Pa. July 23, 2015). Prior to that decision, the Court of Appeals reversed the District Court's decision dismissing the case, and concluded that the challenged requirements created "a chilling effect on protected First Amendment activity." *See Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 363 (3rd. Cir. 2014).

Pursuant to Federal Rule of Appellate Procedure 29, the Center and the undersigned counsel certify that no party or party's counsel authored this Brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting this Brief, and that no person other than the Center, its members, or its counsel contributed money that was intended to fund preparing or submitting this Brief. The Center's Executive Director, Oliver B. Hall, Esq., is also in his private practice special counsel to the Libertarian National Committee; neither the Center nor Mr. Hall represent or have represented the New Hampshire Libertarian Party.

STATEMENT OF THE ISSUE

Whether the *Anderson*/*Burdick* analysis, when applied to non-trivial burdens placed by government on ballot access, allows government to justify those burdens with post hoc rationalizations that played no part in the government's actual decisional process.

STATEMENT OF THE CASE

Candidates for political office in New Hampshire typically gain access to the general-election ballot by winning their party's primary election. Only political organizations that qualify as "political parties" under New Hampshire law, however, hold primaries. To qualify as a "political party," a political organization must receive at least four percent of the total votes cast for Governor or U.S. Senator in the preceding election.

Political organizations that have not qualified to hold primaries may seek to place their candidates on the general-election ballot—including the Libertarian Party of New Hampshire—by submitting nomination papers signed by New Hampshire registered voters to equal three percent of the total votes cast in the prior general election.

To qualify for the general-election ballot, these parties must submit their nomination papers to local election officials in the towns and wards where each signer is registered no later than five weeks before the primary. Local officials then

certify the nomination papers. New Hampshire effectively requires that nomination papers be submitted by early August.

In July 2014, the New Hampshire legislature passed House Bill 1542, which amended prior law to require that "[n]omination papers shall be signed and dated *in the year of the election.*" *See* N.H. REV. STAT. ANN. § 655:40-a (emphasis added).

As noted by the District Court below, "The record contains few details that explain why the legislature passed HB 1542." *Libertarian Party of New Hampshire v. Gardner*, 2015 WL 5089838 at*2 (D.N.H. 2015). The only legislative explanation was that:

> This bill was requested by the Secretary of State. It requires that nominating petitions for a political organization seeking placement on the ballot for the state general election shall be signed and dated in the year of the election, beginning January 1 of the political cycle. This will reduce the number of invalid signatures, due to death or relocation, which might arise if signatures are submitted earlier.

Id. One sponsor, meanwhile, offered the following explanation:

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

Id.

Only after litigation commenced did the State argue that the change to existing law was needed to force political parties to show support and prevent

ballot clutter. *Id*. Neither end was expressed anywhere in the legislative record or expressed by any legislator. Notwithstanding that these were post hoc rationalizations, the District Court concluded that they represented the State's "strongest argument." *Id*. at *12. "[M]aintaining an orderly ballot by requiring candidates to demonstrate a measure of public support before gaining ballot access," the District Court explained, "comports with its broader interest in avoiding ballot clutter and overcrowding by limiting ballot access only to those organizations that demonstrate a basic level of support within New Hampshire." *Id*. "The State's asserted justification finds powerful and extensive support in both Supreme Court and First Circuit precedents, which establish that the State's broad regulatory interest in administering orderly elections includes a strong interest in avoiding ballot clutter." *Id*.

The District Court never explored whether these objectives represented genuine concerns of the legislature. Indeed, the record contained no legislative finding that "ballot clutter" was a problem in New Hampshire or that the bill was intended to address such problem; nor was there any legislative history to that effect. The record contained no demonstration that signatures that were "two years old" were more difficult to verify nor was there any evidence that "two-year-old" signatures ever burdened the State. Similarly, the District Court did not address whether New Hampshire had previously experienced debilitating ballot clutter or

any significant difficulty with "two-year-old" signatures. It instead simply embraced these post hoc rationalizations that bore no established connection to the facts of the case. The District Court erred.

SUMMARY OF ARGUMENT

The *Anderson*/*Burdick* analysis can only mirror rationality review when trivial burdens are at stake. Here, the District Court correctly concluded that New Hampshire's new law presented non-trivial burdens. Therefore, as the District Court correctly conceded, something more than simply rationality review must be used to measure the law's constitutionality.

Whenever something more than simple rationality review is used, the Supreme Court has refused to accept post hoc rationalizations at face value. History teaches that only rationality review allows hypothetical justifications. Every other form of constitutional analysis, whether it is a balancing test, strict scrutiny, intermediate scrutiny, or rational basis with bite, demands actual ends. Some sort of proof of the actual legislative objective behind the bill is required.

Because *Anderson*/*Burdick*'s sliding scale has not in this case descended to simple rationality review, post hoc rationalizations cannot be used to sustain New Hampshire's law. The District Court erred by not being more skeptical. It erred by not questioning the State's credibility and its newly discovered objectives. Under

any level of heightened scrutiny, the absence of a substantiated expression of legislative purpose means the statute should have been overturned.

