Docket No. 15-2068

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LIBERTARIAN PARTY OF NEW HAMPSHIRE,

Plaintiff-Appellant,

-vs-

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

Defendant-Appellee.

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

BRIEF OF AMICUS CURIAE REPUBLICAN NATIONAL COMMITTEE

IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMATION OF THE JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae certifies that it does not have a parent corporation and that it does not issue stock or any other form of securities.

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CONSENT TO FILING OF AMICUS BRIEF

This Amicus Brief is filed with the consent of the Parties pursuant to Fed. R. App. P. 29(a).

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Founded in 1856, the Republican National Committee (the "RNC") is a political committee that provides national leadership for the Republican Party of the United States. The RNC is responsible for developing and promoting the Republican political platform, as well as coordinating fundraising and election strategy. The Republican Party has qualified for access to the New Hampshire general election ballot for 2016. *See* N.H. Rev. Stat. Ann. § 652:11 (2016). Accordingly, the RNC has a vital interest in New Hampshire's election regulation in general and, specifically, the requirements for ballot access.

The District Court below permitted the RNC to file an amicus brief in support of the constitutionality of House Bill 1542 (N.H. Laws 2014, ch. 29:1, amending N.H. Rev. Stat. Ann. § 655:40-a (2016)). Counsel for the RNC also participated at oral argument on the primary parties' cross-motions for summary judgment.

Pursuant to Fed. R. App. P. 29(c)(5), the RNC and its undersigned counsel certify that no party or party's counsel authored this brief, whether 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 RNC, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

There is no "litmus-paper test" regarding ballot-access requirements. Instead, the Supreme Court has developed a flexible "sliding scale" approach for assessing the constitutionality of restrictions on ballot access. Applying this sliding scale requires a court to first assess the character and magnitude of the asserted injury to the plaintiff's protected rights, and then evaluate the interests put forward by the State as justifications for the burden imposed by its rule.

Using this balancing framework, the District Court properly found that the statute at issue, amended § 655:40-a, imposes burdens which are reasonable and nondiscriminatory and not severe. Having made this finding, the District Court properly applied the *Anderson/Burdick* sliding scale test and determined that the State met its burden of establishing legitimate regulatory interests sufficiently weighty to justify any burdens imposed by amended § 655:40-a. More specifically, the State asserted an interest which has long been recognized by the United States Supreme Court and this Court as both legitimate and compelling: the maintenance of an orderly ballot by requiring a demonstration of substantial support before granting general election ballot access to a party or candidate.

The District Court's judgment should be affirmed.

ARGUMENT

I. THE *ANDERSON/BURDICK* TEST

Two transcendent interests inform challenges to ballot-access restrictions. First, "'[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.'" *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Yet that right is not absolute, *id.*, and so, second, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

A balancing of these interests is at the center of the analytical framework established by the Supreme Court and repeatedly applied by this Court. It is well settled that "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Indeed, this Court has observed that "states have considerable discretion in establishing the procedures that govern ballot access," within Constitutional limits. *Barr v. Galvin*, 626 F.3d 99, 109 (1st Cir. 2010).

There is no "litmus-paper test" regarding ballot-access requirements. *Anderson*, 460 U.S. at 789 (quoting *Storer*, 415 U.S. at 730). Rather, "the Supreme Court has developed a flexible 'sliding scale' approach for assessing the constitutionality of such restrictions." *Barr*, 626 F.3d at 109 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 432-434 (1992)). Under this sliding scale approach:

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

Anderson, 460 U.S. at 789; *see also Burdick*, 504 U.S. at 434.

