

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DIVISION

SUPERIOR COURT

603 FORWARD, ET AL.

v.

DAVID SCANLAN, ET AL.

Consolidated with

MANUEL ESPITIA, JR. ET AL.

v.

DAVID SCANLAN, ET AL.

No. 226-2022-CV-00233 and 226-2022-CV-00236

ESPITIA PLAINTIFFS' RESPONSE TO JUNE 26 COURT ORDER

NOW COME Plaintiffs Manuel Espitia, Jr. and Daniel Weeks and submit this response pursuant to the Court's request for supplemental briefing in its June 26, 2023 Order.

I. INTRODUCTION

The Court has requested that the parties brief "which class of voters must use the affidavit ballot" because, in its analysis, while RSA 659:23-a provides that "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 . . . then such voter shall vote by affidavit ballot pursuant to this section" (emphasis added), another section of the statute arguably provides for a broader application to *all voters* who do not have a valid photo identification. The Espitia Plaintiffs' position is that the law applies narrowly and requires only those who are registering to vote for the first time without valid photo identification to use an affidavit ballot. This interpretation, which is supported by the text and

advanced by both sets of plaintiffs in their complaints,¹ is also confirmed by the Defendants' pleadings in this case, as well as the Secretary of State's publicly issued guidance. The plain reading of the text, applying the canons of statutory interpretation, reveals that the narrow interpretation is the stronger one. In the alternative, if the Court concludes that the statutes at issue are ambiguous, the legislative history and the interpretation of the Department of State—the agency tasked with administering the election laws—compel the adoption of the narrow interpretation that applies SB418 to only those registering to vote for the first time in New Hampshire without a valid photo identification.

II. ANALYSIS

“In matters of statutory interpretation, [the courts] are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole.” *Hogan v. Pat's Peak Skiing, LLC*, 168 N.H. 71, 73 (2015) (citations and quotations omitted). Courts “first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.” *Id.* (citations and quotations omitted). Courts “construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” *Id.* (citations and quotations omitted). “The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.” *Marcotte v. Timberlane/Hampstead Sch. Dist.*, 143 N.H. 331, 339 (1999) (citations omitted) (explaining that a statute should be read one way to avoid one element being “mere surplusage”). “When interpreting

¹ We reserve our right to amend the Complaint if necessary, based on the Court's ruling. Espitia Plaintiffs are prepared to include, if necessary, additional allegations as to standing in any amended complaint, but the Court's analysis in its June 26 Order that “a much broader class of individuals may have standing to challenge the constitutionality of SB 418.” In addition to a much larger class of individuals being subject to the absentee ballot process, SB 418 could create longer lines at the polling places for all voters as election officials have to explain a new process to potentially thousands of people.

two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute.” *EnergyNorth Natural Gas v. Concord*, 164 N.H. 14, 16 (2012) quoting *Appeal of Union Tel. Co.*, 160 N.H. 309, 319 (2010). “To the extent that two statutes conflict, the more specific statute controls over the general.” *Id.* “In the event that the statutory language is ambiguous, [courts] will resolve the ambiguity by determining the legislature’s intent in light of legislative history.” *Hogan*, 168 N.H. at 73 (cleaned up).

A. The Plain Meaning of the Text and Canons of Statutory Interpretation Compel a Narrow Reading

Senate Bill 418, as enacted, generally, 1) lists its legislative findings, 2) enacts two new statutes: RSA 659:23-a “Affidavit Ballots” and RSA 660:17-a “Affidavit Ballots; Recounts,” 3) amends RSA 659:13 “Obtaining a Ballot” in two places; 4) adds new subparagraphs to RSA 659:13 governing training and informational pamphlets, and 5) sets an effective date of January 1, 2023. RSA 659:23-a creates an entire new voting regime of “affidavit ballots”—essentially, ballots which are distributed to a certain class of voter and marked in a way that allows them later to be retrieved. Affidavit ballots are counted on Election Day, but if the voter fails to return, by the seventh day after the election, proof of identity to the Secretary of State, then local election officials are instructed to retrieve the ballot in question and subtract the votes cast by that ballot from the totals.

