

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No.: 2023-0041
603 Forward & a.

v.

New Hampshire Secretary of State & a;

and

Manuel Espitia, Jr. & a.

v.

New Hampshire Secretary of State & a.

PLAINTIFFS' JOINT MOTION TO DISMISS THE APPEAL

NOW COME Plaintiffs 603 Forward, Open Democracy Action, Louise Spencer, Edward Friederich, and Jordan Thompson (“603 Forward Plaintiffs”), and Manuel Espitia, Jr. and Daniel Weeks (“Espitia Plaintiffs”) (collectively, “Plaintiffs”), by and through their counsel, and submit the following motion to dismiss this appeal.

1. INTRODUCTION

On January 20, 2023, the New Hampshire Republican State Committee (“NHRSC”) filed a notice of appeal with this Court requesting discretionary review of the Hillsborough Superior Court, Southern District’s denial of NHRSC’s motion to intervene in this action. But NHRSC never served its Notice of Appeal on Plaintiffs, nor did it file its Notice of Appeal in the Superior Court. Plaintiffs only learned that this appeal existed on February 13, and that was by happenstance, when several of Plaintiffs’ counsel received an administrative docketing notice from this Court via email. Prior to receiving that notice, Plaintiffs had no knowledge of this appeal because of NHRSC’s failure to comply with this Court’s clear rules for docketing and noticing an appeal. *See* Sup. Ct. R. 5(1); *see also* Sup. Ct. R. 26(2). NHRSC’s failure to comply with Supreme Court Rules 5 and 26 means that this appeal must be dismissed: “If the moving party shall fail to cause

timely docketing of the case, in accordance with the requirements of these rules, or transmission of the record or to pay the entry fee, if one is required, the case shall be dismissed.” Sup. Ct. R. 5(4).

Dismissal is particularly warranted in this case because NHRSC’s violation of the rules amounts to more than a simple procedural hiccup. Plaintiffs have been deprived of the opportunity to file a motion to summarily affirm the Superior Court’s decision below because they had no notice of this appeal. Sup. Ct. R. 25(2) (setting 20-day deadline for motion for summary affirmance). Furthermore, if allowed to proceed, this appeal would seriously prejudice the rights of Plaintiffs, who have been delayed in prosecuting this case by the need to resolve NHRSC’s motion to intervene, which for conflict reasons controls the judicial assignment this case.

This case was originally assigned to the Honorable Charles Temple. He delayed consideration of the motion to dismiss filed by the State Defendants Attorney General John M. Formella and Secretary of State David M. Scanlan, which was filed in August of last year, pending resolution of NHRSC’s intervention motion. That motion was decided by the Honorable Jacalyn A. Colburn, who was specially assigned to consider NHRSC’s motion to intervene because Judge Temple has a preexisting friendship with NHRSC’s counsel that he later confirmed would cause his recusal if the motion to intervene were successful. Once Judge Colburn denied that motion, Judge Temple lifted the stay and was able to proceed with the case, holding a hearing on the State Defendants’ motion to dismiss on January 30. Thus, the resolution of NHRSC’s motion to intervene caused a two-and-half month lag between when the State Defendants’ motion to dismiss was originally scheduled to be heard and when it was ultimately heard. With NHRSC’s appeal now finally disclosed to the parties, however, its failure to timely docket and notify the parties of its appeal threatens to renew these prejudicial delays and impede the timely resolution of this action.

Plaintiffs respectfully move this Court to promptly dismiss this appeal in light of NHRSC’s prejudicial failure to timely docket it and notify the parties of its existence. Alternatively, if the Court considers NHRSC’s appeal despite their failure to comply with

its rules, then Plaintiffs request the opportunity to file a motion for summary affirmance of the Superior Court's order within 20 days after this Court denies this motion.

2. BACKGROUND

This lawsuit concerns two consolidated complaints challenging a recently enacted voter suppression law—Senate Bill 418 (“SB 418”)—that plaintiffs allege violates the New Hampshire Constitution. Ex. A (pp. 10-17), *603 Forward et al. v. Scanlan et al.*, Case No. 226-2022-CV-00233, Index No. 1 (N.H. Super. Ct. Jun 17, 2022); Ex. B (pp. 18-20), *Espitia et al. v. Scanlan et al.*, Case No. 226-2022-CV-00236, Index No. 1 (N.H. Super. Ct. Jun 21, 2022). Both suits name as defendants the State Defendants: the Attorney General and Secretary of State. *Id.* Shortly after Plaintiffs filed the complaints, the State Defendants moved without opposition to consolidate the actions on the docket of the Honorable Charles S. Temple. Ex. A (p. 14), Index No. 9. On August 26, 2022, the State Defendants moved to dismiss both complaints for lack of standing and ripeness.

NHRSC moved to intervene shortly thereafter.¹ Both sets of Plaintiffs objected to intervention, arguing that NHRSC's interests were closely aligned with those of the named defendants and that intervention would needlessly complicate and further delay the lawsuit. Plaintiffs also noted the likelihood that permitting NHRSC's intervention would require recusal of the trial court judge because of the relationship between him and NHRSC's counsel.² Judge Temple held a hearing on NHRSC's motion, and, confirmed the existence of a conflict of interest, and entered a “limited disqualification” for the sole purpose of adjudicating the motion to intervene, temporarily reassigning the case to Judge Colburn. *See* Ex. C (p. 21), Nov. 15, 2022 Limited Recusal Ord. “The decision on the motion to intervene,” Judge Temple ordered, “will govern the judicial assignment in this case.” *Id.* If NHRSC were granted intervention, the case would no longer be assigned to Judge Temple.

¹ NHRSC also purported to join the State's motion to dismiss; however, Judge Colburn noted that was improper, given that NHRSC had not yet been granted intervention. Ex. A (p. 15), Index No. 23; *see* Notice of Appeal, at 19 n.2 (J. Colburn) (noting joinder was “improperly filed before [NHRSC] was even allowed to intervene”).

² Judge Temple previously recused himself from a similar lawsuit in which NHRSC's counsel appeared on behalf of the Secretary of State. *See League of Women Voters of N.H. et al. v. Gardner*, Case No. 226-2017-CV-00433, Index No. 95, Order on Disqualification (N.H. Super. Ct. Oct. 22, 2018).

After careful consideration, Judge Colburn denied NHRSC's motion on December 21, 2022. With the question of intervention decided—and no Notice of Appeal having been served on the parties or entered on the Superior Court docket—the case reverted to Judge Temple, who scheduled a January 30 hearing on the State's motion to dismiss, which had been fully briefed and pending since October. Ex. D (p. 22), Notice of Hearing. The hearing notice was conveyed to all counsel on the docket, *including* counsel for NHRSC. *Id.* Because the 603 Forward Plaintiffs reasonably understood that Judge Temple would resolve the motion to dismiss after the January 30 hearing, they subsequently assented to the State Defendants' objection to answering the written discovery they had served on January 13 until after resolution of the motion to dismiss. Ex. A (p. 17), Index No. 37.

Unknown to Plaintiffs at the time of the hearing—and apparently the Superior Court and State Defendants, as well—ten days prior, NHRSC had in fact filed a Notice of Appeal in this Court. At the January 30 hearing, Judge Temple noted that he had reviewed Judge Colburn's order denying NHRSC's motion to intervene but made no reference to any pending appeal. Judge Temple proceeded to hear argument on the State Defendants' motion to dismiss—a motion he had previously delayed considering pending complete resolution of NHRSC's intervention motion. Yet, despite its awareness of the hearing on the State Defendant's motion to dismiss, and its motion to join the State Defendants' motion to dismiss, NHRSC never informed the Superior Court that it had appealed denial of its intervention motion.

In violation of this Court's rules, NHRSC did *not* “simultaneously file [copies of] the notice of appeal . . . with each of the parties, and . . . with the office of the clerk of the court from which the appeal is taken.” Sup. Ct. Rule 5(1). As of the time of this filing, Plaintiffs still have not been served with the Notice of Appeal nor has it been filed with the Superior Court. The Plaintiffs only learned of this appeal when this Court issued a docketing order on February 13, after the deadline for filing a motion for summary disposition under Rule 25 had passed. Plaintiffs promptly filed this motion dismiss two days after learning of the appeal.

3. ANALYSIS

This Court's rules dictate that it should dismiss this discretionary appeal because NHRSC failed to comply with Rules 5 and 26. In addition, if permitted to proceed, the appeal would greatly prejudice the Plaintiffs by further delaying the proceedings in the Superior Court, which remain in a preliminary posture more than eight months after the complaints were filed in large part due to NHRSC's motion to intervene.

- a. NHRSC failed to comply with the mandatory process for docketing and noticing an appeal.

This Court's rules mandate a series of steps required to perfect an appeal. Under the rules, the appealing party pays a docketing fee and “*shall simultaneously* file the required forms in the office of the clerk of this court, 1 copy with each of the parties, and 1 copy with the office of the clerk of the court or agency from which the appeal or transfer is taken.” Sup. Ct. R. 5(1) (emphasis added); *see also* Sup. Ct. R. 26(2) (“Copies of all documents filed by any party *shall, at or before the time of filing,* be served by a party or person acting for him or her on all other parties to the case. Service on a party represented by counsel shall be made on counsel.”) (emphasis added); *accord* R. Wiebusch, *New Hampshire Civil Practice and Procedure* § 60.14 (4th Ed. 2014) (“Unless a contrary rule is prescribed by statute or the Supreme Court Rules, the moving party *must . . .* send or deliver a copy to each opposing party or the opposing party’s counsel.” (emphasis added)). The duty to serve the Notice of Appeal on all parties to the case, as well as the clerk of the court from which the appeal is taken, is also prominently displayed in a certification section on this Court’s Rule 7 Notice of Discretionary Appeal.

The consequence of failing to comply with the docketing and service requirements is dismissal of the appeal: “If the moving party shall fail to cause timely docketing of the case, in accordance with the requirements of these rules, or transmission of the record or to pay the entry fee, if one is required, *the case shall be dismissed.*” Sup. Ct. R. 5(4) (emphasis added). Processes described by the word “shall” are mandatory under New Hampshire law. *E.g., Appeal of Concord Nat. Gas Corp.*, 121 N.H. 685, 691, 433 A.2d 1291, 1295 (1981) (“[T]he word ‘shall’ acts as a command.”).

Here, none of the Plaintiffs received *any* notice of the appeal until February 13—24 days after NHRSC filed its notice with this Court and nearly two weeks after the parties had resumed trial proceedings before Judge Temple. Even then, the notice came not from the NHRSC or the clerk of the Superior Court, but from an administrative docketing notice sent by this Court. This Court’s Rules allow no leeway for oversights in perfecting service, and as a result the appeal must be dismissed. *See* Sup. Ct. R. 5(4).

b. If permitted to proceed, NHRSC’s failure to notice its appeal will significantly prejudice Plaintiffs.

NHRSC’s failure to notice its appeal is not merely a technical deficiency; it has seriously prejudiced the existing parties to the case, including Plaintiffs. First, Plaintiffs learned of this appeal after the deadline for filing a motion to summarily affirm the Superior Court’s decision had already passed. Sup. Ct. R. 25. Had Plaintiffs been aware of the appeal, they would have immediately filed a motion for summary affirmance because the Superior Court did not err in denying NHRSC’s motion to intervene.

Moreover, NHRSC has already imposed substantial delays in the resolution of this lawsuit—even as *proposed* intervenors. Its failure to timely notify the parties and the trial court of its appeal now threatens to exacerbate those delays further and should not be excused. Plaintiffs brought this lawsuit immediately after SB 418 was enacted in June 2022. Ex. E (pp. 23-60), 603 Forward Compl. ¶ 3. Despite Plaintiffs’ timeliness, this lawsuit has not progressed beyond the initial pleadings stage in significant part because of NHRSC’s motion to intervene, which required the Superior Court to specially assign the motion to a different judge to determine the judicial assignment in this case. *See* Ex. C (p. 21). Plaintiffs’ efforts to prosecute this case in the trial court could once again be delayed by NHRSC, but this time for its failure to comply with simple rules for noticing an appeal.

Moreover, the 603 Forward Plaintiffs, in reliance on the finality of Judge Colburn’s order, assented to postponement of the State Defendants’ response to already-served written discovery until after resolution of the motion to dismiss. The 603 Forward Plaintiffs would have made no such agreement had they known that Judge Colburn’s

order was subject to an appeal that could potentially further delay the trial court proceedings. If the appeal proceeds, Plaintiffs will likely be deprived of time and opportunity to engage in crucial factual development of the record.

Even without this prejudice, this Court's rules unambiguously require dismissal of the appeal. But this clear prejudice to Plaintiffs also reinforces why it is critical for this Court to vigorously enforce its commonsense rules for docketing and noticing an appeal.

4. CONCLUSION

For the reasons stated above, NHRSC's appeal should be dismissed for failing to comply with Supreme Court Rules 5 and 26. Alternatively, if the Court considers NHRSC's appeal despite their failure to comply with its rules, then Plaintiffs request the opportunity to file a motion for summary affirmance of the Superior Court's order within 20 days after this Court denies this motion.