Applying this sliding scale requires a court to "start by assessing 'the character and magnitude of the asserted injury' to the plaintiff's constitutionally protected rights and then 'evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Werme*, 84 F.3d at 483 (quoting *Anderson*, 460 U.S. at 789) (emphases added). This sequence is important, because the nature and severity of the plaintiff's burden determine both the

standard of review and the significance of the state interest that must be put forward as justification. *See Green Party of Pa. v. Aichele*, 103 F. Supp. 3d 681, 689 (E.D. Pa. 2015) (citing *Burdick*, 504 U.S. at 434) ("the rigorousness of our inquiry would depend upon the extent to which a challenged provision burdens First and Fourteenth Amendment rights"). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons*, 520 U.S. at 358 (quotations omitted).

II. ANY BURDENS IMPOSED BY AMENDED § 655:40-a ARE NONDISCRIMINATORY AND REASONABLE.

A. Amended § 655:40-a is Nondiscriminatory

As with the Massachusetts statutes at issue in *Barr*, New Hampshire's ballot-access regime "do[es] not specifically differentiate among Democrats, Republicans, Libertarians, Mugwumps, or candidates affiliated with any other political organization." *Barr*, 626 F. 3d at 109. With respect to both political parties[1] and political organizations[2], ballot access in New Hampshire depends upon

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[1] New Hampshire defines "Party" as "any political organization which at the preceding state general election received at least 4 percent of the total number

(Footnote continued on next page)

a party's or an organization's ability to evidence sufficient support, whether through prior election results or through collecting nomination papers.

"Distinguishing among political organizations on the basis of success in past elections 'is not per se invidiously discriminatory.'" *Id.* (quoting *Werme*, 84 F.3d at 484 (citing *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974))). The Supreme Court has long "upheld reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections." *Clements v. Fashing*, 457 U.S. 957, 965 (1982). What the Constitution requires is "equality of opportunity — not equality of outcomes." *Werme*, 84 F.3d at 485. For this reason, a "mere demonstration that a state provision distinguishes among groups (such as candidates affiliated with a recognized political party and those not so aligned) is insufficient by itself to establish an equal protection violation." *Barr*, 626 F.3d at 109. Indeed, "the States' interest permits them to enact

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of votes cast for any one of the following: the office of governor or the offices of United States senators." N.H. Rev. Stat. Ann. § 652:11.

[2] New Hampshire recognizes a "political organization" and places its name on the general election ballot after such an organization submits nomination papers signed by at least 3 percent of the total votes cast at the previous state general election. N.H. Rev. Stat. Ann. § 655:40-a; N.H. Rev. Stat. Ann. § 655:42, III (2016).

reasonable election regulations that may, in practice, favor the traditional two-party system." *Timmons*, 520 U.S. at 367.

As the Supreme Court explained in *Jenness v. Fortson*:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . .

403 U.S. 431, 441-442 (1971); *see also Am. Party of Tex.*, 415 U.S. at 782-783 ("So long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner"). As long as regulations do not operate to "freeze the political status quo," and "recognize[ ] the potential fluidity of American political life," they do not infringe upon First or Fourteenth Amendment rights. *See Jenness*, 403 U.S. at 438, 439. Under this standard, established by longstanding precedent from the Supreme Court and this Court, amended § 655:40-a is nondiscriminatory.

B. Amended § 655:40-a's Requirements Are Reasonable

LPNH complains that amended § 655:40-a is unreasonable, based on the January 1 start date, the alleged inability to campaign and electioneer during the general election year, and so-called "compelled idleness" in a non-election year. The District Court correctly rejected these arguments. "States need not remove all of the many hurdles third parties face in the American political arena today." *Timmons*, 520 U.S. at 367. The minimal hurdles third parties face in New Hampshire fall squarely within guideposts established by the Supreme Court which set forth constitutionally permissible requirements.