The very first section of the new statute that creates affidavit ballots provides expressly who should use them. RSA 659:23-a, I reads: “For all elections, 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, or does not meet the identity requirements

of RSA 659:13, then such voter shall vote by affidavit ballot pursuant to this section.” (emphasis added). This section is explicit and clear that voters who 1) on election day, 2) register to vote for the first time in New Hampshire and 3) do not have a valid photo ID or meet the requirements of RSA 659:13 must vote by affidavit ballot. The implication of this statutory command is that voters for whom not all three conditions are met (i.e. voters who have previously registered to vote in New Hampshire, or voters who are registering in advance of election day) do not vote by affidavit ballot. *Cf. In re Gamble*, 118 N.H. 771, 777 (1978) (“Normally the expression of one thing in a statute implies the exclusion of another.”). Moreover, there is no other way to interpret the election laws without rendering at least part of this statute surplusage, which is disfavored. *See Marcotte*, 143 N.H. at 339 (“wherever possible, every word of a statute should be given effect.”). If the broader interpretation the Court suggests in its June 26, 2023 Order (namely, that *every voter* without identification must vote by absentee ballot) were adopted, then it would read at least the phrase “on election day is registering to vote for the first time in New Hampshire” out of the statute as “mere surplusage.”

By contrast, the Court has suggested that there is some textual support in RSA 659:13, I(c) for a contrary and broader reading of SB418’s scope. But even assuming that this may be the case, this broader interpretation is not the better interpretation when reviewing RSA 659:13, I(c) in the context of the overall statutory scheme that is designed to limit the class of voters impacted by SB418. *See State v. Brouillette*, 166 N.H. 487, 491 (2014) (noting the need to read applicable provisions “in the context of the overall statutory scheme”). Section 239:4 of Senate Bill 418 amends RSA 659:13, I(c), which governs obtaining a ballot without identification. This section purports to change the procedure for a person voting without proof of identification from:

If the voter does not have a valid photo identification, the ballot clerk shall inform the voter that he or she may execute a challenged voter affidavit. The voter shall receive an

explanatory document prepared by the secretary of state explaining the proof of identity requirements. If the voter executes a challenged voter affidavit, the ballot clerk shall mark the checklist in accordance with uniform procedures developed by the secretary of state.

To:

If the voter does not have a valid photo identification, the ballot clerk shall direct the voter to see the supervisor of the checklist. The supervisor of the checklist shall review the voter's qualifications and determine if the voter's identity can be verified. If the supervisor of the checklist cannot verify the voter's identity, the supervisor of the checklist shall inform the voter that he or she may execute a challenged voter affidavit and cast an affidavit ballot in accordance with RSA 659:23-a. The voter shall receive an explanatory document prepared by the secretary of state explaining the proof of identity requirements. If the voter executes a challenged voter affidavit and casts an affidavit ballot, the ballot clerk shall mark the checklist in accordance with uniform procedures developed by the secretary of state.

As amended by SB 418, RSA 659:13, I(c) may stand in some tension with RSA 659:23-a over who should use an affidavit ballot if they do not present photo identification according to this Court's preliminary analysis. But under canons of interpretation, this Court should try to harmonize the statutes consistent with the overall statutory scheme and, to the extent they appear in conflict, the more narrow statute takes precedence over the general. *See EnergyNorth Natural*, 164 N.H. at 16 (2012). RSA 659:23-a is the more narrow statute in two ways: it dictates a smaller class of voters forced to use affidavit ballots, *and* it is a statute governing affidavits ballots specifically rather than ballots generally (which is what RSA 659:13 governs).² Moreover, Espitia Plaintiffs' interpretation does not render the changes to RSA 659:13, I(c) a complete nullity, as it

² Moreover, the canon of constitutional doubt advises that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to legislative intent." *Polonsky v. Bedford*, 171 N.H. 89, 96 (2018) (citations, quotations, brackets, and emphasis removed). The Court's proposed interpretation could, upon information and believe, subject thousands upon thousands of additional voters per year to the affidavit ballot system, which, for reasons discussed in this Complaint and the 603 Forward Plaintiffs' Complaint, would dramatically multiply the constitutional issues with the law.

still gives meaning to the statutory change in that section which directs voters without proof of identity to the supervisors of the checklist for potential verification. As a result, under the canons of statutory construction, harmonizing the statutes to the greatest extent possible consistent with the overall statutory scheme is achieved by a reading that gives meaning to RSA 659:23-a, I and which recognizes that only the more narrow class of voters is required to use affidavit ballots if they do not present photo identification.