WHEREFORE, the undersigned respectfully requests that the Honorable Court:

- i. Dismiss NHRSC's appeal; and
- ii. Grant such further relief as it deems just and proper.

Date: February 15, 2023

Respectfully submitted,

603 Forward, Open Democracy Action,
Louise Spencer, Edward Friedrich, and
Jordan Thompson

and

Manuel Espitia Jr. and Daniel Weeks

By their Attorneys

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** Pro Hac Vice applications forthcoming*

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CERTIFICATE OF SERVICE

On this 15th day of February 2023, I hereby certify that I served the foregoing through the Court's electronic filing system and via electronic mail on all parties and counsel of record.

/s/ Steven J. Dutton
Steven J. Dutton

RETRIEVED FROM DEMOCRACYDOCKET.COM

Hillsborough South

Case Summary

Case No. 226-2022-CV-00233

603 Forward, et al v David M. Scanlan, Acting NH
Secretary of State, et al

§
§
§

Location: Hillsborough South
Judicial Officer: Temple, Charles S
Filed on: 06/17/2022

Case Information

Case Type: Complaint for Injunction
Case Status: 06/17/2022 Pending

Assignment Information

Current Case Assignment

Case Number 226-2022-CV-00233
Court Hillsborough South
Date Assigned 06/17/2022
Judicial Officer Temple, Charles S

Party Information

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Case Summary

Case No. 226-2022-CV-00233

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Case Summary

Case No. 226-2022-CV-00233

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Hillsborough South

Case Summary

Case No. 226-2022-CV-00233

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Events and Orders of the Court


06/17/2022  Complaint - Civil Index # 1
Bench
Party: Plaintiff 603 Forward;
Plaintiff Friedrich, Edward R.;
Plaintiff Open Democracy Action;
Plaintiff Spencer, Louise;
Plaintiff Thompson, Jordan Michael


06/23/2022 **Service**
David M. Scanlan, Acting NH Secretary of State
Served: 06/29/2022
John M. Formella, NH Attorney General
Served: 06/29/2022


06/23/2022  Summons on Complaint Index # 2
Env #2424308


06/29/2022  Acceptance of Service Index # 3
obo Defs
Party: Plaintiff 603 Forward;
Plaintiff Friedrich, Edward R.;
Plaintiff Open Democracy Action;
Plaintiff Spencer, Louise;
Plaintiff Thompson, Jordan Michael

06/29/2022 Service

07/14/2022  Appearance Index # 4
Samuel Garland obo Defs
Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General

07/14/2022  Appearance Index # 5
Anne Edwards obo Defs
Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General

07/14/2022  Appearance Index # 6
Myles Matteson obo Defs
Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General


07/14/2022  Appearance Index # 7
Matthew Conley obo Defs

Hillsborough South

Case Summary

Case No. 226-2022-CV-00233

Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General

07/19/2022	 Motion to Consolidate <i>with 226-2022-CV-00236/Assented/Defts</i> Party: Defendant David M. Scanlan, Acting NH Secretary of State; Defendant John M. Formella, NH Attorney General	Index # 8
07/27/2022	Granted (Judicial Officer: Colburn, Jacalyn A) <i>Env #2481694</i>	
08/26/2022	 Motion to Dismiss <i>Defts</i> Party: Defendant David M. Scanlan, Acting NH Secretary of State; Defendant John M. Formella, NH Attorney General	Index # 10
09/01/2022	 Motion to Intervene <i>of NH Republican State Committee</i> Party: Intervenor NH Republican State Committee	Index # 11
09/01/2022	 Appearance <i>of Morgan G. Tanafon obo Intervenor</i> Party: Intervenor NH Republican State Committee	Index # 12
09/01/2022	 Appearance <i>of Bryan K. Gould obo Intervenor</i>	Index # 13
09/12/2022	 Response <i>to Mo Intervene-Plts</i> Party: Plaintiff 603 Forward; Plaintiff Friedrich, Edward R.; Plaintiff Open Democracy Action; Plaintiff Spencer, Louise; Plaintiff Thompson, Jordan Michael	Index # 14
09/12/2022	 Obj-Motion to Intervene <i>Espitia Plts</i> Party: Attorney Klementowicz, Henry R. ESQ	Index # 15
09/13/2022	 Notice of Intent to Reply <i>to obj mo intervene-Intervenor</i> Party: Intervenor NH Republican State Committee	Index # 16
09/22/2022	 Response to Objection <i>to Motion to Intervene - Intervenor</i> Party: Intervenor NH Republican State Committee	Index # 17
09/26/2022	 Obj-Motion to Dismiss <i>603 Plfs</i> Party: Plaintiff 603 Forward; Plaintiff Friedrich, Edward R.; Plaintiff Open Democracy Action; Plaintiff Spencer, Louise; Plaintiff Thompson, Jordan Michael	Index # 18
09/26/2022	 Obj-Motion to Dismiss <i>Espitia Plfs</i> Party: Attorney Klementowicz, Henry R. ESQ	Index # 19
09/29/2022	 Notice of Intent to Reply	Index # 20


Hillsborough South

Case Summary

Case No. 226-2022-CV-00233

to Objs to MTD - Defs

Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General








10/07/2022	 Response to Objection to Motion to Dismiss - Defs Party: Defendant David M. Scanlan, Acting NH Secretary of State; Defendant John M. Formella, NH Attorney General	Index # 21
10/14/2022	 Motion to Reschedule 11-10-22 Hearing/Parties Party: Plaintiff 603 Forward; Plaintiff Friedrich, Edward R.; Plaintiff Open Democracy Action; Plaintiff Spencer, Louise; Plaintiff Thompson, Jordan Michael	Index # 22
10/19/2022	Granted (Judicial Officer: Temple, Charles S) Env #2628912	
11/10/2022	 CANCELED Hearing-Motion to Intervene (8:00 AM) (Judicial Officer: Temple, Charles S) Other	
11/10/2022	 CANCELED Hearing-Motion to Dismiss (8:00 AM) (Judicial Officer: Temple, Charles S) Other	
11/14/2022	 Joinder to Motion to Dismiss/Intervenor Party: Intervenor NH Republican State Committee	Index # 23
11/15/2022	 Hearing-Motion to Intervene (8:00 AM) (Judicial Officer: Temple, Charles S) Parties Appeared-Hearing Continued	
11/15/2022	 Hearing-Motion to Dismiss (8:00 AM) (Judicial Officer: Temple, Charles S) Parties Appeared-Hearing Continued	
11/15/2022	 Court Order (Judicial Officer: Temple, Charles S) Env #2675014	Index # 24
11/15/2022	Other advanced notice audio/ video form	Index # 25
12/21/2022	 Court Order (Judicial Officer: Colburn, Jacalyn A) RE #11-Env #2736289	Index # 26
12/21/2022	Denied (Judicial Officer: Colburn, Jacalyn A) see #26	
01/25/2023	 Motion to Appear Pro Hac Vice Admit Henry J. Brewster PHV-Assented-Plfs Party: Plaintiff 603 Forward; Plaintiff Friedrich, Edward R.; Plaintiff Open Democracy Action; Plaintiff Spencer, Louise; Plaintiff Thompson, Jordan Michael	Index # 27
01/25/2023	 Motion to Appear Pro Hac Vice Admit Christopher D. Dodge PHV-Assented-Plfs Party: Plaintiff 603 Forward; Plaintiff Friedrich, Edward R.; Plaintiff Open Democracy Action; Plaintiff Spencer, Louise;	Index # 28

Hillsborough South

Case Summary

Case No. 226-2022-CV-00233




Plaintiff Thompson, Jordan Michael

- 01/25/2023  Motion to Appear Pro Hac Vice Index # 29
Admit Aria C. Branch PHV-Assented-Plfs
Party: Plaintiff 603 Forward;
Plaintiff Friedrich, Edward R.;
Plaintiff Open Democracy Action;
Plaintiff Spencer, Louise;
Plaintiff Thompson, Jordan Michael
- 01/25/2023  Motion to Appear Pro Hac Vice Index # 30
Admit Raisa Cramer PHV-Assented-Plfs
Party: Plaintiff 603 Forward;
Plaintiff Friedrich, Edward R.;
Plaintiff Open Democracy Action;
Plaintiff Spencer, Louise;
Plaintiff Thompson, Jordan Michael
- 01/25/2023  Motion to Appear Pro Hac Vice Index # 31
Admit Elena Rodriguez Armenta PHV-Assented-Plfs
Party: Plaintiff 603 Forward;
Plaintiff Friedrich, Edward R.;
Plaintiff Open Democracy Action;
Plaintiff Spencer, Louise;
Plaintiff Thompson, Jordan Michael
- 01/25/2023  Motion to Appear Pro Hac Vice Index # 32
Admit Marisa O'Gara PHV-Assented-Plfs
Party: Plaintiff 603 Forward;
Plaintiff Friedrich, Edward R.;
Plaintiff Open Democracy Action;
Plaintiff Spencer, Louise;
Plaintiff Thompson, Jordan Michael
- 01/27/2023 Granted (Judicial Officer: Temple, Charles S)
Env #2797508
- 01/27/2023 Granted (Judicial Officer: Temple, Charles S)
Env #2797508
- 01/27/2023 Granted (Judicial Officer: Temple, Charles S)
Env #2797508
- 01/27/2023 Granted (Judicial Officer: Temple, Charles S)
Env #2797508
- 01/27/2023 Granted (Judicial Officer: Temple, Charles S)
Env #2797508
- 01/27/2023 Granted (Judicial Officer: Temple, Charles S)
Env #2797508
- 01/30/2023  **Hearing-Motion to Dismiss** (8:00 AM) (Judicial Officer: Temple, Charles S)
Taken Under Advisement
- 02/03/2023  Motion to Stay Index # 33
1st set Interrog-Def-Formella
Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General
- 02/03/2023  Motion to Stay Index # 34
Req for Prod-Def-Formella
Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General

Hillsborough South

Case Summary

Case No. 226-2022-CV-00233

- 02/03/2023  Motion to Stay Index # 35
1st set of Interrog-Def-Scanlan
Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General
- 02/08/2023  Motion to Stay Index # 36
Req for Prod-Def-Scanlan
Party: Defendant David M. Scanlan, Acting NH Secretary of State;
Defendant John M. Formella, NH Attorney General
- 02/09/2023  Non-Objection to Motion Index # 37
to Stay First Set of Interrog and Req for Prod on Formella & Scanlan-Plts
Party: Plaintiff 603 Forward;
Plaintiff Friedrich, Edward R.;
Plaintiff Open Democracy Action;
Plaintiff Spencer, Louise;
Plaintiff Thompson, Jordan Michael

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Hillsborough South

Case Summary

Case No. 226-2022-CV-00236

Manuel Espitia, JR, et al v David Scanlan, NH Secretary
of State, et al §
§
§

Location: Hillsborough South
Judicial Officer: Temple, Charles S
Filed on: 06/21/2022

Case Information

Case Type: Complaint for Injunction
Case Status: 06/21/2022 Pending

Assignment Information

Current Case Assignment

Case Number 226-2022-CV-00236
Court Hillsborough South
Date Assigned 06/21/2022
Judicial Officer Temple, Charles S

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PAGE 1 OF 3

Printed on 02/14/2023 at 11:33 AM

Hillsborough South

Case Summary

Case No. 226-2022-CV-00236

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Events and Orders of the Court

06/21/2022	 Complaint - Civil <i>Bench Trial</i> Party: Plaintiff Espitia, Manuel JR; Plaintiff Weeks, Daniel	Index # 1
06/21/2022	 Appearance <i>of Gilles Bissonnette for Plts</i> Party: Plaintiff Espitia, Manuel JR; Plaintiff Weeks, Daniel	Index # 2
06/24/2022	Service David Scanlan, NH Secretary of State Served: 06/27/2022 John Formella, NH Attorney General Served: 06/27/2022	
06/24/2022	 Summons on Complaint <i>Env #2427754</i>	Index # 3
06/27/2022	Service	
06/30/2022	 Acceptance of Service <i>and App of Samuel Garland for Defs</i> Party: Defendant David Scanlan, NH Secretary of State; Defendant John Formella, NH Attorney General	Index # 4
07/14/2022	 Appearance <i>Samuel Garland obo Defs</i> Party: Defendant David Scanlan, NH Secretary of State; Defendant John Formella, NH Attorney General	Index # 5
07/14/2022	 Appearance <i>Anne Edwards obo Defs</i> Party: Defendant David Scanlan, NH Secretary of State; Defendant John Formella, NH Attorney General	Index # 6

Hillsborough South

Case Summary

Case No. 226-2022-CV-00236

07/14/2022	 Appearance <i>Myles Matteson obo Defs</i> Party: Defendant David Scanlan, NH Secretary of State; Defendant John Formella, NH Attorney General	Index # 7
07/14/2022	 Appearance <i>Matthew Conley obo Defs</i> Party: Defendant David Scanlan, NH Secretary of State; Defendant John Formella, NH Attorney General	Index # 8
07/19/2022	 Motion to Consolidate <i>Assented to/Def's</i> Party: Defendant David Scanlan, NH Secretary of State; Defendant John Formella, NH Attorney General	Index # 9
07/27/2022	Granted (Judicial Officer: Colburn, Jacalyn A) <i>Env #2481718</i>	
07/28/2022	Other <i>LEAD CASE IS 226-2022-CV-00233</i>	Index # 10
11/15/2022	Hearing-Motion to Dismiss (8:00 AM) (Judicial Officer: Temple, Charles S) <i>Hearing Held</i>	
11/15/2022	Hearing-Motion to Intervene (8:00 AM) (Judicial Officer: Temple, Charles S) <i>Parties Appeared-Hearing Continued</i>	
01/30/2023	Hearing-Motion to Dismiss (8:00 AM) (Judicial Officer: Temple, Charles S) <i>Taken Under Advisement</i>	

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Hillsborough County

Hillsborough Superior Court Southern District

603 Forward, et al v David M. Scanlan, Acting NH Secretary of State, et al

226-2022-CV-00233

LIMITED RECUSAL ORDER

In accordance with Supreme Court Rule 38, Canon 2, Rule 2.11, a limited disqualification is entered for the sole purpose of a ruling on the pending motion to intervene filed by the New Hampshire Republican State Committee. (Court Index No. 11). This motion is assigned to Judge Colburn. The reasons for the Court's limited recusal were set forth on the record at the hearing held on November 15, 2022. The judicial disqualification directly relates to the order on pending motions entered in N.H. Democratic Party v. Gardner, et al/ 226-2017-CV-432 and League of Women Voters of N.H., et al/ 226-2017-CV-433 on June 8, 2018.