1. The Time Provided to Collect Nomination Papers is Reasonable

In order to have its name placed on the general election ballot, a political organization must submit nomination papers signed by at least three percent of the total votes cast at the previous state general election. N.H. Rev. Stat. Ann. § 655:40-a; N.H. Rev. Stat. Ann. § 655:42, III. To qualify for the ballot in 2012, LPNH was required to submit 13,843 valid nomination papers. Appellee Br. 8. Amended § 655:40-a requires that nomination papers must be dated in the year of the election, i.e., on or after January 1. Each nomination paper must be "submitted to the supervisors of the checklist of the town or ward in which the signer is domiciled or registered" for certification five weeks before the primary. N.H. Rev. Stat. Ann. § 655:41, I (2016). Therefore, a political organization has from January

through July of an election year, a period of seven months (or 210 days), to collect nomination papers.

As the District Court noted, "[b]oth the Supreme Court and the First Circuit … have repeatedly upheld petition requirements comparable to HB 1542 in both the number of petitions required and the length of time allowed to collect them. These precedents effectively foreclose any argument that the petitioning window provided by HB 1542 is too short on its face." Appellant Add. 78. Indeed, the Supreme Court has provided detailed guidance for determining whether and to what degree signature requirements burden parties or candidates. *See, e.g.*, *Jenness*, 403 U.S. at 433-434; 440 (finding "nothing that abridges the rights of free speech and association secured by the First and Fourteenth Amendments" in a state law requiring nominating papers signed by five percent of eligible voters from the prior election submitted within a 180 day period); *Am. Party of Tex.*, 415 U.S. at 783; 786 (finding that a requirement to gather 22,000 signatures fell within the outer boundaries of support the state may require before according political parties ballot position and, further, that 55 days was not an unduly short time).

In *Barr*, this Court concluded that a requirement of gathering 10,000 signatures in 60 days – more than two-thirds of the signatures required here in less than one-third the time – represented only a "modest" burden. 626 F.3d at 109-110. The *Barr* decision was based, in part, on the fact that "the Supreme Court has

approved analogous time frames for collecting signatures as not unduly burdensome." *Id.* at 110 (citing *Am. Party of Tex.*, 415 U.S. at 786).

Other Courts of Appeals have applied these Supreme Court guideposts to uphold signature requirements similar to New Hampshire's. *See, e.g.*, *Stone v. Bd. of Election Comm'rs for Chi.*, 750 F.3d 678 (7th Cir. 2014) (upholding 90 day/12,500 signature requirement); *Green Party v. Martin*, 649 F.3d 675 (8th Cir. 2011) (upholding 90 day/10,000 signature requirement); *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006) (upholding 5 month/2% of voters signature requirement); *Rainbow Coal. of Okla. v. Okla. State Election Bd.*, 844 F.2d 740 (10th Cir. 1988) (upholding law requiring political body to obtain signatures equivalent to 5% of the total votes cast in the last General Election for Governor or President within one year of May 31 of even numbered year).

The requirements of amended § 655:40-a, in terms of the number of signatures required and the time provided to collect them, fall comfortably within the guideposts set by the Supreme Court, this Court, and other Courts of Appeals.

a. LPNH's Past Experience Establishes Reasonableness

Assessing the burden of a ballot-access regulation requires courts to ask: "[C]ould a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Storer*, 415 U.S. at 742. In answering this

question, "[p]ast experience will be a helpful, if not always an unerring, guide … ." *Id.* In *Barr*, this Court concluded that the 60 day/10,000 signature requirement "was not so short as to impose an unreasonable burden" on the plaintiffs, in part because the candidates the plaintiffs sought to replace were able to submit "many more than the 10,000" signatures required for ballot access in the same time period. *Barr*, 626 F.3d at 110. *See also Stone*, 750 F.3d at 683 ("the fact that nine candidates satisfied 65 ILCS 20/21-28(b) is powerful evidence that the burden of gathering 12,500 signatures in ninety days is not severe").