B. Alternatively, if the Statutes are Ambiguous, the Legislative History and Defendants' Interpretation Confirm a Narrow Reading

In the alternative, to the extent the statutes are ambiguous as to which class of voters must use affidavit ballots, legislative history and Defendants' plausible interpretation support Espitia Plaintiffs' narrow interpretation. *Cf. Birch Broad., Inc. v. Capitol Broad. Corp.*, 2009 N.H. Super LEXIS 22, *8 (Merr. Cty. Super. Ct. Dec. 15, 2009) (“Courts generally distinguish between patent ambiguities and latent ambiguities. An ambiguity is patent when it is recognized as an ambiguity by reading the document; it is latent when it is not recognized as an ambiguity until one considers information outside the document.”). While Espitia Plaintiffs submit that the better reading is to give meaning to RSA 659:23-a, at the very least such a reading is plausible. And if this Court's preliminary assessment is also plausible, then any resulting ambiguity requires this Court to review the legislative history in this matter—legislative history that unequivocally confirms Espitia Plaintiffs' interpretation. Indeed, statutes should not be construed in a way that “nullifies, to an appreciable extent,” their evident purpose, and a broader interpretation would do just that. *Brouillette*, 166 N.H. at 491 (quoting *Asmussen v. Comm'r, N.H. Dep't of Safety*, 145 N.H. 578, 586 (2000)). New Hampshire Courts turn to legislative history to ascertain the meanings of ambiguous statutes, and here the legislative history is definitive that the legislature intended

affidavit ballots to be required only by voters registering for the first time in New Hampshire on election day without photo identification. *See Hogan*, 168 N.H. at 73. The legislative history for this bill generally reveals an initial effort to require a very large class of voters to use absentee ballots, but generally a continued effort to narrow its applicability as SB418 went through the legislative process.

As originally introduced in the Senate, SB 418 read “659:23-a Affidavit Ballots. I. For all elections, if a voter seeks to cast a ballot and such voter’s name is not on the voter registration checklist for that town, city, ward, or district, or if such voter does not have a valid photo identification establishing such voter’s identity and domicile in that town, city, ward, or district, then such voter shall vote by affidavit ballot.”

https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/billText.aspx?sy=2022&v=SI&id=2108&txtFormat=html. This version of the bill would have mandated affidavit ballots to a much

broader class: 1) anyone who is not registered in the town, city, ward, or district, and 2) anyone without proof of identity or domicile. It was amended by the Senate Election Law and Municipal Affairs Committee by Amendment #2022-1096s.

https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=3015&sy=2022&sortoption=billnumber&txtsessionyear=2022&txtbillnumber=sb418. #2022-1096s was a

replace-all amendment, which instead provided:

659:23-a Affidavit Ballots. I.(a) For all elections, if a voter on election day does not have a valid photo identification establishing such voter’s identification or does not meet the identity requirements of RSA659:13, then such voter shall vote by affidavit ballot pursuant to this section. (b) For all elections, *if a voter on election day is registering to vote for the first time in New Hampshire*, and does not possess proper documentation, as defined in statute, establishing citizenship and establishing domicile in that town, city, ward, or district, then such voter shall vote by affidavit ballot pursuant to this section.

https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/billText.aspx?sy=2022&v=SI&id=2108&txtFormat=html (emphasis added). This language would have limited the use of absentee ballots to 1) those voting without photo identification, and 2) those registering to vote in New Hampshire for the first time on election day without proof of domicile or citizenship.

Once adopted by the Senate, the bill was further amended by the House Election Law Committee with amendment #2022-1487h. This amendment narrowed the class of voters who must use affidavit ballots further still to what is codified in RSA 659:23-a: “For all elections, *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, or does not meet the identity requirements of RSA 659:13, then such voter shall vote by affidavit ballot pursuant to this section.”

https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/billtext.aspx?sy=2022&txtFormat=amend&id=2022-1870H (emphasis added).³ In explaining this change, Representative Berry, the sponsor of the amendment, told the House Election Law Committee: “The first major change is in section one, *I removed the requirement for anybody who’s already on the rolls that shows up without an ID*. As is common knowledge now, you don’t actually need an ID when you’re voting in New Hampshire—they ask you for an ID you don’t actually have to show it—I’m not going to change that. The reason being is that we cut off registration fourteen days before an election—it’s the job of the supervisors of the checklist to make sure people actually live where they say they live so I’m going to let them do their job. So this scopes the bill down to just people that are showing up, on election day with nothing...” See https://www.youtube.com/watch?v=_Xd-jPtQCpM (beginning 1:14:00).