Judge Colburn will decide whether to issue an order on the pleadings related to the motion to intervene or schedule a hearing on the motion. The decision on the motion to intervene will govern the judicial assignment in this case.

So Ordered.

November 15, 2022

Date



Judge Charles S. Temple

Clerk's Notice of Decision
Document Sent to Parties
on 11/15/2022

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
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<http://www.courts.state.nh.us>

NOTICE OF HEARING

FILE COPY

Case Name: **603 Forward, et al v David M. Scanlan, Acting NH Secretary of State, et al**
Case Number: **226-2022-CV-00233 226-2022-CV-00236**

The above referenced case(s) has/have been scheduled for: **Hearing-Motion to Dismiss**

Date: January 30, 2023 **30 Spring Street**
Time: 2:00 PM **Nashua NH 03060**
Time Allotted: 2 Hours **Location:**

If you do not appear at this hearing, the Court may consider you to be in default and may make orders against you without your input. If you are the defendant and do not appear, the Court may find for the plaintiff(s) and proceed immediately to the assessment of damages or a hearing on the relief sought. If you are the plaintiff and do not appear, the Court may dismiss the case.

Multiple cases are scheduled during this session. Please notify the court immediately if your hearing is expected to last longer than the allotted time, as the Court cannot guarantee that additional time will be available.

If you will need an interpreter or other accommodations for this hearing, please contact the Court immediately.

Please be advised (and/or advise clients, witnesses, and others) that it is a Class B felony to carry a firearm or other deadly weapon as defined in RSA 625:11, V in a courtroom or area used by a court.

January 12, 2023

Amy M. Feliciano
Clerk of Court

(921)

C: Steven J. Dutton, ESQ; Amanda E. Quinlan, ESQ; Anne M. Edwards, ESQ; Samuel R. V. Garland, ESQ; Myles Brand Matteson, ESQ; Matthew Gregory Conley, ESQ; Gilles R. Bissonnette, ESQ; Bryan K. Gould, ESQ; Morgan Gareth Tanafon, ESQ

EXHIBIT E

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

226-2022-CV-00233
Case No. _____

603 FORWARD;
OPEN DEMOCRACY ACTION;
LOUISE SPENCER;
EDWARD R. FRIEDRICH; and
JORDAN M. THOMPSON

Plaintiffs

v.

DAVID M. SCANLAN, in his official capacity as the Acting New Hampshire Secretary of State;
and JOHN M. FORMELLA, in his official capacity as the New Hampshire Attorney General

Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs 603 Forward; Open Democracy Action; Louise Spencer; Edward R. Friedrich, and Jordan M. Thompson, by and through counsel, Paul Twomey, Esq., McLane Middleton, Professional Association, and Elias Law Group LLC, bring this Complaint for a declaratory judgment and permanent injunction and state as follows:

INTRODUCTION

1. New Hampshire has long enjoyed high-turnout, secure, and fraud-free elections. As Governor Sununu boasted months ahead of the 2020 election, New Hampshire's elections are "secure, safe and reliable," and the state has "done it right 100% of the time for 100 years."

2. Governor Sununu predicted the 2020 election would "be no different" from previous successful elections, and he was correct. In the 2020 election, New Hampshire voters turned out in record numbers, surpassing a 70 percent turnout rate for the first time in over half-a-

century. As longtime Secretary of State Bill Gardner recognized, it was “quite an accomplishment” to “set a record” for turnout despite the obstacles created by the pandemic. Officials across the political spectrum agreed the election was a success and unmarred by any significant instances of fraud.

3. Nevertheless, the New Hampshire General Court enacted Senate Bill 418 this year, purportedly to combat voter fraud in New Hampshire elections. *See* Ex. A (“SB 418”). There is no credible evidence that voter fraud is, in fact, a problem in New Hampshire. Yet, on this basis, SB 418 significantly alters New Hampshire’s election procedures to make it harder for new registrants to vote. The legislation was passed on a strictly party-line vote. After expressing reservations about the legislation, Governor Sununu signed SB 418 into law on June 17, 2022.

4. Under SB 418, “if a voter on election day is registering to vote for the first time in New Hampshire and does not have a valid photo identification establishing such voter’s identification,” the voter must vote a so-called “Affidavit Ballot”—which is serialized, segregated, and subject to removal from official vote counts if the voter does not provide documentation of their identity within seven days of the election. Voters who are unable to comply with the burdensome cure process necessary to have an Affidavit Ballot counted will be referred to the Attorney General for investigation and possible criminal penalties.

5. The impacts of SB 418 are significant and will have broad, negative impacts on the voting rights of entirely lawful, eligible New Hampshire voters. Many new registrants will be forced to cast an Affidavit Ballot and may have their Affidavit Ballot nullified by the Secretary of State and even become the subject of a criminal investigation, all for the “crime” of not having or presenting a specific form of identification. SB 418’s administrative burdens will harm other voters as well. Due to the law’s lengthy certification process, overseas voters, including military voters,

will not receive their absentee ballots in a timely manner, threatening their ability to have their votes returned and counted. Thousands of other voters will feel the effects of SB 418 in the form of longer lines and confusion about how to vote due to the needlessly complicated election procedures SB 418 imposes on polling places. Rather than contend with longer lines and confusing forms, many voters will simply choose not to vote at all. Because New Hampshire elections are so competitive, the impact of SB 418 may be outcome determinative in some races.

6. The New Hampshire Constitution guarantees the fundamental right to vote. It provides that “[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” N.H. Const. pt. 1, art. 11. It further declares that “[e]very person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile,” and requires that “[v]oting registration and polling places [] be easily accessible to all persons.” *Id.* New Hampshire’s founding charter further recognizes that citizens enjoy other inalienable rights, including equal protection of the laws; the right to privacy; and due process. *See* N.H. Const. pt. 1, arts. 1, 2, 2-b, 10-12, 14, 15. SB 418 violates both the letter and spirit of these decrees.

7. The New Hampshire Constitution also sets forth certain procedural requirements for elections, including that city and town clerks must report the results of an election to the Secretary of State’s office within five days of the election. *See* N.H. Const. pt. 2, art. 32. Because the complicated Affidavit Ballot verification process will not be complete until seven days after an election, SB 418 violates these requirements as well. Indeed, the Secretary of State himself has raised questions about SB 418’s constitutionality on numerous occasions, despite also supporting the bill. After the General Court passed the bill, Secretary Scanlan explained he had “simply raised, you know, that there may be a constitutional issue with [SB 418], and I’ve done that. But if the

bill becomes law, then we're going to administer it and leave it up to someone else.”¹

8. That the General Court would enact a law flagrantly violating these constitutional provisions is, unfortunately, not surprising. SB 418 is simply one in a series of suppressive voting laws enacted over the past decade. New Hampshire's courts have enjoined each of these recent and repeated efforts to discourage qualified voters from casting ballots, finding that the restrictions violate the state constitution's guarantee of the right to vote. *See, e.g., N.H. Democratic Party v. Sec'y of State*, 262 A.3d 366, 382 (N.H. 2021) (enjoining SB 3 as unduly burdening the right to vote); *Guare v. New Hampshire*, 167 N.H. 658, 669 (2015) (enjoining SB 318 as unduly burdening the right to vote). SB 418 is similar in kind to its predecessors and accordingly the same result is required here: SB 418 must be permanently enjoined.

PLAINTIFFS

9. Plaintiff 603 Forward is a non-profit, non-partisan organization formed under section 501(c)(4) of the Internal Revenue Code and incorporated under the laws of New Hampshire. 603 Forward's principal place of business is 4 Park Street, Suite 302, Concord, New Hampshire 03301, but it engages in activities throughout the state. Founded in 2020, 603 Forward confronts “the generational crises facing New Hampshire” by engaging in policy areas like public education reform, healthcare access, and voting rights. The organization advances its mission in multiple ways: its volunteers, whom they recruit and train, submit testimony and advocate on proposed legislation moving through the General Court; staff with the group encourage communities to take collective action; and the organization's staff helps young people from New

¹ *See* Ethan DeWitt, *As Sununu Indicates Support, Legal Questions Around 'Provisional Ballot' Bill Persist*, New Hampshire Bulletin (June 7, 2022), <https://newhampshirebulletin.com/2022/06/07/as-sununu-indicates-support-legal-questions-around-provisional-ballot-bill-persist/>.

Hampshire run for elected office in their home communities. 603 Forward is supported by thousands of New Hampshire citizens who actively volunteer in the civic life of the state through their affiliation with the organization.

10. The organization's mission is, above all else, the maintenance and promotion of a healthy democracy. SB 418 is antithetical to that mission. The law will keep a significant number of eligible, lawful voters from casting a regular ballot and having their votes counted. SB 418 will create barriers to voting that will threaten the electoral prospects of 603 Forward's trained candidates, making it more difficult for 603 Forward's constituents to elect their preferred candidates and further their shared political purposes. The new law also harms 603 Forward's sophisticated voter education program, which focuses on empowering communities with lower voter engagement in several ways, including through voter registration. As part of this work, 603 Forward works to simplify complex election laws for voters, particularly recent immigrants, making it easier for them to understand and navigate the voting process. SB 418 will require the organization to revamp its voter education efforts by developing programs to educate New Hampshire voters about SB 418's confusing requirements. 603 Forward will also need to print substantially different voter education materials and translate them into several languages to help engage the state's growing immigrant population from many African, Asian, and Latin American countries. These efforts will reduce the time and resources 603 Forward has to educate its constituents and legislators on other legislation, policies, and developments that impact New Hampshire voters. The advocacy to combat SB 418 has already required significant reallocation of time and resources in terms of personnel and budget. The law will also require extensive retraining of staff and volunteers who work with communities to register and encourage citizens to vote.

11. Plaintiff Open Democracy Action is a non-profit, non-partisan organization formed under section 501(c)(4) of the Internal Revenue Code and headquartered at 4 Park Street, Suite 301, Concord, New Hampshire 03301. Open Democracy Action's mission is to bring about and safeguard political equality for the people of New Hampshire, which its founders believe will only happen through an open, accountable, and trusted democratic government "of, by, and for the people." Inherent to that mission is an electoral system that allows eligible citizens to vote and have their vote counted. The organization effects change by asking its dedicated roster of volunteers to complete three action items each week in pursuit of the organization's goals. These efforts include engaging friends and family about pressing issues, writing letters to the editors of local newspapers, speaking at local functions, and encouraging others to become more involved in the state's civic life. Open Democracy Action also works in furtherance of its mission by educating and informing public, civic, and political leaders about legislation and other actions needed to reform the state's government to a system that promotes equality under the law for all citizens. Open Democracy Action's advocacy includes working with candidates and elected officials who support their reform agenda.

12. Open Democracy Action also pursues its mission through significant voter education efforts that focus on informing prospective voters about voter registration rules and advising voters on how to vote either through absentee ballot or in person. These efforts require Open Democracy Action to print voter education materials, train its volunteers on New Hampshire's voting rules, and plan programming for the constituencies it serves. Open Democracy Action focuses its education efforts on groups who historically have lower voter turnout, including young voters, new citizens, and lower-income voters. For example, Open Democracy Action works with New Hampshire's schools to educate high school students about voting rules as they

become eligible to register to vote. The group's voter education initiatives also involve educating prospective voters on how to register on election day at polling places. During the 2020 elections, for instance, Open Democracy Action volunteers ran phone drives to reach unregistered, lower-income voters, which required informing them about same-day registration options. Open Democracy Action's core constituencies—young voters, new voters, and lower-income voters—are the very voters most likely to be harmed by SB 418.