The summary judgment record with respect to LPNH's past experience in gathering nomination papers overwhelmingly establishes that amended § 655:40-a is reasonable. To obtain access to the 2012 general election ballot, LPNH was required to secure 13,843 nomination papers. Appellant Br. 8. Because not every paper will be valid, LPNH's effective goal was about 19,000 raw (or unverified) nomination papers. *Id.* (citing JA 9; Appellant Add. 68). Using professional petitioners paid for by the Libertarian National Committee ("LNC"), in the 53 days between August 1 and September 23, 2011, LPNH obtained 13,787 nomination papers, an average of 260 papers per day. *See id.* at 8-9 (citing Appellant Add. 69). At that rate, it would take approximately 75 days – just over one-third of the time allotted by amended § 655:40-a – to reach the total goal of 19,000 papers.

In support of its argument that the compressed schedule imposes a "severe" burden, LPNH makes much of New Hampshire's "harsh winter months." Appellant Br. 26-28. LPNH's argument is at odds with both the record and reality. In fact, in December 2011, LPNH gathered 1,269 nomination papers, the fifth-highest yielding month of its thirteen-month effort. *See* JA 215.

Moreover, because of its election calendar, New Hampshire's political life is especially vibrant in the winter months. Every presidential year, New Hampshire conducts a primary, generally in January or February, *see* N.H. Rev. Stat. Ann. § 653:9 (2016), generating high voter turnout. On February 8, 2016, both the Republican and Democrat parties conducted contested presidential primaries and 542,459 registered voters cast their votes at the polls. *See* http://sos.nh.gov/2016PresPrimElectResults.aspx. In March or May of every calendar year, New Hampshire's 221 towns hold town elections. N.H. Rev. Stat. Ann. § 39:1 (2016); N.H. Rev. Stat. Ann. § 39:1-a (2016). These events are particularly relevant because, according to LPNH: "The highest verification rate is going to be petitioning at a polling place. The lowest verification rate is going to be some event where there's a lot of tourists." JA 165 (Babiarz Dep. 117:1-4).

The summary judgment record establishes that, both lacking volunteers and having exhausted the funds provided by the LNC to pay professional petitioners, LPNH managed to send only "a couple" of petitioners to polling places during the

2012 presidential primary, *see* JA 108 (Tomasso Dep. 115:12-13), passing up an opportunity for potentially thousands of signatures and an extremely high rate of verifications. Similarly, LPNH also was unable to capitalize on town elections in March and May in 2012, even though it collected over 750 nomination papers in just two towns on town election day in 2000. JA 143, 144 (Babiarz Dep. 29:12-19, 34:2-12).

In sum, the summary judgment record establishes that, using funds made available by its national party – the LNC – in 2012, LPNH was able to collect nomination papers at a pace that demonstrates the reasonableness of the amended statute's parameters. Whatever difficulties LPNH later encountered were the result of its lack of volunteer and financial support in New Hampshire once the LNC-provided funds were exhausted.

2. Amended § 655:40-a Does Not Burden the Ability to Campaign or Electioneer

LPNH contends that the amendment to § 655:40-a "creates the unique burden of putting LPNH at a distinct disadvantage compared to the two major parties in New Hampshire during the election year" and "prevents LPNH from meaningfully engaging in the campaign process during the majority of the general election cycle . . . . " Appellant Br. 37. The Court should reject this argument for at least the following three reasons.

a. Political Organizations and Their Candidates Benefit From a General Election Head Start on Parties and Their Candidates

LPNH's argument falters when considered against the election calendar established by New Hampshire statute. All individuals seeking to appear on the general election ballot must file with the Secretary of State by a filing deadline occurring in June. N.H. Rev. Stat. Ann. §§ 655:14; § 655:14-a; § 655:17-c; 655:43, III (2016). For a political organization such as LPNH seeking access by nomination papers, this means identifying its full slate of general election candidates. *See* N.H. Rev. Stat. Ann. §§ 655:17-c; 655:43, III. In contrast, party candidates who file in June must then win a primary election to appear on the general election ballot. The primary election does not occur until the second Tuesday in September. N.H. Rev. Stat. Ann. § 653:8 (2016).