³ The bill was amended one final time by the House Finance Committee, but not in a way which changes RSA 659:23-a, I.

On April 21, 2022, Representative Torosian, a supporter of the bill, told the full House of Representatives “Well, under this proposed legislation, same day registrants, they come to the polls without a valid photo ID will be required to vote by affidavit ballot. Senate Bill 418, as amended, would require for all elections, if a voter on election day is registering to vote for the first time does not have a valid photo identification establishing such voter’s identity or does not meet the identity requirement of RSA 659:13, then such voter shall vote by affidavit ballot.” <https://www.youtube.com/watch?v=JHKZjSMGYKo> (beginning 2:39:40) (emphasis added). Representative Berry told the House: “What we did Mr. Speaker, with the amendment this body passed, is we scoped this bill down to address people that are showing up to the polling location on election day who are not registered to vote, and are registering to vote with nothing—they are presenting nothing to show who they are or they say they are ... This is a compromise off the original bill.” *See id.* (beginning at 2:46:46) (emphasis added). After the full House adopted the bill as amended, the Senate concurred with the House changes and SB 418 was signed by Governor Sununu. https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=3015&sy=2022&sortoption=billnumber&txtsessionyear=2022&txtbillnumber=sb418. The legislative history overwhelmingly demonstrates that the intent of the bill was only to require those who had not registered to vote in New Hampshire before to be subject to the affidavit ballot scheme if they did not present photo identification.

Finally, Defendants’ interpretation of the statutes supports a narrow reading. The Secretary of State is the chief elections officer in New Hampshire. *See* RSA 652:23. He has consistently interpreted the affidavit ballot scheme to only apply to those registering to vote on election day for the first time in New Hampshire who do not have photoidentification or meet the verification

requirements of RSA 659:13. He announced this position in his Motion to Dismiss filed August 26, 2022, in paragraph 20: “[I]n order to have standing under *Asumussen*, the individual plaintiffs must demonstrate that they are not only subject to SB 418 – that they are (1) election day (2) first time registrants in New Hampshire, (3) without a valid photo identification document...” He further confirmed that position in a memorandum to New Hampshire Election Officials issued February 10, 2023, attached hereto as Exhibit A: “A voter uses an affidavit ballot only if all of the following apply: 1) Election Day Registration; 2. First time registrant in New Hampshire . . . ; 3 Applicant does not have valid Photo ID to prove identity; and 4. Applicant does not meet the identity requirements of RSA 659:13; RSA 659:13, I(c); RSA 659:23-1.” (emphasis in original).

The Espitia Plaintiffs concede that the doctrine of administrative gloss is not squarely appropriate here because the Secretary’s interpretation has not been in place for a period of years. *See State v. Priceline.com, Inc.*, 172 N.H. 28, 38 n.3 (2019) quoting *Petition of Kalar*, 162 N.H. 314, 321 (2011) (“Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference.”). But while the interpretation may not have been in place for years, the doctrine can provide some guidance, as since the guidance has been implemented, the legislature was in session and at least two special elections have been conducted under this interpretation of SB 418. The legislature could have corrected the Secretary or amended the statute if, in its view, he had been misreading the statutes. *Cf. id.* (“If an administrative gloss is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent.”). But it did not. *See also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 and n. 11 (1988) (“when a state law has been authoritatively construed so as to render it

constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits”).

III. CONCLUSION

For the reasons discussed above, the Court should accept the Espitia Plaintiffs’ reading of the law.

Respectfully submitted,

MANUEL ESPITIA, JR. AND DANIEL WEEKS

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

/s/ Henry R. Klementowicz

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July 17, 2023

Certificate of Service

I hereby certify that a copy of the foregoing was filed electronically through the court’s e-filing system.