13. SB 418 will require Open Democracy Action to divert significant resources to address the law's harmful effects on New Hampshire voters, and particularly the constituencies served by Open Democracy Action. The law will require the organization to revise its voter education materials and programming to explain the law's new requirements to voters, diverting resources and time away from other mission critical initiatives. SB 418 will also force Open Democracy Action to expend resources and time educating and retraining its volunteers. These volunteers will in turn have to reallocate their time away from other Open Democracy Action priorities to educate the most vulnerable voters about SB 418's burdensome requirements. The resources that Open Democracy Action must divert in response to SB 418 detract from the group's ability to pursue other aspects of its mission.

14. Further still, as a result of SB 418's administrative requirements, Open Democracy Action's constituents—and thousands of other New Hampshire voters—will likely be confronted by longer lines at the polls, as first-time registrants and poll workers alike navigate a new and confusing registration regime. Open Democracy Action's constituents—particularly those in New Hampshire's largest cities and localities with many first-time registrants—will likely have their wait times to vote in person significantly increased.

15. Plaintiff Louise Spencer is a taxpaying citizen and registered voter of New Hampshire, residing at 3 Kent Street, No. 3, Concord, New Hampshire 03301. Ms. Spencer has long been an active member of New Hampshire's civic society. She is a co-founder of the Kent Street Coalition—an all-volunteer grassroots community organization focused on helping New Hampshire voters engage in politics in a meaningful way at the local level. Ms. Spencer testified against the passage of SB 418 before the General Court and organized rallies urging lawmakers to reject the bill.

16. It is Ms. Spencer's belief as an engaged voter and citizen of New Hampshire that SB 418 is unconstitutional, and that, by passing the law, the state government has approved spending public funds in violation of the New Hampshire Constitution. Among other concerns with the bill, Ms. Spencer is troubled by the impact the law will have on waiting times to vote, particularly in communities with many first-time voters. Ms. Spencer has served as a poll observer during multiple election cycles and has witnessed firsthand how cities and towns with larger numbers of new registrants tend to experience longer lines and waiting times on election day. Ms. Spencer joins this complaint because SB 418 is not presently subject to any judicial or administrative decision from which there is a right of appeal. Accordingly, with SB 418 now enacted, this lawsuit is the sole means by which Ms. Spencer can ensure the state government remains "open, accessible, accountable and responsive" to the people and their constitutional guarantees. N.H. Const. pt. 1, art. 8.

17. Plaintiff Edward R. Friedrich is a taxpaying citizen and registered voter in New Hampshire, residing at 7023 School Street, Loudon, New Hampshire 03307. Mr. Friedrich previously served in the United State Marine Corps from May 1969 until August 1973, achieving the rank of First Lieutenant. During his time in the Marine Corps, Mr. Friedrich served as a

Bombardier/Navigator in an A6A aircraft assigned to VMA(AW)-224 based in Cherry Point, North Carolina. Mr. Friedrich's grandson currently serves in the United States Navy as an Aviation Firefighter aboard the aircraft carrier USS Carl Vinson.

18. Like Ms. Spencer, Mr. Friedrich is deeply troubled by SB 418 and believes the law is unconstitutional. He is particularly concerned about the impact the law will have on overseas military voters, like his grandson, who due to SB 418 will not be able to receive absentee ballots in a timely manner, as required by the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").² Mr. Friedrich urged the General Court to reject SB 418 and for Governor Sununu to veto the bill. His efforts included sending letters to the editor and speaking publicly against the bill at rallies.³ He believes that, by passing the law, the state government has approved the spending of public funds in a manner that violates the New Hampshire Constitution. He joins this complaint

² UOCAVA requires that states and territories allow certain overseas citizens, including members of the United States Uniformed Services, to register and vote absentee in elections for federal office. *See generally* 52 U.S.C. § 20301, *et seq.* Under UOCAVA, states must transmit requested absentee ballots to overseas voters no later than 45 days before a federal election. *See* 52 U.S.C.A. § 20302(a)(8). SB 418 makes it all-but-impossible for New Hampshire to comply with this statutory deadline. The law's burdensome verification scheme means that cities and towns are not required to report certified vote tallies until 14 days after an election. *See* SB 418 § 2, VI. Due to New Hampshire's late primary date, this means that the state's primary elections will not be certified until *after* the 45-day deadline imposed by UOCAVA. The state therefore will not have adequate time—indeed, any time—after the primary election to prepare, print, and mail ballots to overseas voters in a manner sufficient to ensure their ability to vote and have their ballots counted. Secretary Scanlan *repeatedly* recognized this problem while testifying on the bill, acknowledging the timing created a "conflict." *See* Ex. B (Jan. 20, 2022 Sen. Elec. Law & Mun. Affairs Comm. Hr'g Tr.) at 14; Ex. C (April 8, 2022 House Election Law Comm. Hr'g Tr.) at 56-57 (acknowledging bill required modification to comply with UOCAVA). But no amendment to the bill fixed this glaring violation of federal law.

³ *See* Ed Friedrich, *Sununu Should Veto Senate Bill 418 For Sake Of Our Military*, The Keene Sentinel (May 27, 2022), https://www.sentinelsource.com/opinion/op-ed/sununu-should-veto-senate-bill-418-for-sake-of-our-military/article_cafd29ea-23db-5a77-8baa-9d5e6f9a9ed7.html; Kevin Landrigan, *Advocates Urge Sununu Veto Affidavits Ballot Bill*, N.H. Union Leader (May 23, 2022), https://www.unionleader.com/advocates-urge-sununu-veto-affidavits-ballot-bill/image_70c4945a-acd7-5dd7-993f-9bc2357d5807.html.

because SB 418 is not presently subject to any judicial or administrative decision from which there is a right of appeal. Accordingly, with the law now enacted, this lawsuit is the sole means by which Mr. Friedrich can prevent SB 418's harmful operation and hold the state government to its constitutional commitments. *See generally* N.H. Const. pt. 1, art. 8.

19. Plaintiff Jordan Michael Thompson is a taxpaying citizen and registered voter of New Hampshire, residing at 11 Lovewell Street, Nashua, New Hampshire 03060. He currently serves as the Executive Director of Black Lives Matter Nashua. Mr. Thompson is actively engaged in the civic life of Nashua and has run for several public offices in the city. He currently anticipates volunteering as a ballot inspector in the upcoming September primary. Mr. Thompson is concerned about the impact SB 418 will have in his community, as cities like Nashua tend to have more same-day registrants, first-time voters, younger voters, and voters without photo identification documents. Mr. Thompson believes that these voters will be disproportionately harmed by SB 418.

20. It is Mr. Thompson's belief as an engaged voter and citizen of New Hampshire that SB 418 is unconstitutional and that, by passing the law, the state government has approved spending public funds in violation of the New Hampshire Constitution. Mr. Thompson joins this complaint because SB 418 is not presently subject to any judicial or administrative decision from which there is a right of appeal. Accordingly, with SB 418 now enacted, this lawsuit is the sole means by which Mr. Thompson can ensure that the constitutional rights, including voting rights, of people in his community are upheld. *See* N.H. Const. pt. 1, art. 8.

DEFENDANTS

21. Defendant David M. Scanlan is the New Hampshire Secretary of State, whose office is located at 25 Capitol Street, Concord, New Hampshire 03301, and is named as a Defendant in his official capacity. The Secretary of State is the chief elections officer for New

Hampshire in charge of administering New Hampshire's election laws. RSA 652:23 (2010). Under SB 418, the Secretary is responsible for designing, producing, and distributing the "affidavit voter package" at issue in this lawsuit. SB 418 § 2, II(a)-(b). The law also makes the Secretary of State's office responsible for reviewing the verification letter submissions made by those voting by Affidavit Ballot, and for then instructing moderators about whether to deduct such ballots from vote totals. *Id.* § 2, V. The Secretary is further required to refer the names of affidavit voters whose verification letters are not returned within seven days of an election to the New Hampshire Attorney General's office for investigation. *Id.* § 2, VII. The Secretary, personally and through the conduct of his agents, servants, and employees, acted under color of state law at all times relevant to this action.

22. Defendant John Formella is the New Hampshire Attorney General, whose office is located at 33 Capitol Street, Concord, New Hampshire 03301, and is named as a Defendant in his official capacity. Under New Hampshire law, the Attorney General is authorized to impose civil penalties on individuals found liable for wrongful voting as well as to institute civil actions to collect on those penalties. RSA 659:34, V (2017). The Attorney General is also responsible for approving the elections manual of New Hampshire election laws and procedures for conducting elections. RSA 652:22 (2009). The Attorney General is responsible for enforcement of the state's election laws. RSA 7:6-c, I (2015). Under SB 418, the Secretary of State is required to refer the names of affidavit voters who do not provide sufficient verification information to the Attorney General's office for investigation. SB 418 § 2, VII. The Attorney General, personally and through the conduct of his agents, servants, and employees, acted under color of state law at all times relevant to this action.

JURISDICTION & VENUE

23. This Court, as the court of general jurisdiction in New Hampshire, has subject-matter jurisdiction over this complaint and the jurisdiction to grant both declaratory and equitable relief. RSA 491:7 (2017); RSA 491:22, II (2010); RSA 498:1 (2014).

24. This Court has personal jurisdiction over Defendants, both of whom are sued in their official capacities and are appointed officials in New Hampshire. Both Defendants work and reside in the State of New Hampshire.

25. Venue is proper in this judicial district because certain of the Plaintiffs are domiciled, based, or provide voter education in this judicial district, and the violations complained of have harmed and will, if unchecked, continue to harm the rights of voters domiciled in this judicial district. Venue is further appropriate in this judicial district because Defendants are responsible for administering SB 418 across the entire state of New Hampshire, including within Hillsborough County and this judicial district.

STATEMENT OF FACTS

I. Recent New Hampshire elections have been highly competitive and widely lauded as successful and secure.

26. New Hampshire's electorate is evenly split on partisan lines; Republicans, Democrats, and undeclared voters each comprise approximately 30 to 40 percent of the voting population. This means that New Hampshire elections are often close and highly contested. Historically, they have also seen high voter turnout and been free from significant instances of fraud.

27. The 2020 presidential election saw the highest national voter turnout of any election in the twenty-first century: 66.8 percent of American citizens over the age of 18 cast a ballot nationwide. New Hampshire voters turned out in even greater numbers—74 percent of eligible

Granite State voters participated, according to the United States Census Bureau. Only two states—Minnesota and Oregon—and the District of Columbia saw greater turnout. New Hampshire’s turnout was a significant increase over the already record-high turnout during the 2016 presidential election, with 814,499 votes cast in 2020 compared to 755,850 in 2016.

28. Tens of thousands of these voters—75,611 to be exact—registered to vote at their polling place on election day, representing nearly 10 percent of the electorate. Nonpartisan outsider observers attributed New Hampshire’s high 2020 turnout in part to the fact that it offers same day voter registration to voters.⁴

29. Politicians across the political spectrum agreed that the 2020 election in New Hampshire was secure and its results were reliable.

30. Prior to the election, Governor Sununu expressed his belief that the “voting system in NH is secure, safe and reliable” and that the state has “done it right 100% of the time for 100 years” with 2020 being “no different.”⁵

31. The Governor reaffirmed that view after certification of the election results, releasing a statement that New Hampshire’s elections “are secure, accurate, and reliable—there is no question about it.” Press Release, *Governor Chris Sununu Statement Following Certification of 2020 Election Results* (Dec. 2, 2020).⁶ He thanked election officials “for delivering results to the people of New Hampshire timely and accurately, just as they have always done.” *Id.*

⁴ See VOTE, *America Goes to the Polls 2020* at 6 (last updated Mar. 18, 2021), <https://www.nonprofitvote.org/wp-content/uploads/2021/03/america-goes-polls-2020-7.pdf>.

⁵ Casey McDermott, *Sununu Affirms Reality of President-Elect Biden, Vouches for New Hampshire’s Voting Procedures*, N.H. Public Radio (Nov. 12, 2020), <https://www.nhpr.org/nh-news/2020-11-12/sununu-affirms-reality-of-president-elect-biden-vouches-for-new-hampshires-voting-procedures>.

⁶ Press Release, *Governor Sununu Statement Following Certification of 2020 Election Results* (Dec. 2, 2020), <https://www.governor.nh.gov/news-and-media/governor-chris-sununu-statement-following-certification-2020-election-results>.

32. Without any supporting evidence, then-President Trump falsely claimed that his 2020 defeat in New Hampshire—by a margin of over seven percentage points—was attributable to fraud.