It is only after the primary election that party candidates are known. However, for a political organization, the process to gather and submit nomination papers is necessarily completed no later than five weeks before the primary election (and twelve weeks prior to the general election, *see* N.H. Rev. Stat. Ann. § 653:7 (2016)), when the papers must be submitted to local election officials. N.H. Rev. Stat. Ann. § 655:41 (2016). At that point, a political organization and its candidates will plainly know whether it has met its required paper totals. Thus, those candidates – first identified in June – have a full five weeks to prepare for the

general election before it begins in earnest after the party primaries have occurred. These candidates have a "head start" on the general election campaign and may engage in campaigning and electioneering well before the general election begins.

b. Amended § 655:40-a Does Not Restrict Campaigning in the Critical Period Immediately Before the Election

For reasons just described, because the petitioning process is effectively complete in early August, a political organization's slate of candidates has approximately twelve weeks to engage in campaigning and electioneering before the November general election. This is, as LPNH properly conceded below, the critical time to campaign. Its chairman testified that "the time immediately prior to the election is the most important time for campaigning." JA 86 (Tomasso Dep. 26:6-8); Appellant Add. 83; *see also* JA 152 (Babiarz Dep. 67:13-22). In fact, a number of courts have held that early petition filing deadlines requiring nomination paper gathering too remote in time (including during the year preceding the election) present impermissible burdens. *See Anderson*, 460 U.S. at 792 ("When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.") (citing *Bradley v. Mandel*, 449 F. Supp. 983, 986-987

(D. Md. 1978) (findings of three-judge panel on remand from the Supreme Court)); *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 701 (8th Cir. 2011) (timing of a primary election) ("Within the framework of organized political parties, most voters in fact look to third party alternatives only when they have become dissatisfied with the platforms and candidates put forward by the established political parties. This dissatisfaction often will not crystalize until party nominees are known.") (quotation and citation omitted).

c. Collecting Nomination Papers Involves Voter Contact

Third, LPNH has recognized that there are, in fact, hidden benefits and campaigning opportunities inherent in the petitioning process. *See* Appellant Add. 84 ("In a March 2012 email to solicit volunteers to collect petitions at town elections, for instance, Tomasso wrote, 'If you want to run for office as a Libertarian, [town election day] is a great time to meet your voters and do some early campaigning.' . . . An August 2000 LPNH newsletter comments that the petitioning process, which allows 'thousands of voters … to meet Libertarian candidates and activists,' provides the party 'an effective outreach tool.'); *see also* JA 152 (Babiarz Dep. 66:23-67:4) ("Q: But isn't this article saying that the simple act of petition[ing] brings awareness to people of the Libertarian party? A: Yes. Physical contact with the populous [sic] does help.").

Notwithstanding this record evidence, LPNH argues that securing nomination papers is not the equivalent of campaigning. Even if that is so, the record also establishes that there need not be a choice between petitioning and campaigning. Paid petitioners have the financial incentive to work efficiently and, as the record establishes, the entire process of gathering nomination papers can be completed by professionals for a relatively modest sum in fewer than ninety days, enabling a political organization's full general election slate of candidates to focus on campaigning.[3]

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[3] The realities of modern American politics require political parties to multitask. As the District Court pointed out:

> I do not doubt that LPNH would rather spend its time and resources during an election year on campaigning instead of petitioning. But the same could be said of any political party, including the major parties, which would likely prefer to avoid the sometimes factious primary process and instead select their candidates and begin campaigning for the general election before September of the election year. The challenge that political parties of all sizes face to manage multiple tasks at once, even in an election year – to both walk and chew gum, so to speak – is a simple and essential fact of American political life, not cause for heightened constitutional scrutiny. See Am. Party of Tex., 415 U.S. at 782-83.

Appellant Add. 87.