/s/ Henry Klementowicz

Henry Klementowicz

July 17, 2023

EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

To: New Hampshire Election Officials
From: Secretary of State David M. Scanlan
Re: SB 418 (2022), Affidavit Ballots
Date: February 10, 2023

SB 418, Chapter 239 of the Laws of 2022, requires that in-person voters registering in New Hampshire for the first time who are unable to prove their identity on election day must use a ballot marked as an "Affidavit Ballot." The voter has a duty to submit proof of identity to the Secretary of State within 7 days after the election. If identity is not proven, the affidavit ballot is removed and the votes on that ballot are deducted from the election results. This guidance addresses implementation of this new law.

A. Who is required to use an affidavit ballot?

A voter uses an affidavit ballot only if **all** of the following apply:

1. Election Day Registration;
2. First time registrant in New Hampshire;
 - ❖ When ElectionNet is available at the polling place, check for prior registration;
 - ❖ When ElectionNet is not available, rely on the Voter Registration Form entry for "Place Last Registered to Vote." If applicant enters a New Hampshire town/city ward, treat as previously registered in New Hampshire – affidavit ballot does not apply;
 - ❖ If the applicant left the "Place Last Registered to Vote" blank, ask the applicant to verify that they have never been registered to vote anywhere in New Hampshire in the past.
3. Applicant does not have valid Photo ID to prove identity; and
4. Applicant does not meet the identity requirements of RSA 659:13; RSA 659:13,I(c); RSA 659:23-a.

The greeter or a ballot clerk must direct an unregistered person seeking to register and vote without a valid photo identification to the Supervisors of the Checklist. RSA 659:13, I(c)(2).

B. Verifying Identity

The Supervisors of the Checklist, during processing of the voter's registration, shall review the voter's qualifications and determine if the voter's identity can be verified. RSA 659:13, I(c)(2).

For registered voters who do not have photo ID, a ballot clerk will work with the voters to determine if the Moderator, Clerk, or a Supervisor personally knows the voters well enough to verify each voters identity.

If identity is verified, mark the voter on the checklist as if they showed a New Hampshire driver's license and issue a ballot.

If identity is not verified, send the voter to the "No Photo ID" table where the staff will require the voter to complete a Challenged Voter Affidavit and take the voter's photo. The voter presents the completed Challenged Voter Affidavit with an attached photo to the ballot clerk. The ballot clerk marks the checklist, including a checkmark in the CVA box, and issues the voter a ballot. This new law does not change the established process for a registered voter without photo ID.

For voters registering for the first time in New Hampshire on election day without a photo ID, if the Supervisors of the Checklist cannot verify the identity of an applicant who is registering in New Hampshire for the first time, the applicant must execute a Challenged Voter Affidavit, have their photo taken, and vote using an affidavit ballot. The photo taken shall be attached to the second copy of the Affidavit Verification Letter and delivered to the Secretary of State. If the Moderator, Clerk, or a Supervisor personally knows the applicant well enough they can verify the voter's identity.

For a voter already registered in New Hampshire but who is registering in a new town or ward, the process for proof of identity by an applicant who is registering to vote but was previously registered in New Hampshire, which is known as a registration transfer, is not changed by SB 418. **A Moderator, Clerk, or Supervisor who personally knows the person can verify the applicant's identity.** Otherwise, the transfer registration applicant must complete a Qualified Voter Affidavit and have a photo taken or complete an affidavit of religious objection. The photo is

attached to the Qualified Voter Affidavit and kept with the Supervisors' records.

For all voter registration applicants:

- If the camera fails, the voter may vote without a photograph being taken.
- If the voter objects to being photographed based on religious beliefs, the voter shall complete an affidavit of religious exemption in accordance with RSA 659:13-b.

For an election day applicant who is registering to vote for the first time in New Hampshire without a photo ID, after the registration is approved by the Supervisors, the Moderator oversees the marking and issuing of an affidavit ballot and Affidavit Voter Package to the voter.

The Moderator shall direct a ballot clerk to add the voter to the checklist and ensure that the box for Challenged Voter Affidavit use (CVA) on the checklist is marked to show that the voter used a Challenged Voter Affidavit for proof of identity.

C. Affidavit Voter Package

A voter who uses an affidavit ballot shall be issued an "Affidavit Voter Package." The Secretary of State will issue each town and city ward a quantity of Affidavit Voter Packages prior to the next election and will establish a process for replenishing the supply as needed in advance of future municipal and state elections.