ARGUMENT

The District Court erred in applying the functional equivalent of pure rationality review to New Hampshire's law. Although the District Court correctly observed that New Hampshire's condensed window for collecting signatures was "certainly not trivial," *Libertarian Party of New Hampshire v. Gardner*, 2015 WL 5089838 at *11 (D.N.H. 2015), and was not "so minor" that rationality review should be employed, *id.* at *12 n.11, it erred by effectively applying simple rationality review to the law anyway.

Its error allowed defendants to plead post hoc legislative objectives that were never considered by New Hampshire when it passed the law. While this would be appropriate under traditional rationality review, *see Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) ("[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it"), it is not proper under any other form of constitutional analysis. Heightened scrutiny and balancing tests (of any sort) eschew post hoc rationalizations. "Implausible post hoc justifications for a statute can only be used under the any conceivable interest test of rational review." R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines*

Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice, 4 U. PA. J. CONST. L. 225, 247 n.107 (2002) (emphasis added).

The Supreme Court has long made clear that strict scrutiny demands that a state's allegedly compelling objectives be genuine. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) ("None of these 'findings,' singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.'") (citation omitted). They cannot be imagined or hypothesized. *Id*. The same is true of intermediate scrutiny, in all of its manifestations. *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 317-18 (1998) ("The intermediate scrutiny formulation ordinarily requires the government to demonstrate that the law in question serves actual, important governmental objectives").

With gender, for example, the Supreme Court in *United States v. Virginia*, 518 U.S. 515, 533 (1996), stated that "[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation." It took the same approach with illegitimacy's weaker standard of intermediate scrutiny in *Trimble v. Gordon*, 430 U.S. 762, 774-75 (1977) ("We need not resolve the question whether presumed intent alone can ever justify discrimination against illegitimates, for we do not think that § 12 was enacted for this purpose."), where it refused to allow the

state to hypothesize that its law discriminating against illegitimate children was intended to enforce the presumed intentions of intestate decedents.

In between pure rationality review and intermediate scrutiny, of course, lie several forms of heightened analysis. Under virtually all of these stronger-than-rationality-analyses, the Supreme Court has demanded actual or factually supported objectives. As stated by one commentator, "a classification's defender need not offer justifications for a classifying measure under rational basis review, unlike under heightened scrutiny, where the government must specify and defend, with evidence, its justifications for differential treatment." Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 539 (2004).

With the Commerce Clause, for example, the Supreme Court -- which at one time deferred completely to Congress's arguments and findings under the rational basis test -- now looks for congressional fact-finding to support Congress's claimed objectives and connections. It is not enough that "Congress could have rationally concluded" that its law was supported by constitutional ends found in Article I of the Constitution. *See United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting argument that "Congress could rationally have concluded that [guns in schools] substantially affects interstate commerce"). Even when it conducts fact-finding and expressly links its measures to constitutional ends, Congress's fact-finding receives no deference from the Court. *See United States v. Morrison*, 529

U.S. 598, 614 (2000) ("the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation"). This is because simple rationality review is no longer employed.

Equal Protection analysis offers perhaps the best example. As an historical matter, even when the Supreme Court has employed pure rationality review under the Equal Protection Clause it has often searched for actual (as opposed to hypothetical) ends. According to Justice Brennan in 1980, the Supreme Court "frequently recognized that the actual purposes of Congress, rather than the post hoc justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test." *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting).

Justices Powell and Stevens, for instance, both believed that that "the Court should receive with some skepticism post hoc hypotheses about legislative purpose.... [Otherwise] equal protection review [is no] more than 'a mere tautological recognition of the fact that Congress did what it intended to do." *Schweiker v. Wilson*, 450 U.S. 221, 244-45 (1981) (Powell, J., dissenting) (quoting *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring)).

These views have since been accepted by a majority of the Court in equal protection cases when the Court has employed something more than mere

rationality review, like rational basis review "with bite." In these cases, the Supreme Court has never deferred to post hoc explanations. It has demanded proof. For instance, in *Plyler v. Doe*, 457 U.S. 202, 228 (1982), where the Supreme Court invalidated a Texas law denying a free public-school education to undocumented aliens, the Court rejected Texas's explanation that it sought to deter illegal immigration's economic impact on the state because "[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy." Because neither a suspect class nor a fundamental right was at stake, the Court was applying some variation of deferential scrutiny; yet it still demanded proof. Unsubstantiated, post hoc rationalizations were rejected.

The use of "something more" than simple rationality review has become more and more common with the Burger Court, the Rehnquist Court and now the Roberts Court. Right or wrong, when the Court applies rationality review "with bite," it does so using "credibility-questioning review of the record." As explained by Professor Ross:

> over the past forty years, members of the Court have shifted from adequacy-checking review to credibility-questioning review of the record under both strict scrutiny and rational basis review. In whole categories of cases, Justices have begun to rigorously cross-examine and discount state findings of fact.