33. Governor Sununu dismissed claims of fraud in the election, explaining that “folks voted at [an] unbelievable rate,” in the state, but that “in New Hampshire there is no evidence of widespread voter fraud.”⁷

34. Governor Sununu disputed Trump’s attacks on the reliability of New Hampshire’s elections, explaining that a subsequent state audit of the election was “proof that New Hampshire’s voting process is the most reliable, safe, and secure in the country.”⁸

35. Similarly, Former Secretary of State Bill Gardner, who oversaw the 2020 election in New Hampshire and served as the state’s top election official for decades, stated he had “no basis . . . to agree” with the President’s claims of fraud, and that “[n]obody has brought any evidence [of fraud] before my office.”⁹

36. Senator President Chuck Morse and Senator Jeb Bradley recently described New Hampshire’s elections as “the gold standard for the nation.”¹⁰

⁷ Andrew Solender, *GOP N.H. Governor Calls Biden President-Elect, Says ‘No Evidence’ of Voter Fraud There*, Forbes (Nov. 12, 2020), <https://www.forbes.com/sites/andrewsolender/2020/11/12/gop-nh-governor-calls-biden-president-elect-says-no-evidence-of-voter-fraud-there/?sh=4a59855b2bb9>.

⁸ Paul Steinhauser, *On the trail: Sununu disputes Trump’s ‘massive’ voter fraud claim*, Concord Monitor (May 8, 2021), <https://www.concordmonitor.com/On-the-trail-Windham-voting-discrepancy-boils-over-40356708>.

⁹ See Michael Graham, *Trump’s Claims of ‘Massive Fraud’ in NH Elections Puts Local Republicans in a Bind*, NH Journal (May 6, 2021), <https://nhjournal.com/trumps-claims-of-massive-fraud-in-nh-elections-puts-local-republicans-in-a-bind/>.

¹⁰ Chuck Morse & Jeb Bradley, *Senate Will Focus on the Needs of Working Families*, N.H. Union Leader (Feb. 18, 2022), https://www.unionleader.com/opinion/op-eds/chuck-morse-and-jeb-bradley-senate-will-focus-on-the-needs-of-working-families/article_a6b01974-ac87-5782-bc88-b527a67ab109.html.

37. Then-President-elect Trump made similarly false claims about New Hampshire elections after the 2016 presidential election. He alleged that “serious voter fraud” in New Hampshire was to blame for both his loss to Hillary Clinton, as well as then-Senate Kelly Ayotte’s loss to Maggie Hassan—a race that was decided by 0.14 percentage points, a margin of barely over 1,000 votes. Trump claimed that “thousands” of voters were bussed in from Massachusetts to steal the election from him and Ayotte. Not only did Trump have no evidence to support those claims, but since then those claims have been repeatedly and thoroughly debunked, including by the Attorney General’s office.¹¹

38. Indeed, as they would be again in 2020, Trump’s false claims were widely-rebutted even at the time he was making them, including by many Republicans. For example, Defendant Scanlan—then the Senior Deputy Secretary of State and head of the Election Division—publicly stated that there was “no indication of anything that widespread taking place in New Hampshire.”¹²

39. Current Senate President Chuck Morse stated he had “been assured by the secretary of state that our elections are good and clean.”¹³

40. Steve Duprey, a Republican National Committee member and former chair of the New Hampshire Republican Party, posted on Twitter, “Repeating: there is no voter fraud in N.H. None. Zip. Nada. Hundreds of lawyers, poll workers, watchers, press – no buses rolled in.”¹⁴

¹¹ See Ethan DeWitt, *Attorney General's Office: No Evidence Out-Of-State Voters Bused Into New Hampshire*, Concord Monitor (May 29, 2018), <https://www.concordmonitor.com/Attorney-General-s-office-No-evidence-out-of-state-voters-bused-into-New-Hampshire-17828373>.

¹² Brennan Center for Justice, *In Their Own Words: Officials Refuting False Claims of Voter Fraud* (Apr. 13, 2017), <https://www.brennancenter.org/our-work/research-reports/their-own-words-officials-refuting-false-claims-voter-fraud>.

¹³ *Id.*

¹⁴ Katherine Q. Seelye, *Voter Fraud in New Hampshire? Trump Has no Proof and Many Skeptics*, N.Y. Times (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/us/voter-fraud-new-hampshire-gop.html>.

41. Former New Hampshire Attorney General Tom Rath similarly tweeted, “Allegations of voter fraud in NH are baseless, without any merit – it’s shameful to spread these fantasies.”¹⁵

42. Then-Attorney General Gordon MacDonald agreed, stating, “We have seen no evidence of large-scale voter fraud whatsoever, and none has been brought to our attention.”¹⁶

43. New Hampshire’s 2016 election was every bit as successful as the 2020 election. Turnout in New Hampshire topped 70 percent and was higher than any other state in the nation except Maine and Minnesota.

44. As in 2020, New Hampshire successfully registered tens of thousands of voters on election day in 2016—over 76,000 same day registrants were either first-time voters or voters who re-registered after moving to a new town or ward.

45. Nonpartisan outsider observers again attributed New Hampshire’s high turnout in the 2016 election to the fact that it offered same-day registration to voters.¹⁷

II. SB 418 is part of a longstanding pattern of trying to make it more difficult to vote in New Hampshire on the basis of false voter fraud claims.

46. SB 418 is only the most recent addition to a long-running pattern of efforts to restrict access to voting in New Hampshire over the last two decades.

47. In 2003, New Hampshire enacted House Bill (“HB 627”), which modified the New Hampshire election laws for the first time since their codification in 1979, and changed the definition of the word “domicile,” the documentation and procedural requirements for proving

¹⁵ *Id.*

¹⁶ John DiStaso, *FEC Commissioner to Trump: Show Evidence of ‘Astonishing NH Voter Fraud Scheme’ Claim*, WMUR (Feb. 11, 2017), <https://www.wmur.com/article/fec-commissioner-to-trump-show-evidence-of-astonishing-nh-voter-fraud-scheme/8732187>.

¹⁷ Press Release, New Report Ranks 2016 Voter Turnout for 50 States, PR Newswire (Mar. 16, 2017), <https://www.prnewswire.com/news-releases/new-report-ranks-2016-voter-turnout-for-50-states-300424504.html>.

domicile, and increased the penalties for voter fraud. HB 627 was introduced and enacted on the basis of alleged voter fraud, for which no factual support was actually offered. The legislative history reveals that HB 627 was intended to limit the access of same-day registrants, including student voters. HB 627 was opposed in large part due to the impact the law was projected to have on young voters, and it was enacted without any evidence that same-day registration resulted in issues of voter fraud.

48. In 2013, New Hampshire again enacted legislation intended to limit the access of young voters to the franchise with the passage of Senate Bill (“SB 318”). SB 318 merged the concepts of “domicile” and “resident” and required residents to acknowledge on voter registration forms that they were bound by New Hampshire residency requirements to register vehicles and apply for state driver’s licenses. SB 318 was challenged in court and the New Hampshire Supreme Court permanently enjoined SB 318 as unconstitutional in *Guare v. New Hampshire*, 167 N.H. 658, 669 (2015). Applying a balancing test adopted into the state constitution, *see Akins v. Sec’y of State*, 904 A.2d 702 (N.H. 2006), the Court concluded that “as a matter of law, the burden [SB 318] imposes upon the fundamental right to vote is unreasonable,” *Guare*, 167 N.H. at 668.

49. Most recently, the General Court enacted Senate Bill 3 (“SB 3”), which created new burdens restricting access to voter registration. The law’s backers again justified these burdens by reference to foundationless claims that New Hampshire’s elections had been affected by voter fraud. SB 3 modified the meaning of the statutorily defined term “domicile” and imposed arbitrary and burdensome paperwork requirements on voters. Most radically, SB 3 changed the definition of domicile by requiring that everyone seeking to register to vote present documentary evidence of “a verifiable act or acts carrying out” their intent to be domiciled in New Hampshire. SB 3 was permanently enjoined as unconstitutional by the New Hampshire Supreme Court in 2021, which

again applied the balancing framework in *Akins* and *Guare* to conclude that SB 3 “imposes unreasonable burdens on the right to vote” without being “substantially related to an important governmental objective.” *N.H. Democratic Party*, 262 A.3d at 382.

50. SB 418—like SB 3, SB 318, and their predecessors—is not justified by any factually- or data-supported incidents of voter fraud. Instead, the law is merely the latest instance of New Hampshire adopting voter suppression laws that run afoul of the State’s robust constitutional right to vote.

III. New Hampshire law has traditionally permitted qualified voters without photo identification to register and cast a regular ballot on election day.

51. Since the election laws were first codified in 1979, New Hampshire has permitted individuals to register to vote on election day, even when they have been unable to present photo identification. New Hampshire law has treated these ballots the same as all other election-day ballots; it neither segregated them from other ballots nor conducted a separate tally of them.

52. To register to vote in New Hampshire, an applicant must complete a voter registration form and present proof of identity, citizenship, and age. *See* RSA 654:12, I (2010). Prior to SB 418, an applicant without acceptable documentation could attest to their identity, citizenship, and age, under the penalties for committing voter fraud, by executing a “qualified voter affidavit,” (if registering before Election Day) or executing a “sworn statement” (if registering on election day). *See* RSA 654:12, I(a)-(b), (c)(2)(A) (2010). These forms required registrants to provide their name, place of birth, date of birth, domicile address, mailing address, and additional identifying information. *Id.* Applicants registering in this manner are further required to have their photographs taken (barring any religious objection) and are subject to subsequent verification of their domiciles. RSA 654:12, I(c)(2), III-a (2010).

53. Applicants must also present proof of domicile when registering to vote. *See* RSA 654:12, I(c) (2010). Critically, as with the other registration requirements discussed above, registrants who lacked acceptable documentation of domicile when registering to vote on election day could attest to their domicile, under the penalties for committing voter fraud, by executing a sworn statement on the voter registration form. RSA 654:12, I(c)(2)(A) (2010).¹⁸

54. This existing legal regime worked well. Under these laws, New Hampshire had historically high turnout relative to most states and had virtually no instances of voter fraud. Despite this admirable track record with election administration, including consistently registering tens of thousands of same-day registrants each election cycle, New Hampshire has enacted new legislation that will make it harder to vote, all in the name of combating fictitious claims of widespread voter fraud.

IV. Under SB 418, first-time New Hampshire voters who register without ID on election day must now cure their provisional ballots or face disenfranchisement and other harmful consequences.

55. SB 418 creates a new and unprecedented form of ballot in New Hampshire—so-called “Affidavit Ballots”—that are counted only on a provisional basis, subject to the voter’s ability to cure their Affidavit Ballot through a cumbersome verification process. *See* SB 418, § 2 (creating RSA 659:23-a (2021) (“Affidavit Ballots”)). If the voter is not able to satisfactorily comply with SB 418’s arbitrary and burdensome verification process, the voted Affidavit Ballot is deducted from the tally. *Id.* § 2, I-V.

56. The process for voting via an Affidavit Ballot is extraordinarily complicated. *See* SB 418, §§ 2, 4. Voters are first given an “affidavit voter package” designed, produced, and

¹⁸ New Hampshire law imposes different registration requirements depending on whether the applicant seeks to register more than 30 days before an election. *See* RSA 654:12, I(c)(1) (2010) (registering more than 30 days in advance of an election); RSA 654:12, I(c)(2) (2010) (registering within 30 days of an election or on election day).

distributed by the Secretary of State. *See Id.* § 2, II. The package contains two items: (1) a prepaid envelope addressed to the Secretary of State; and (2) an “affidavit voter verification letter, in duplicate form” that “lists all the documents required to qualify to vote in the state of New Hampshire.” *Id.* § 2, II(a)-(b). An election official is required to mark the verification letter to identify which qualifying documents were not provided by the voter. *Id.*, II(b). One copy of the verification letter is provided to the voter, while the duplicate is retained by the election official. *Id.*, II(b). The verification letter requires the voter to return both their copy of the verification letter and a copy of any required documentation, not to the voter’s polling place, but to the Secretary of State within just seven days of the date of the election “in order for the ballot to be certified.” *Id.* Voters must also complete the pre-existing requirements for voting without photo identification, including executing a challenged voter affidavit and having their photograph taken by an election official. *See* RSA 659:13, I(c)(4) (2018) (as amended by SB 418).

57. Voters then cast the Affidavit Ballot at their polling place. SB 418 § 2, IV. But the Affidavit Ballots created by SB 418 are not anonymous like regular ballots. Town moderators are required to mark each Affidavit Ballot “Affidavit Ballot # ___” sequentially, starting with the number “1.” *Id.* § 2, III. Affidavit ballots are also stored in a segregated container marked “Affidavit Ballots.” *Id.* § 2, IV. Town moderators announcing election results, as required by the New Hampshire Constitution, must now also separately announce the total number of Affidavit Ballots cast in the election. *Id.*

58. An Affidavit Ballot is not “certified” under SB 418 until the voter submits the necessary paperwork to the Secretary of State’s office, which must occur within seven days of the

election. SB 418 § 2, II(b).¹⁹ On the seventh day after the election, the Secretary of State informs the town moderator at the voter's polling place which Affidavit Ballots were not certified. *Id.* § 2, V. The Secretary then specifically instructs the moderator to retrieve the "associated number affidavit ballot" and to inspect its contents. *Id.* The moderator must conduct a tally, by candidate and issue, of the votes cast by the numbered Affidavit Ballot that were not certified. *Id.* "The votes cast on such unqualified affidavit ballots" are then "deducted from the vote total for each affected candidate or each affected issue." *Id.* In other words, SB 418 requires town officials to review the votes cast for each candidate and issue by an identifiable person in order to deduct their vote from the count.