The Affidavit Voter Package must include:

- A prepaid and pre-addressed U.S. Postal Service envelope addressed to the Secretary of State;
- An Affidavit Verification Letter (two copies) with the document "Registering to Vote in New Hampshire," which explains the documents required to qualify to vote in New Hampshire;
 - One marked copy of the Affidavit Verification Letter shall be issued to the voter;
 - One marked copy of the Affidavit Verification Letter shall be retained by the local election official to send to the Secretary of State.

- **At state elections**, include the state copy of the Affidavit Verification Letter(s) with the election night return of votes and the one4all tablet.
- **At special state elections**, mail the state's copy of the Affidavit Verification Letter(s) to the Secretary of State using a pre-paid, pre-addressed, U.S. Postal Service envelope provided by the Secretary of State and ensure it is placed into the U.S. mail within one day of the election (by 5:00 P.M. on the Wednesday immediately following election day).
- **At municipal elections**, the Moderator, with assistance as needed from the Clerk, shall place the copies of the Affidavit Verification Letter(s) in a pre-paid, pre-addressed, U.S. Postal Service envelope provided by the Secretary of State and ensure it is placed into the U.S. mail within one day of the election (by 5:00 P.M. on the Wednesday immediately following election day).
- The New Hampshire Voter ID Law – Explanatory Document, which has been revised to reflect the Affidavit Ballot law.
- A blank voucher for obtaining a free photo identification, for voting purposes only, from the Division of Motor Vehicles. The Moderator should inquire whether the voter has a photo identification that they just did not bring to the polls. If the voter does not have any photo ID, the Moderator should explain the availability of a free photo identification through the Division of Motor Vehicles.

Encourage the voter to obtain the Clerk's signature on the voucher while at the polling place. In a city, Ward Clerks may sign the voucher. The vouchers provided in the Affidavit Voter Package will have a Secretary of State seal on the form and need not have the Clerk's seal on the form, just the Clerk's signature.

 - A Division of Motor Vehicles form explaining the proof of identity that must be presented to obtain a photo identification for voting purposes only should be included.

The voter must deliver the completed Affidavit Verification Letter and a proof of identity document in the pre-paid, pre-addressed, US Postal Service envelope to the Secretary of State within 7 days after the election. Delivery to the Postal Service no later than day 5 following the election is recommended. The voter may also have the completed package

delivered to the Secretary of State's office no later than day 7 following the election.

The Moderator should pre-number sets of Affidavit Verification Letters for each election. Number both the copy going to the voter and the copy going to the Secretary of state with a sequential number in the "Affidavit Ballot # ___" space. This will ensure that if a Deputy or Assistant Moderator issues an affidavit ballot when covering for the Moderator, there is one unique number for each affidavit ballot.

The State's copy of the Affidavit Verification letter should be the only record containing the voter's name and the Affidavit Ballot number. Do not keep a copy or a separate list. This helps preserve the voter's right to a secret ballot. Once the State's copy of the Affidavit Verification letter is sent to the Secretary of State, there should be no local record that identifies which voter used an affidavit ballot or the Affidavit Ballot number that was written on a specific voter's ballot.

D. Affidavit Ballot

The "Affidavit Ballot" is an election day ballot on which the Moderator marks "Affidavit Ballot # ___." Enter the number "1" on the affidavit ballot for the first voter using an affidavit ballot, "Affidavit Ballot #2" on the affidavit ballot for the second voter using an affidavit ballot, continuing sequentially for all affidavit ballots used at the election. The "Affidavit Ballot #_" shall be written in red or blue ink in the header area of the ballot.

At town, school, and village district elections, where a voter receives ballots from both town and school elections and/or SB2/Official Ballot Referendum multiple page ballots, the "Affidavit Ballot # ___" must be written on each ballot page using an identical number on each ballot page issued to one voter.

At polling places using a ballot counting device, a single thick black line must be drawn through at least 3 of the timing marks along the top and bottom of the ballot. If an affidavit ballot voter inserts their ballot into the ballot counting device, these markings will cause the device to reject/return the ballot. Affidavit ballots must be placed into the device's side pocket for hand counting with other hand count ballots. The side pocket is designated as the container for affidavit ballots as required by RSA 659:23-a, IV.