3. Amended § 655:40-a Does Not Compel Idleness in a Non-Election Year

LPNH argues that amended § 655:40-a forces it to "sit on the sidelines" in odd-numbered years. Appellant Br. 44. This assertion lacks any basis. A political organization is perfectly free to engage in any activity with the sole exception of collecting nomination papers. As the District Court succinctly pointed out, "[e]ven with the January 1 start date in place, LPNH remains free to plan its election-year petition drive and recruit volunteers during the off year. More importantly, because paid petitioners are central to any petition drive, LPNH also remains free to raise funds for the drive during the off year that it can then spend on paid petitioning during the election year." Appellant Add. 88. Among other activities, LPNH could also develop a strategic plan for targeting potential nomination paper gathering events in the coming year, purchase necessary supplies, and retain necessary vendors. Simply put, amended § 655:40-a leaves a political organization with plenty of productive activities to fill the odd-numbered years. If it is idle, it is not because of the law.

4. When Assessed Collectively the Burdens are Minimal

Taken individually, the burdens identified by LPNH are, at best, minimal and are certainly not severe. The result is no different when the burdens are considered collectively.

The summary judgment record demonstrates that in 2012, LPNH's success in submitting the required number of nomination papers was overwhelmingly the result of its ability to engage professional petitioners, principally as a result of financial support from the LNC. The overall effort required the expenditure of $40,000. Appellant Br. 9 (citing Appellant Add. 70). As a result, LPNH's entire slate of candidates qualified to appear on the general election ballot.[4] In contrast, and to take just one example, the ultimate 2012 Republican gubernatorial nominee spent over $1 million during a contested primary election to secure a place on the general election ballot. *See* Appellant Add. 90 (citing "Statement of Receipts and Expenditures for Political Committees for Friends of Ovide 2012 Committee," Sept. 19, 2012, http://sos.nh.gov/20120919comm.aspx?id=26519). That was just one of many contested primaries in both parties that year. By any measure, the expenditure of $50,000 – the amount LPNH's chair estimated would be required for a successful 2016 petitioning drive, *see* JA 104 (Tomasso Dep. 97:14-16) – is

[4] The New Hampshire 2012 General Election ballot included Libertarian candidates for President, Vice President, Governor, Representative in Congress (one candidate for each of the two Congressional Districts), state Executive Council (single candidates in three of the five Executive Council Districts), state senator (a single candidate in one Senate District), and state representative (single candidates in three state districts). *See* http://sos.nh.gov/2012GenElectResults.aspx.

small, if not minute, when measured against the expenditures and effort, aggregated among all candidates, required to obtain general election ballot access through the party primary process. It is certainly a reasonable and nondiscriminatory, and not a severe, burden on ballot access.

This reflects the District Court's analysis and, as it noted, the use of expenditures as a proxy for assessing the burden is firmly grounded in reality. As the District Court noted, "all petitioning requirements demand either a certain number of volunteer hours or a certain amount of money to pay professional petitioners to replace those volunteers. *See Am. Party of Tex.*, 415 U.S. at 787 ("Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization."); Doc. No. 36-1 [LPNH's Mem. of Law in Supp. of its Mot. for Summ. J.] at 24 ("Without paid support, a petition drive cannot get off the ground because the Libertarian Party structure is not a large organization.")." Appellant Add. 89. This Court should similarly conclude that any burdens are minimal and certainly not severe.

III. THE DISTRICT COURT PROPERLY APPLIED THE *ANDERSON/BURDICK* SLIDING SCALE TEST AND PROPERLY RULED THAT THE STATE'S LEGITIMATE INTEREST IN MAINTAINING AN ORDERLY BALLOT BY REQUIRING A DEMONSTRATION OF SUPPORT BEFORE GRANTING BALLOT ACCESS JUSTIFIES ANY BURDENS IMPOSED BY AMENDED § 655:40-a

A. The *Anderson/Burdick* Sliding Scale Approach Controls

Because of the competing interests involved, "the Supreme Court has developed a flexible 'sliding scale' approach for assessing the constitutionality of restrictions." *Barr*, 626 F.3d at 109 (citing *Timmons*, 520 U.S. at 358; *Burdick*, 504 U.S. at 432-434). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'" *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788); *Norman v. Reed*, 502 U.S. 279, 288-289 (1992); *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) ("However slight th[e] burden may appear … it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'") (quoting *Norman*, 502 U.S. at 288-289).