59. In addition to being disenfranchised, Affidavit Ballot voters who do not successfully file verification paperwork with the Secretary of State within the allotted seven days face other serious repercussions. The law *requires* the Secretary of State to refer the name of each such voter to the New Hampshire Attorney General for investigation in accordance with RSA 7:6-c (2015). Voters would then be probed for possible criminal prosecution. *See* SB 418 § 2, VII.

60. Further, only voters who "provide[] the required information verifying their right to vote" have information related to their ballot and verification letter protected from disclosure under New Hampshire's Right-to-Know laws. *See* SB 418 § 2, VIII (citing RSA 91-A (2010)). Voters who are unable to provide the necessary paperwork, or who attempt to do so unsuccessfully, receive no such protection from having their personal information made public upon request.²⁰

¹⁹ SB 418 is not clear whether this seven-day period is inclusive of election day itself, nor does it specify by what time on the seventh day after the election the verification packet must be received by the Secretary's office.

²⁰ SB 418 does not contain any provisions pertaining to voters who submit an affidavit voter packet to the Secretary of State's office but whose affidavit is rejected for a technical reason, such as inadvertently omitting a required piece of information or including insufficient proof of

61. The burdensome verification process imposed by SB 418 means that cities and towns cannot calculate their final vote totals until at least seven days after the election. That is because “[t]he total vote minus the unqualified affidavit ballot vote for each race or issue shall be the final vote to be certified by the appropriate certifying authority.” *Id.* This marks another one of SB 418’s significant departures from longstanding New Hampshire law, which by statute requires city and town clerks to forward election returns to the Secretary of State’s office the morning after the election. *See* RSA 659:75 (2022). And it further makes it impossible for city and town clerks to comply with the New Hampshire Constitution’s requirement that election results be “directed to the secretary of state, within five days following the election.” N.H. Const. pt. 2, art. 32.

V. SB 418’s legislative history reveals that there were many questions raised about the law’s constitutionality and whether it serves any legitimate state interest.

62. SB 418 asserts that its purpose is “to prevent the nullification of legitimate votes by the casting, counting, and certification of illegitimate ballots.” SB 418 § 1, II. The bill’s drafters concluded that existing fines for fraudulent voting were “hardly a deterrent,” and thus concluded more was required to deter fraud. *Id.* § 1, I. But these same legislators well know that New Hampshire’s existing laws have been effective in securing the State’s elections, resulting in vanishingly few instances of voter fraud. During SB 418’s path through the General Court, Republicans repeatedly admitted that voter fraud in New Hampshire is virtually nonexistent. Further still, these same legislators acknowledged widespread doubt about SB 418’s constitutionality. Despite these doubts—and over Secretary Scanlan’s repeated recommendation that the General Court obtain an advisory opinion about the law’s constitutionality—Republican

identification. These voters may believe that they have successfully cured their ballots—and that their votes will be counted—only to learn after the fact that their ballots were rejected and they have been disenfranchised, if they ever learn at all. *See infra* § VI.D.

legislators rushed the bill through the House and Senate almost immediately after the legislative session convened. They did this despite widespread public outcry and with little discussion on how the bill would impact voters.

63. Senator Bob Giuda introduced the bill on December 23, 2021, sponsoring it along with three other Republican Senators. As early as the bill's first hearing, the bill's supporters admitted that SB 418 could not be justified by any claims of actual voter fraud.

64. Secretary Scanlan, for example, said, "I will be the first to say that New Hampshire elections are sound. I have complete confidence in them." Ex. B at 10-11. When pressed about whether he had any concerns about the legitimacy of the upcoming fall elections, Secretary Scanlan said, "No, absolutely not." Even Senator Giuda, the lead sponsor of SB 418, admitted during the same meeting that the bill was "not targeting fraud." *Id.* at 15.

65. Remarkably, even the law's backers acknowledged widespread doubts about the bill's constitutionality. Secretary Scanlan agreed, for example, "there are some [constitutional] questions raised . . . that are fairly taken before a court." Ex. B at 10. While Secretary Scanlan nonetheless indicated his support for the bill, on at least three occasions either he or someone from his office encouraged legislators to obtain an advisory opinion from the New Hampshire Supreme Court about the bill's constitutionality.

66. These doubts about the law's constitutionality and purpose persisted when the bill reached the House. For example, during an April 8, 2022 House Election Law committee hearing, Senator James Gray—while testifying as a witness *in support of* the bill—admitted that he "consult[ed] with various attorneys on the constitutionality of [the] bill" and that "some said it wasn't constitutional." Secretary Scanlan echoed those concerns, stating he "believe[d] that there are constitutional questions that need to be addressed" about the bill. *See* Ex. C (April 8, 2022

House Elec. Law Comm. H'rg Tr.) at 55. He further stated that he “would like to see this Bill amended to address some of the other concerns that have been mentioned,” noting the General Court should “send a Resolution to the Supreme Court and ask them for an advisory opinion on those questions that they would like to ask.” *Id.*

67. SB 418’s backers nonetheless pushed forward without seeking an advisory opinion or amending the bill to address the concerns flagged by Secretary Scanlan. Representative Bergeron noted Secretary Scanlan’s suggestion that the Senate “table [SB 418] and ask for an opinion from the Supreme Court on the constitutionality” during an Election Law committee hearing, and asked Senator Gray why “that wasn’t done.” Ex. C at 17. Senator Gray responded: “I would lose my ability to take action on it this year”—suggesting that rushing the bill towards passage was more important than ensuring its constitutionality. *Id.*²¹

68. Representative Bergeron asked the same question to Senator Giuda—SB 418’s chief sponsor in the Senate—who made clear that constitutional doubts about SB 418 would not deter the law’s backers. He explained the General Court should not “subordinate our laws that are proposed to the opinion of justices,” Ex. C at 67, despite Secretary Scanlan’s observation that the Constitution purposefully includes just such a “tool” to review the lawfulness of proposed legislation, *id.* at 12. In Senator Giuda’s words, lawmakers were under no duty “to ask the courts, Mother, may I?” before passing the constitutionally doubtful bill. *Id.* at 67.

69. At the same time, backers of the bill continued to concede that the legislation could not be justified by actual widespread voter fraud. Representative Ross Berry, for example, admitted during the full House debate that there is no “massive voter fraud in the state of New

²¹ The General Court’s rush to pass a constitutionally doubtful law is all the more puzzling in view of the decision to amend SB 418’s effective date to January 1, 2023.

Hampshire.” Ex. D (April 21, 2022 House Debate Tr.) at 7; *see also* Ex. E (April 13, 2022 House Elec. Law. Comm. Exec. Session Hr’g Tr.) at 22 (Rep. Berry: “I have never said that voter fraud is rampant in New Hampshire. I’ve never said that.”).

70. After its passage in the House, the bill was sent back to the House Finance Committee, where concerns about the bill’s constitutionality persisted. Senior Deputy Secretary of State Patty Lovejoy explained that “[t]he Secretary of State has taken the position on this bill that he was in support of it, but he would prefer that it would be laid on the table and brought to the Supreme Court to deal with the constitutional issues.” Ex. E (April 13, 2022 House Fin. Comm. Hr’g Tr.) at 4. She also shared her own legal concerns, noting that “there’s an RSA about no extraneous marks on ballots.” *Id.*²² Neither the bill’s backers nor the Secretary of State’s office has explained how local election officials can comply both with SB 418’s requirement to mark individual ballots and pre-existing New Hampshire law that bars doing just that.

71. Despite unresolved doubts about SB 418’s legality, and the widespread recognition by legislators that little actual election fraud exists in New Hampshire, the bill ultimately became law and is scheduled to go into effect on January 1, 2023.

VI. SB 418 harms New Hampshire voters.

72. SB 418 makes it more difficult to vote in New Hampshire. The law imposes the harshest burdens on voters registering to vote for the first time in New Hampshire by creating an arbitrary, after-the-fact verification scheme that places the burden on the voter to make sure their vote is counted. But its burdens will also be felt more widely. Administering the law’s new requirements will increase wait times at polling locations across the state, particularly burdening

²² The RSA in question is RSA 656.16, which states: “There shall be no impression or mark to distinguish one general election ballot from another.” SB 418 does nothing to amend this existing provision in New Hampshire code, creating a conflict between new and existing law.

those New Hampshire voters who are unable to spend lengthy amounts of time in line. And the delay the bill imposes on certifying election results, coupled with New Hampshire's September primary, will prejudice the ability of overseas voters, including military voters, to have their votes counted. The law's backers have yet to identify any legitimate, never mind compelling, state interest that justifies this imposition on New Hampshire voters, who are harmed in myriad ways.

A. The new law imposes undue burdens on the right to vote for New Hampshire voters.

73. SB 418 will severely burden—and in some cases entirely deny—the right to vote to citizens lawfully qualified to vote under the New Hampshire Constitution. The legislature's asserted interest in preventing out of town voters from casting ballots in local election precincts simply cannot justify the new mechanism this law creates and the burden on New Hampshire voters' right to vote.

74. The requirements of SB 418 will present severe hindrances for many voters. Access to documents that verify an individual's identity require time and resources to acquire. Compliance with SB 418 is therefore dependent on access to stable housing; consistent and available utility services documentation; access to the time and resources to assemble copies of such materials for mailing during the narrow window provided by the law; the ability to successfully complete complicated transactions; the ability to pay associated fees for licensing or services; accessible and orderly personal records; and the capacity to make trips to governmental offices in time for Election Day. For many otherwise qualified New Hampshire voters, the voter verification requirements of SB 418 pose significant obstacles that cannot be completed in time for their votes to count. As an example, a passport costs \$110 and ordinarily takes 10-12 weeks to obtain, far exceeding the time limit imposed by SB 418. The other documents permitted for establishing

identity are similarly expensive and burdensome to obtain under the seven-day timeframe imposed by SB 418's verification process.

75. SB 418 further burdens would-be voters by subjecting them to SB 418's procedural processes at polling places and the subjective judgment of election officials. SB 418 empowers the "supervisor of the checklist" on Election Day to "review the voter's qualifications" and "determine if the voter's identity can be verified." The law is silent, however, as to the actual verification procedures to be employed by the supervisor of the checklist, and "how the nonpublic data in the statewide centralized voter registration database may be used to satisfy voter identification requirements." SB 418 appears to place this subjective, discretionary judgment wholly in the hands of polling place officials.

76. SB 418 also burdens the right to vote by intimidating otherwise qualified voters who do not want to subject themselves to the considerable risks associated with the new voter registration scheme, including the forfeiture of the right to a secret ballot by casting an Affidavit Ballot. These would-be-voters may also be deterred by the further risk of potential referral to the Attorney General for investigation if they do not perfectly comply with the paperwork requirements of the new law. These qualified voters risk exposing themselves to violations of privacy, investigation, and prosecution simply for seeking to register to vote in the same manner that thousands of New Hampshire voters have used in recent elections. SB 418 will therefore cause many would-be voters not to vote either through disenfranchisement or through intimidation.

77. The harms of SB 418 are not limited to first-time registrants, however. New Hampshire voters located overseas, including military voters, will be burdened by the law. As explained, *supra* n.2, UOCAVA entitles certain overseas voters, including members of the United States Uniformed Services, to request an absentee ballot for federal elections and to receive that

ballot at least 45-days ahead of an election. This period reflects Congress’s judgment about the time necessary to ensure that overseas voters have sufficient opportunity to receive, mark, and return ballots while accounting for delays in foreign mail systems.

78. New Hampshire law describes how the state will comply with UOCAVA. *See, e.g.*, RSA 652:16-b (2021), 657:2-3 (2017), 657:8 (2010), 657:19-21 (2021). The state recognizes that those qualified to vote under the New Hampshire Constitution “shall have the right to vote absentee in any state election” under the provisions set out in UOCAVA and state law. *Id.* § 654:3-I, II (2021). New Hampshire’s UOCAVA provisions also recognize the importance of complying with the requirement that overseas voters receive their ballots at least 45 days ahead of an election to allow them sufficient time to return ballots. *See, e.g.*, RSA 657:19-III, V (2021).

79. SB 418 burdens the ability of qualified overseas New Hampshire voters to cast a ballot. Under the law, following a primary election, it would be all-but-impossible for New Hampshire to prepare and distribute ballots to overseas voters sufficiently far ahead of subsequent general elections to guarantee overseas voters the opportunity to mark, review, and return their ballots in time for them to be counted. That is because, under SB 418, cities and towns are not required to certify final election results until 14 days after the election. *See* SB 418 § 2-VI. And cities and towns *cannot* certify final election results until at least seven days after the election while they wait for the Secretary to confirm which Affidavit Ballots have been successfully verified. *Id.* § 2-V. Because New Hampshire law mandates that the “state primary election shall be held on the second Tuesday in September of every even-numbered year,” RSA 653:8 (1979), cities and towns cannot reliably prepare absentee ballots in time to deliver them to overseas voters 45 days before

general elections.²³ SB 418 therefore will delay the preparation and distribution of absentee ballots beyond the 45-day period that both Congress and New Hampshire have recognized as reasonably necessary to permit these overseas voters to cast a ballot, unduly burdening their ability to vote.