At polling places using a ballot box, a voter casting a marked affidavit ballot in a hand count polling place must cast the ballot in person and the

Moderator must place the marked ballot in a container designated "Affidavit Ballots." Each polling place must prepare this "affidavit ballots" box for each election to ensure its availability if needed. A cardboard box with a printed sign attached stating "Affidavit Ballots" satisfies this requirement. RSA 659:23-a, IV.

After the polls close to voting, the Moderator must manage the hand counting of affidavit ballots in a manner that protects those voters' right to a secret ballot. After counting is complete, the affidavit ballots must be kept segregated from all other ballots and sealed into a separate container. At most polling places, the affidavit ballots can be sealed into a large envelope or box if needed. The sealed container with the marked and counted affidavit ballot(s) must be placed in the custody of the Clerk who will securely store the container in the same place and manner as sealed boxes of ballots from the election. The separate, sealed, affidavit ballot container will allow retrieval of specific affidavit ballots without breaking the seal(s) on the other boxes used to store ballots following the election.

For state elections, if the ballots from the polling place are transferred to the custody of the Secretary of State for the purposes of an audit or re-count, the sealed affidavit ballot container shall also be transferred to the custody of the Secretary of State.

Best practice is for the Moderator to hand count all affidavit ballots using a tally sheet that will also be used for hand counting other ballots. When the Moderator completes entering the votes from the hand count of the affidavit ballot(s) on the tally sheet, the same sheet will be used by the team hand counting other ballots that will add marks on the tally sheet for the other ballots the team counts. When counting is complete, the combined marks from the affidavit ballots and other hand count ballots will not allow anyone to determine from the tally sheet how the affidavit voter(s) marked their ballots. **The tally sheet shall not be marked to show how affidavit voter(s) marked their ballot(s) versus how other hand count voters marked their ballots - all ballot totals must include both affidavit ballots and other hand count ballots.**

A tally of the number of affidavit ballots cast is public information and must be announced when the results of the election are announced. RSA 659:23-a, IV. Keep a record of the number of affidavit ballots that are issued to voters. **Do not include the identity of the voters on that list.**

Never disclose the name of any voter and the candidate(s) for whom that voter voted for or how that voter voted on a question. Announce

only the final total results that include all results from a ballot counting device and all results from hand counting of ballots. The ballot counting device results tape is a public document. After complete results are announced, the public gets to know how many votes a candidate received from device counted ballots versus from all hand counted ballots. Do not disclose the breakdown of how many votes a candidate received from affidavit ballots versus other hand counted ballots. This protects the affidavit ballot voter's right to a secret ballot.

E. Deducting Votes

The Secretary of State will notify the Moderator to retrieve an affidavit ballot if a voter does not return an Affidavit Verification Letter as required by law. The Moderator and Clerk shall schedule a public counting session by posting a notice "in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings." RSA 91-A:2, II. It is expected that the public counting session will take place in the Clerk's office or some other suitable room in a town/city building.

For state elections, the deduction count and transmittal of the revised Return of Votes to the Secretary of State shall be completed as soon as possible, but no later than 14 days after the election. RSA 659:23-a, VI. The counting of the votes on an affidavit ballot(s) shall use "the same methods of counting and observation utilized on the day of the election for hand counted ballots." RSA 659:23-a, V. "The counting of votes shall be public and conducted within [a] guardrail and shall not be adjourned nor postponed until it shall have been completed. No ballot shall be placed within 4 feet of the guardrail during the counting of votes." RSA 659:63. Any informal tool, such as a rope, ribbon, or a line of chairs can be used as the rail establishing a 4 foot space between ballot counters and observers. After counting, the affidavit ballot(s) shall be re-sealed in an envelope or appropriate container and returned to the custody of the Clerk to be kept in secure storage with the other ballots from the election, for the period of time required by law.

The Moderator and Clerk shall revise the Return of Votes form previously submitted, noting the number of votes deducted because of unverified affidavit ballots and the resulting revised total votes for each candidate and question. This revised Return of Votes form shall be signed and dated by the Moderator and Clerk. For a state election, the revised Return of Votes must

be submitted to the Secretary of State by fax or scanned and attached to an e-mail sent to: elections@sos.nh.gov.

For state elections, the Secretary of State will aggregate revisions and certify the revised total vote for each office and question. The results posted on the Secretary of State's web site shall be updated to reflect the deducted votes in a manner similar to that used to report recount results.