Although severe burdens are subject to strict scrutiny, the sliding scale approach repeatedly sanctioned by the Supreme Court forecloses specific

assignment of lesser levels of scrutiny. The discussions of intermediate scrutiny set forth by both LPNH and Amicus Center for Competitive Democracy only prove the point. Neither point to any binding ballot-access case employing intermediate scrutiny.

Simply, Supreme Court precedent, as well as this Court's cases, teach that where, as here, something less than a severe burden is imposed, a court must engage in the flexible *Anderson/Burdick* balance. This Court should conclude that the legitimate and compelling interest set forth by the State outweighs whatever minimal burdens are imposed by amended § 655:40-a.

B. The State Has a Legitimate and Compelling Interest in Maintaining an Orderly Ballot by Requiring a Demonstration of Support Before Granting Ballot Access

The State has explained that amended § 655:40-a requires a political organization to obtain the requisite number of nomination papers within a set time frame, thereby demonstrating that the organization currently has the necessary level of popular support within New Hampshire to gain ballot access. *See* Appellee Br. 33-36. This purpose, the State argues, comports with its broader interest in avoiding ballot clutter and overcrowding by limiting ballot access only to those organizations that demonstrate a basic level of support within New Hampshire. *Id.* at 33-34.

As an initial matter, the *Anderson/Burdick* balancing framework precludes, as a matter of law, any suggestion by LPNH and Amicus Center for Competitive Democracy that the State's interest is an improper "*post hoc* rationalization." Heightened scrutiny that might otherwise require evidence of justifications considered by the Legislature does not apply. The District Court's survey of rationales set forth by states in the Supreme Court's cases applying *Anderson* balancing underscores this point. Appellant Add. 99-100; *see also Timmons*, 520 U.S. at 378 n.6 (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 70-71 (1983) ("the State is not required now to justify its laws with exclusive reference to the original purpose behind their passage"); *see also Dudum v. Arntz*, 640 F.3d 1098, 1116 n.28 (noting that in *Timmons* "the Court expressly relied on a state interest admittedly not advanced in its briefs, but mentioned during oral argument, implying that the interest also was not advanced prior to the litigation (or else the Court presumably would have noted that fact). *See* 520 U.S. at 366 n.10."). Moreover, as the Supreme Court has made clear, states do not need to provide evidence of the harms they seek to prevent before enacting ballot-access provisions, including modifications of existing requirements. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196 (1986). Therefore, the addition of the

January 1 start date to amended § 655:40-a is not, as LPNH contends, "arbitrary."[5] Appellant Br. 51.

This legitimate regulatory interest is one long recognized by the Supreme Court. Indeed, the Supreme Court has found:

> an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Jenness, 403 U.S. at 442; *see also Timmons*, 520 U.S. at 366 ("The State surely has a valid interest in making sure that minor and third parties who are granted access

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[5] The differing requirements for a party's access to the general election ballot on the one hand, *see* N.H. Rev. Stat. Ann. § 652:11, and a political organization's access on the other hand, *see* amended § 655:40-a, are entirely lawful and not discriminatory. As discussed in Section II.A. *supra*, "[s]o long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner." *Am. Party of Tex.*, 415 U.S. at 782-783; *see also Jenness*, 403 U.S. 431, 441-442. Notably, in 2012, LPNH had a gubernatorial nominee on the general election ballot, *see* n.4, *supra*, but lacked the support to reach the 4 percent threshold required under § 652:11. Nonetheless, it still had the nomination paper process available to it to secure access to the general election ballot. Thus, both provisions of this statutory scheme advance the State's interest in ensuring sufficient support.

to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support.") (citing *Anderson*, 460 U.S. at 788 n.9; *Storer*, 415 U.S. at 733, 746); *Anderson*, 460 U.S. at 788 n.9 ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.").