80. The added administrative burdens of SB 418 will also harm voters who vote in person on election day. Processing same-day registrants under the burdensome procedures mandated by SB 418 will create lines at polling places and longer wait times to vote, particularly in areas that have significant numbers of first-time voters, such as large cities and college towns.

81. New Hampshire has a history of long lines at polling locations. In the last general non-pandemic-impacted election in 2016, voters waited in line for over one hour in certain high-turnout areas. Research shows that one of the primary causes for long voting lines are photo ID laws. In particular, heavy voter administration requirements coupled with an inability of election administrators to commit resources to processing voters lead to long wait times. Administration of SB 418 will exacerbate the issue precisely for this reason. SB 418 allocates no new funding to municipalities to cope with this issue, nor does it implement any procedures that would help poll workers process new voters more quickly and prevent longer lines.

²³ For example, 14 days after New Hampshire's 2022 primary election is September 27, 2022. That date is only 42 days before the November 8, 2022 general election. Similarly, 14 days after the 2020 state primary date was only 41 days ahead of the 2020 general election. In no recent biennial election would the certification date mandated by SB 418 have fallen more than 45 days before the subsequent general election. Even if, improbably, *every* New Hampshire city and town voluntarily certified its election results seven days after the election—the earliest day possible under SB 418—the state would typically still be left with only three or four days before the 45-day deadline to prepare, print, and distribute absentee ballots for overseas voters. As Representative Griffin, a supporter of SB 418, admitted during the full House debate, these “ballots are not prepared magically the day after [an] election. Ballots need to be prepared for multiple jurisdictions with multiple variations, and the process for printing them is not a day or two.” Ex. F (May 5, 2022 Full House Debate Tr.) at 5.

B. SB 418 imposes disparate burdens on New Hampshire voters by creating a two-tiered voting system that will disproportionately impact specific groups.

82. SB 418 creates a two-tiered voting system in New Hampshire. While most voters will be able to cast regular ballots, those who seek to register to vote on Election Day without photo identification will be forced to cast inferior Affidavit Ballots. This latter group of voters will be required to complete burdensome paperwork requirements to ensure their vote is counted, and further face the possibility of a criminal investigation and disclosure of their ballot's contents if they fail to complete the paperwork to the Secretary's satisfaction.

83. In this way, SB 418 divides the voting population of New Hampshire—all of whom are granted equal protection under the law—and creates a separate class composed of first-time registrants who will have to vote by provisional Affidavit Ballots. These provisional ballots place the burden on the voter to ensure that their votes actually count and are clearly inferior to the regular ballots that may be used by already-registered voters.

84. SB 418 will also disproportionately impact specific groups of voters who are more likely to be forced to cast Affidavit Ballots, including young voters, student voters, mobile voters, and low-income voters. These voters will also face greater difficulties in complying with the procedural and paperwork requirements of the SB 418 verification scheme, as people in these groups are less likely to have access to the time and resources necessary to comply with SB 418's burdensome requirements in the prompt manner required to meet the seven-day deadline. SB 418 will also disparately burden Democratic voters, as voters who use same-day registration are disproportionately Democratic with respect to political party affiliation.

85. Further, SB 418 will disadvantage other groups by creating physical obstacles to voting. While SB 418 will increase wait times for voters across the state, this burden will be acutely

felt by those who have greater difficulty standing in line to vote for long periods of time, including older voters, disabled voters, and voters with childcare, educational, or job-related responsibilities.

86. SB 418 will therefore subject specific groups of individuals who are otherwise similarly situated with all other voters in New Hampshire to an inferior class of provisional ballot, and to harmful, burdensome requirements and procedures.

C. The Affidavit Ballot verification scheme will permit government officials to see who identifiable voters in New Hampshire vote for.

87. A fundamental element of our modern election apparatus is the secret ballot, which allows voters to mark ballots in secrecy.

88. The secret ballot was adopted widely in the United States during the early twentieth century as an anti-corruption measure to curb the influence of political bosses over voters and election outcomes. Secret voting is now essential to the administration of honest elections in the United States. Such ballots bolster voter confidence in elections and preserve the integrity of the political process.

89. “New Hampshire’s elections laws have long preserved voter privacy.” *Sumner v. N.H. Sec’y of State*, 136 A.3d 101, 105 (N.H. 2016). New Hampshire legislators have enacted numerous laws throughout the state’s history to ensure that individual ballots are not marked in a manner that will identify any individual voter. *See, e.g.*, Laws 1808, 49:4 (stating that a ballot with a marking on the back “to distinguish the vote or voter” will not be counted); Laws 1891, 49:23, :29 (penalizing voters for “occupy[ing] a marking shelf or compartment already occupied by another” voter, placing “distinguishing mark[s]” on ballots, or showing their ballots to others); *see also Att’y Gen. v. Duncan*, 78 A. 925, 926 (N.H. 1911) (describing New Hampshire’s adoption of secret ballot laws); *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (describing the United States’ adoption of secret ballots).

90. Current New Hampshire election law reflects New Hampshire's longstanding policy of barring distinguishing marks on ballots. *See, e.g.*, RSA 656:16 (2006) (forbidding any "impression or mark to distinguish one general election ballot from another"); RSA 659:23, I (2021) (requiring that ballots be handled "so that the marks on [them] cannot be seen"); RSA 659:35, II (2017) (preventing voters from placing "distinguishing mark[s]" on ballots).

91. New Hampshire election law includes numerous other provisions intended to ensure voter privacy. *See, e.g.*, RSA 40:4-a (2013) (offering secret ballots for town meetings); *id.* § 658:9 (providing for arrangement of voting booths to ensure privacy); *id.* § 659:20 (2020) (requiring those providing voter assistance to swear an oath that they shall "give no information" regarding the voter's ballot); *id.* § 659:37 (2021) (making it a misdemeanor to interfere with a voter within the guardrail); *id.* § 659:40 (2015) (making it a felony to coerce or intimidate voter); *id.* § 659:45-a (2021) (barring photography within the guardrail); *id.* § 659:95 (setting forth rules for sealing ballots); *id.* § 659:97 (1979) (setting forth rules for preparing containers and seals); *id.* § 660:16 (2016) (providing for disposal of ballots and exempting ballots from Right-to-Know laws).

92. These statutory provisions reflect New Hampshire's recognition that who someone votes for is private and personal information.

93. In sharp contrast to the spirit of this long-standing practice in New Hampshire and the United States generally, the new election scheme created by SB 418 would result in many voters losing ballot privacy.

94. Under SB 418, each Affidavit Ballot is marked with a unique number that readily distinguishes it from all other ballots cast on Election Day. The Affidavit Ballots are then separated out from the other ballots and placed in a container designated "Affidavit Ballots."

95. At some point between seven and fourteen days after an election, the town moderator will review—by hand—the Affidavit Ballots to identify “unqualified voters” for the purpose of adjusting final vote totals. These are voters who the Secretary has deemed to have not returned their verification letters or to have provided the necessary “voter qualifying information.” Additionally, a list of their names is provided by the Secretary’s office to the Attorney General’s office for “investigation.”

96. Because the numerical markings on the Affidavit Ballots are traced back to the individual voters who originally cast the ballots, during this process the election administrator learns the name of the voter, the ballot the voter used, the candidates who each particular voter chose to support, and what decision the voter made on any issue question on the ballot. Likewise, both the Secretary and Attorney General are made aware of which New Hampshire voters did not successfully complete the verification process.

97. By revealing how a particular voter voted to election administrators, SB 418 undercuts the purpose and advantages of having a secret ballot.

98. Because would-be voters are aware of these privacy concerns, as well as the potential that their names and addresses could be forwarded to the New Hampshire Attorney General for investigation, many will choose not to vote at all, creating a further chilling effect on voter turnout and participation.

D. The Affidavit Ballot verification scheme is arbitrary, unfair, and likely to disenfranchise qualified New Hampshire voters.

99. Under SB 418, even many qualified voters who make good faith efforts to comply with the law’s verification process are likely to have their ballots thrown out due to the arbitrary and unreasonable nature of the law’s verification process.

100. For example, the law makes no exception for voters who make a timely effort to mail in their proof of verification, but whose packets are lost in the mail or arrive at the Secretary's office more than seven days after the election. Voters are also never told whether their verification documents are sufficient to certify their ballot until it is too late to make a second attempt. The Secretary's office is under no obligation to contact a voter who makes a good faith effort to verify, but whose mailing includes the wrong version of a form or omits a necessary signature. Whether a voter's submission satisfies SB 418's requirement is left to the Secretary's discretion, with no opportunity for the voter to appeal or request reconsideration. Many voters therefore may believe that they have complied with the law, only to learn after seven days that their ballots will be discounted—if they ever learn at all.

101. SB 418 compounds this problem by requiring that submissions be made to the Secretary's office in Concord, rather than to a voter's local polling location or other municipal facility. A voter who wants to ensure that their ballot is certified by hand-delivering his or her verification documents therefore must travel to Concord, rather than a local town hall or polling place, to hand deliver a verification packet.

VII. SB 418 delays certification of final election results until at least a week after election day.

102. Under SB 418, New Hampshire cities and towns cannot certify final election results until at least seven days after an election and in practice often will not do so until fourteen days after an election, despite the Constitution's requirement that vote totals be conveyed to the Secretary's office within *five* days of an election.

103. The law states that “[o]n the seventh day after the election, if an affidavit ballot voter has failed to return the verification letter with the missing voter qualifying documentation to the secretary of state,” then the Secretary “shall instruct the moderator of the town, city, ward, or

district in which the affidavit ballot was cast to retrieve the associated numbered affidavit ballot and list on a tally sheet, by candidate or issue the votes cast on that ballot.” SB 418 § 2, V. These votes must then “be deducted from the vote total for each affected candidate or affected issue.” *Id.*

104. City and town election officials cannot certify a final vote count until after this seven-day period. That is because SB 418 provides that “[t]he total vote minus the unqualified affidavit ballot vote for each race or issue shall be the final vote to be certified by the appropriate certifying authority.” SB 418 § 2, VI (further providing that certifying authorities must “[n]o later than 14 days after the election” provide a summary report to the Secretary). In other words, under SB 418, the “final vote to be certified” in any given election cannot be known until at least one week after election day.

105. That delay in reporting final certified election results is contrary to existing New Hampshire constitutional and statutory law. The New Hampshire Constitution has long required that city and town clerks “make a fair record” of election day results as reflected in a “public declaration” made by the town moderator supervising the election. *See* N.H. Const. pt. 2, art. 32. In 1976, New Hampshire voters amended the Constitution to require that city and town clerks convey this record to the secretary of state “within five days following the election, with a superscription expressing the purport thereof.” *Id.* Article 32 is “[t]he paramount law . . . by which town-clerks must be governed in performing their duties respecting elections[.]” *Bell v. Pike*, 53 N.H. 473, 476 (1873).

106. Prior to SB 418, New Hampshire’s statutory law was consistent with this constitutional mandate. State law instructed clerks to forward one copy of the election return “to the secretary of state in both paper and electronic form no later than 8:00 a.m. on the day following a state election unless the secretary of state orders them at a different time and date.” RSA 659:75.

Because SB 418 does not repeal or amend this provision of New Hampshire's legal code, the statute *continues* to instruct clerks to submit returns the day after the election. SB 418 therefore creates conflicting legal mandates for New Hampshire's city and town clerks.

107. The election return that clerks must send to the Secretary under RSA 659:75 is required to reflect the "final count of all votes on all ballots cast." RSA 659:70; *see also id.* § 659:71 (explaining the clerk "shall prepare the election return" . . . "[a]fter the tabulation of votes has been completed and the result has been announced by the moderator as provided in RSA 659:70").

108. But, as explained, under SB 418 city and town clerks will not be able to send the Secretary election returns reflecting the "final count of all votes" until at least seven days after the election. This delay both violates the procedures set out in the Constitution and prejudices the ability of overseas voters to cast ballots.

109. SB 418 does not amend or repeal RSA 659:75 and city and town clerks therefore now face conflicting statutory requirements about when and how to convey election returns to the Secretary of State.²⁴

VIII. SB 418 represents a specific governmental approval of spending that violates the New Hampshire Constitution.

110. The General Court's enactment of SB 418 represents a specific government act that will require the State and local government to spend taxpayer money in violation of the New Hampshire Constitution.

111. The Fiscal Note attached to SB 418 indicates that the law will require the State to expend funds to prepare affidavit ballot verification packets, to pay for postage for returned

²⁴ This represents at least the second way in which SB 418 creates conflicting statutory mandates for town officials. *See supra* n.22.

verification packets, and to disburse overtime pay for Department of State workers required to administer the law. *See* SB 418, Fiscal Note. The Fiscal Note further indicates that there will be “an increased expense to the General Fund in FY 2023 and FY 2025 of \$48,000 and \$72,000 respectively.” SB 418, Fiscal Note. In other words, New Hampshire legislators and Governor Sununu were aware of the specific spending amounts that they were approving when they chose to enact SB 418.