For municipal elections, the Moderator shall certify the revised Return of Votes. The Clerk shall update any posted results to reflect votes deducted because of unverified affidavit ballots. The Clerk will follow existing law to notify the candidates who are elected to office of their obligation to take the oath of office.

The Secretary of State will refer to the Attorney General's Office the names of all affidavit ballot voters who do not return an Affidavit Verification Letter with the required proof of identity. The New Hampshire Attorney General's Office will investigate to determine whether any election law was violated in accordance with RSA 7:6-c. RSA 659:23-a, VII.

F. Recounts

If the total number of affidavit ballots submitted for any local, district, county, or statewide race or measure would, if counted in favor of either candidate or measure, alter the outcome of the election, the Secretary of State shall extend the deadline for requesting a recount until after the deadline for submitting Affidavit Verification Letters with proof of identity. The Secretary of State shall publish the new deadline(s) for requesting a recount. RSA 660:17-a.

G. Requirements for Photo ID and Identity Verification

This is a review of existing law.

To be valid, photo identification must:

- Show the name of the individual to whom the identification was issued;
 - The name shall substantially conform to the name on the checklist/voter registration application signed by the applicant;
- Show a photograph of the individual to whom the identification was issued; and

- Be current or, if expired, have an expiration date that has not been exceeded by more than 5 years
 - Except, if the voter/applicant is 65 years old or older, there is no limit on use of an expired photo identification;
 - Except that a student ID is valid if it has either an expiration date or an issuance date that has not been exceeded by a period of more than 5 years.
- Be a driver's license issued by any state or the federal government; or
- Be a New Hampshire Voter ID issued by the Department Of Safety; or
- Be a non-driver ID issued by the NH Division of Motor Vehicles or any other state; or
- Be a United States Armed Services identification card; or
- Be a United States passport or passcard; or
- Be a valid student identification card issued by;
 - A college, university, or career school; or
 - A public high school in New Hampshire; or
 - A non-public high school in New Hampshire; or
 - Dartmouth College; or
 - A college or university operated by the University System of New Hampshire or the Community College System of New Hampshire; or

Lists of the educational entities that are recognized as issuing valid student photo identification are posted on the Secretary of State's web site here:

<https://www.sos.nh.gov/elections/elections/election-officials>

- Be a photo identification not authorized by any of the subparagraphs above, but determined to be legitimate by the Supervisors of the Checklist, the Moderator, or the Clerk of a town, ward, or city (RSA 659:13, II (a)(7);
 - A voter using such an ID is subject to challenge;
 - Examples include, but are not limited to: Employer issued ID from an employer who the Supervisors, Moderator, or Clerk know to have appropriate controls;
- Verification of the voter's identity by a Supervisor of the Checklist, Moderator, or the Clerk;
 - **If verification of identity by a Supervisor of the Checklist, Moderator, or Clerk is used for a person registering on election day for the first time in New Hampshire,** the checklist must be marked in the margin by the voter's name with "P" indicating "personal recognizance," "S" if verified by a Supervisor, "M" if verified by the Moderator, or "C" if verified by

the Clerk, followed by the first and last initials of the individual providing the verification of identity. The mark on the checklist shall be made by the Moderator, Clerk, or Supervisor who identified the voter. "By initialing the checklist, the moderator [ø] clerk [or supervisor] personally affirms, under penalty of perjury, the identity of the voter they are qualifying to vote." RSA 659:13, II (b). While RSA 659:13 lists the Moderator and Clerk, it relies on existing law that also gives the Supervisors of the Checklist authority to verify identity.

- "An election officer pro tempore as provided for in RSA 658:19 through 658:22 shall have all the powers and duties of the officer he replaces as provided in the election laws and shall take the oath of office in like manner." RSA 658:23. "Each town may have a deputy town clerk who shall be qualified in the same manner as the town clerk and who shall perform all the duties of the town clerk in case of his or her absence by sickness, resignation, or otherwise subject to the provisions of RSA 669:65." RSA 41:18. Therefore, a Deputy/Assistant Moderator, Deputy/Assistant Clerk, or a Supervisor Pro Tem may also verify the identity of an applicant for voter registration who does not have a qualified photo identification with them at the polling place when registering.