Similarly, this Court has acknowledged that a state has a legitimate interest in protecting "'the integrity of elections by avoiding overloaded ballots and frivolous candidacies, which diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, . . . and may ultimately discourage voter participation in the electoral process.'" *Barr*, 626 F.3d at 111 (quoting *Libertarian Party of Me. v. Diamond*, 992 F.2d 365, 371 (1st Cir. 1993)).

The Supreme Court and Courts of Appeals alike have characterized this interest as compelling. *See Am. Party of Tex.*, 415 U.S. at 783 n.14 ("preservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion, are compelling"); *Libertarian Party v. Rednour*, 108 F.3d 768, 774 (7th Cir. 1997) ("[S]tates have a vital and compelling interest in requiring 'political parties appearing on the general ballot [to] demonstrate a significant, measurable quantum of community support.'") (quoting

Am. Party of Tex., 415 U.S. at 782 & n.14); *Libertarian Party of Fl. v. Florida*, 710 F.2d 790, 792-793 (11th Cir. 1983) ("[T]he state has an interest in regulating the election process and avoiding voter confusion. That these, and the other interests asserted, are compelling has been well established under decided cases.") (citations omitted).

Restrictions which require a "preliminary showing of a substantial measure of support as a prerequisite to appearing on the ballot," *Barr*, 626 F.3d at 111, advance this compelling state interest. New Hampshire's nomination-by-papers provisions, N.H. Rev. Stat. Ann. § 655:40-45 (2016), serve that purpose by establishing a framework whereby a political organization or individual candidates may obtain general election ballot access upon the submission of the requisite number of verified nomination papers.

Additionally, the amendment to § 655:40-a aligns with identical requirements in § 655:40, governing individual candidate petitioning. The coordination of the start dates in the two statutes advances the State's legitimate interest in orderly elections. *See Anderson*, 460 U.S. at 788 n.9. The potential for confusion is plain. Checklist supervisors, conducting an already complex and labor-intensive process, must confront two different date restrictions depending on the type of nomination papers submitted. Members of the public and other participants in the election process who wish to object, *see* N.H. Rev. Stat. Ann.

§ 655:44 (2016), face similar confusion. There is also a very limited window for objections to be received by the Secretary of State. N.H. Rev. Stat. Ann. § 655:41, I.

Against the foregoing clear and compelling interests advanced by New Hampshire, LPNH and Amici's heavy reliance on *Block v. Mollis*, 618 F. Supp. 2d 142 (D.R.I. 2009), is misplaced. As the District Court noted: "[T]he State's interest in requiring a demonstration of sufficient support independently justifies HB 1542. For that reason, *Block v. Mollis*, which involved a challenge against a Rhode Island ballot-access restriction similar to HB 1542, does not bear on this case, since Rhode Island sought to justify the challenged restriction there solely on the basis of the state's claimed 'false positive' interest."

Here, the State has offered completely different interests to justify amended § 655:40-a. Those legitimate and compelling interests outweigh any reasonable and nondiscriminatory burdens imposed by amended § 655:40-a.

CONCLUSION

For the reasons set forth herein, this Court should affirm the judgment of the District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,085 words, excluding 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 brief has been prepared in a proportionally spaced typeface,14-point Times New Roman, using Microsoft Word 2010.

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Dated: March 31, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, March 31, 2016, a copy of the foregoing *Brief for Amicus Curiae Republican National Committee* has been served via Electronic Case Filing (CM/ECF) on all counsel of record as follows:

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