112. The Fiscal Note further indicates that there will be a “fiscal impact on local expenditures.” *Id.* That is because the law will require New Hampshire’s towns and cities to train and hire additional election day staff to account for the increase in “hand counted ballots and the need to take additional action with respect to those ballots after elections.” *Id.* Again, the Fiscal Note reflects that New Hampshire legislators and Governor Sununu were aware of the increased municipal expenditures they were imposing by enacting the law.

113. The New Hampshire Constitution grants every individual taxpayer eligible to vote in the state the right to petition the Superior Court to declare whether the State has spent, or has approved spending, public funds in violation of the law. *See* N.H. Const. pt. 1, art. 8. By enacting SB 418, the State has approved spending the taxpayer funds identified in the Fiscal Note in a manner violative of numerous constitutional guarantees.

CAUSES OF ACTION²⁵

COUNT I

(Violation of Part 1, Article 11, the Free and Equal Elections Clause of the New Hampshire Constitution, by Burdening the Fundamental Right to Vote)

114. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

²⁵ Each count is directed to both Defendants Scanlan and Formella.

115. The right to vote is a fundamental right guaranteed by the New Hampshire Constitution. The New Hampshire Constitution specifically protects the right to free and equal elections, by providing that, “[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” N.H. Const. pt. 1, art. 11.

116. The New Hampshire Constitution further provides that, “[e]very person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile.” *Id.*

117. In determining whether SB 418 violates the State Constitution, the Court must evaluate whether the statute unreasonably burdens the fundamental right to vote and whether the State has advanced “a sufficiently weighty interest to justify [the statute].” *N. H. Democratic Party*, 262 A.3d at 376 (citing *Guare*, 117 A.3d at 734).

118. SB 418 will unduly burden the right to vote in New Hampshire, creating unreasonable and unnecessary obstacles for first-time, same-day registrants, including voters who have recently moved into the State of New Hampshire, as well as voters who traditionally have greater difficulty obtaining state-approved photo identification, including young voters, student voters, mobile voters, low-income voters, disabled voters, and homeless voters. SB 418 will cause otherwise qualified voters not to register to vote, and effectively disenfranchise qualified voters attempting to exercise their right to private ballot access.

119. SB 418 will further unduly burden overseas New Hampshire voters who “have the right to vote absentee” in certain elections. RSA 654:3 (2010). The law’s cumbersome verification procedures will make it all-but-impossible for cities and towns to successfully distribute absentee ballots to overseas voters in the timeframe recognized as reasonably necessary to allow them

sufficient time to vote and have their votes counted.

120. SB 418 will further unduly burden New Hampshire voters at polling places across the state, as the confusing and burdensome paperwork created by SB 418 will create delays and uncertainty for voters statewide. This burden will be acutely felt by those who have greater difficulty standing in line to vote for long periods of time, including older voters, those with disabilities, or voters with childcare or job responsibilities.

121. Unless Defendants can demonstrate that SB 418 is “substantially related to the precise governmental interests it set forth as justifications necessitating the burdens the law imposes on the right to vote,” it must be declared unconstitutional and enjoined. *N.H. Democratic Party*, 262 A.3d at 380 (citing *Guare*, 117 A.3d at 734).

122. There is no governmental interest, and certainly no “sufficiently weighty” interest, that justifies the imposition of SB 418’s undue burdens on New Hampshire voters. *N.H. Democratic Party*, 262 A.3d at 376 (citing *Guare*, 117 A.3d at 734). The bill’s backers acknowledged that there is no widespread voter fraud in New Hampshire—never mind fraud likely to be resolved by SB 418. Governor Sununu, too, has stated that New Hampshire’s voting system is already “secure, safe, and reliable.” Defendant Scanlan—the person chiefly responsible for administering New Hampshire’s elections—agrees the state’s “elections are sound” and he has “complete confidence in them.”

123. Defendants, through the adoption and implementation of SB 418, have therefore deprived and will continue to deprive Plaintiffs, their supporters and constituents, and many more New Hampshire voters of the rights as guaranteed to them by the New Hampshire Constitution.

COUNT II

(Violation of Part 1, Articles 1, 2, 10, 11, 12, and 14 of the New Hampshire Constitution, by Denying Equal Protection Under the Law)

124. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

125. The New Hampshire Constitution provides for and guarantees equal protection under the law. *See* N.H. Const. pt. 1, arts. 1, 2, 10-12, and 14. The “principle of equality pervades the entire constitution.” *State v. Pennoyer*, 65 N.H. 113, 114 (1889).

126. The equal protection provisions of the New Hampshire Constitution provide a constitutional right of equal protection, which “ensure[s] that State law treats groups of similarly situated citizens in the same manner.” *McGraw v. Exeter Region Co-op. Sch. Dist.*, 145 N.H. 709, 711 (2001).

127. “In considering an equal protection challenge under our State Constitution, [the Court] must first determine the [correct] standard of review by examining the purpose and scope of the State-created classification and the individual rights affected.” *Cnty. Res. for Just., Inc. v. City of Manchester*, 917 A.2d 707, 717 (N.H. 2007) (quoting *In re Sandra H.*, 846 A.2d 513 (N.H. 2004)) (quotation omitted). “Classifications based upon suspect classes or affecting a fundamental right are subject to strict scrutiny.” *Id.*

128. SB 418 violates the Constitution’s equal protection guarantee by dividing similarly-situated New Hampshire voters into a two-tier voting system. Under this system, one class of individuals has access to regular ballots for voting. In contrast, the other class must use an inferior type of provisional Affidavit Ballot that imposes a burdensome verification process, creates a substantial likelihood of disenfranchisement, invades the voter’s privacy, and risks referral for investigation.

129. Moreover, SB 418's two-tiered voting system disparately burdens and negatively affects specific groups of New Hampshire voters, including young voters, student voters, mobile voters, and low-income voters, all of whom disproportionately use same-day registration. These otherwise similarly situated individuals will not only be required to vote via an inferior provisional ballot but will face exacerbated difficulties in complying with the burdensome procedural and paperwork requirements of the SB 418 verification scheme. Additionally, SB 418 will increase wait times for voters across the state and will consequently disproportionately burden those who have greater difficulty standing in line to vote for long periods of time, including older voters, disabled voters, and voters with childcare, educational, or job-related responsibilities.

130. SB 418 violates the equal protection provisions of the New Hampshire Constitution by denying New Hampshire voters equal access to their constitutionally protected election process.

COUNT III

(Violation of Part 1, Article 2-b of the New Hampshire Constitution, by Denying Right of Privacy)

131. The New Hampshire Constitution recognizes that “[a]n individual’s right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.” N.H. Const. pt. 1, art. 2-b; *cf. In re Caulk*, 480 A.2d 93, 95 (N.H. 1984); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964). New Hampshire law has long recognized that the contents of a voter’s ballot constitute the kind of “private or personal information” that must be protected against governmental intrusion.

132. The United States Supreme Court has also recognized the importance of ballot privacy. In *Burson v. Freeman*, Justice Blackmun explained: “After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting

compartments.” 504 U.S. 191, 206 (1992). He elaborated: “We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States’ compelling interests in preventing voter intimidation and election fraud.” *Id.*

133. SB 418 violates the constitutional right to privacy by requiring that election officials serialize Affidavit Ballots in a manner that allows the government to review how an individual cast his or her ballot—including which candidates the voter cast their ballot for, and how they vote on issues on the ballot. SB 418 in fact requires election officials to review how a person cast their ballot, at the Secretary of State’s instruction, if that person is not able to comply with the law’s burdensome verification process. The law therefore commands government officials to intrude upon information that has long been recognized as personal and private under New Hampshire law.

134. Further still, by requiring election officials to update vote counts after Affidavit Ballots are certified by the Secretary of State, SB 418 creates a substantial risk that the contents of a voter’s ballot will be made known to the public at large, and not only local election officials. This risk of public disclosure is compounded by the fact that unverified Affidavit Ballots are not shielded from New Hampshire’s public records laws.

COUNT IV

(Violation of Part 1, Article 15 of the New Hampshire Constitution, by Denying Due Process)

135. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

136. Part 1, Article 15 of the State Constitution provides, in relevant part: “No subject shall be . . . deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the

land” N.H. Const. pt. I, art. 15. The “[l]aw of the land in this article means due process of law.” *State v. Veale*, 972 A.2d 1009 (N.H. 2009) (quotation omitted).

137. The first determination in a due process claim is “whether the challenged procedures concern a legally protected interest.” *State v. McLellan*, 146 N.H. 108, 113 (2001) (quotation omitted). The New Hampshire Constitution expressly recognizes the equal right to vote in any election, N.H. Const. pt. I, art. 11, and the right to vote is indisputably a legally protected interest of all New Hampshire residents.

138. “The standard for determining whether a law or procedure violates due process is whether it is fundamentally fair.” *State v. Barnett*, 789 A.2d 629, 631 (N.H. 2001).

139. The verification procedure implemented by SB 418 is not fundamentally fair because, due to the arbitrary and unreasonable nature of the scheme, many qualified voters who make good faith efforts to comply with the law are likely to nonetheless have their ballots discounted. An election procedure that will result in many qualified being disenfranchised cannot be deemed “fundamentally fair.” Nor is it “fundamentally fair” to expose such *bona fide* voters to the risk of criminal prosecution or public disclosure of the content of their ballots.

140. SB 418 undermines the notions of fundamental fairness central to due process.

COUNT V

(Violation of Part 2, Article 32, the Return of Votes Clause of the New Hampshire Constitution, by Delaying Certification of Election Results Until More than Five Days After Election Day)

141. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

142. The New Hampshire Constitution requires that federal and statewide elections be “governed by a moderator, who shall, in the presence of the selectmen (whose duty it shall be to

attend) in open meeting, receive the votes of all the inhabitants of such towns and wards present[.]”
N.H. Const. pt. 2, art. 32.

143. For such elections, the moderator “shall, in said meetings, in the presence of the said selectmen, and of the town or city clerk, in said meetings, sort and count the said votes, and make a public declaration thereof.” *Id.*

144. After the moderator announces the results of an election in open meeting, the city or town clerk “shall make a fair record of the same at large, in the town book, and shall make out a fair attested copy thereof, to be by him sealed up and directed to the secretary of state, within five days following the election” *Id.* (emphasis added). The “secretary of state shall, as soon as may be, examine the returned copy of such records” in order to inform and summon those elected. N.H. Const. pt. 2, art. 33.

145. Article 32 is “[t]he paramount law . . . by which town-clerks must be governed in performing their duties respecting elections[.]” *Bell*, 53 N.H. at 476. Under that Article it is the “duty of the town-clerk to make a true record and return” of the vote account “to the secretary of state, according to [the moderator’s] public declaration.” *Id.* at 473.

146. SB 418 violates this “paramount law” governing town clerks by delaying any final vote count until at least seven days after the election. *See* SB 418 §§ 2, II, V, VI.

147. Under SB 418, if a first-time registrant in New Hampshire is not able to comply with the law’s burdensome verification process, the Secretary of State must instruct the relevant moderator to deduct that individual’s vote from the count. *See* SB 418 § 2, V. “The counting of votes on affidavit ballots identified by the secretary of state as unqualified shall be conducted by the town, city, ward, or district, using the same methods of counting and observation utilized on the day of the election for hand counted ballots.” *Id.*

148. The Secretary of State issues this instruction to city or town officials “[o]n the seventh day after the election.” *Id.* (emphasis added). And the city or town then must “provide to the secretary of state a summary report, by race or ballot issue, of the total votes cast by the unqualified voters” by “[n]o later than 14 days after the election.” SB 418 § 2, VI. This second vote count—made at least seven days following the election—“shall be the final vote to be certified by the appropriate certifying authority.” *Id.*

149. SB 418 violates Part 2, Article 32 of the New Hampshire Constitution by making it impossible for city and town clerks to convey election results to the Secretary of State’s office “within five days following the election,” N.H. Const. pt. 2, art. 32, and delaying certification of the final vote until at least seven days after an election.

PRAYER FOR RELIEF

Accordingly, Plaintiffs respectfully request that this Court enter the following declaratory and equitable relief:

A. An order declaring that SB 418 violates the New Hampshire Constitution and that the rights and privileges of Plaintiffs will be irreparably harmed without the intervention of this Court.

B. An order permanently enjoining Defendants, their respective agents, officers, employees, successors, and all persons acting in concert with each or any of them from implementing, enforcing, or giving any effect to SB 418.

C. An order awarding Plaintiffs their costs, disbursements, and reasonable attorneys’ fees incurred in bringing this action pursuant to the Court’s inherent equitable power, *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 595 (1999).

D. Such other or further relief as the Court deems just and proper.

Dated: June 17, 2022

Respectfully submitted,

/s/ Steven J. Dutton

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* Applications for Admission *Pro Hac Vice*
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