Bertrall L. Ross II, *The State as Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2039 (2014).

The Supreme Court's recent treatment of sexual orientation proves its continued commitment to seriously questioning governmental objectives -- even under pure rationality review. Courts and scholars agree that the Supreme Court in Equal Protection cases like *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), applied an invigorated rational basis review -- one with bite. This form of rational basis review did not accept post hoc justifications. According to Professor Bartrum:

> the *Windsor* Court did not consider "possible" or "conceivable" post-hoc rationalizations for the challenged law, which is the normal practice under rational basis review. Rather, the Supreme Court inquired into DOMA's "design, purpose, and effect" and carefully examined the available legislative history to determine Congress's *actual* motivations.

Ian Bartrum, *The Ninth Circuit's Treatment of Sexual Orientation: Defining "Rational Basis With Bite*," 112 MICH. L. REV. FIRST IMPRESSIONS 142, 148 (2014) (footnote omitted and emphasis original). *See also* Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 288 (2011).

Consequently, even with rationality review in its pure state, the modern Supreme Court has been known to reject proffered justifications and post hoc explanations. Once rationality review is elevated to one "with bite," the Supreme Court always demands actual objectives. And when the constitutional analysis

moves beyond the language of rational basis review, post hoc explanations must be rejected out of hand.

The question here becomes whether the Supreme Court's treatment of ballot access has moved beyond simple rational basis review. The answer must certainly be in the affirmative. In *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), the Court set forth the modern analysis to be employed in considering the constitutionality of state election laws that limit ballot access:

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

This "sliding scale" formula was reiterated in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), giving rise to its modern name, "*Anderson*/*Burdick* balancing."

Amicus believes that the *Anderson*/*Burdick* balancing formula must, in order to be effective in the context of any "non-trivial" burden on ballot access, consider only actual governmental concerns in its calculus. If it were any other way, the *Anderson*/*Burdick* sliding scale formula would in all cases short of those presenting severe burdens collapse into rationality review. Governmental lawyers would then always be able to hypothesize post hoc rationalizations for a state's laws despite the absence of any evidence of proper objectives at the time the law was adopted.

All ballot access laws would always be valid since a reviewing court would, in effect, be deprived of the means to judge the merits of the laws. *See* Farrell, *supra*, 86 WASH. L. REV. at 288 ("Where courts follow this practice and are willing to hypothesize purpose or accept post-hoc assertions of purpose by government lawyers, rational-basis review becomes so deferential as to amount to virtually no review at all. Even the most egregiously unfair laws could survive this kind of scrutiny."). This could not be the intent of the Supreme Court's *Anderson*/*Burdick* balancing test.

Anderson/*Burdick* could not have been meant to unravel footnote four's prophetic suggestion in *United States v. Carolene Products Co*., 304 U.S. 144, 152 n.4 (1938), that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *Anderson*/*Burdick* was meant to embrace this prophecy; while the vast majority of laws receives only rational basis review, *id.*, "legislation which restricts … political processes" does not fall into this class. Short of minor or trivial burdens (which are not at issue here), legislation restricting ballot access must under the logic of *Carolene Products* be realistically questioned. Under *Anderson*/*Burdick* ballot access laws must be scrutinized for the actual policy objective, not one that

can merely be hypothesized. States cannot be trusted to offer only post hoc explanations.

Harkening back to *Carolene Products*, Professor Ross has observed that "credibility-questioning review of the record is the result of judicial presumptions about political process malfunction." Ross, *supra*, 89 N.Y.U. L. REV. at 2039. While this does not always translate into a direct distrust by the Supreme Court of the political process, it does recognize that the Supreme Court, and courts in general, must apply a substantial degree of scrutiny when confronted with legislation that impacts the heart of the political process. This skepticism could not possibly translate into total deferential review of post hoc rationalizations under the *Anderson*/*Burdick* formula. This formula, after all, was meant to protect the very fabric of the political process.

Whether *Anderson*/*Burdick* is described as a form of intermediate scrutiny, *see, e.g.*, *Guare v. State*, 117 A.3d 731 (N.H. 2015), an old-fashioned balancing test, or some sort of sliding scale analysis, *see, e.g.*, *Ohio Council 8 AFSCME v. Husted*, 2016 WL 537398 (6th Cir. 2016), post hoc rationalizations cannot suffice. Government's actual objectives must be measured against the burdens placed on ballots.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be **REVERSED.**

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

Counsel for Amicus certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(6) and (7)(B) because it contains 3366 words and is proportionally spaced using Microsoft Word for Windows with fewer than 10 ½ characters per inch in Times New Roman 14 point type.

/s/ Bruce I. Afran
Bruce I. Afran

Dated: February 26, 2016

CERTIFICATE OF SERVICE

I certify that a copy of this Brief was filed using the Court's electronic filing system and will thereby be electronically delivered to all parties through their counsel of record.

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