

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2022-CV-00233

603 Forward; Open Democracy Action; Louise Spencer; Edward R. Friedrich; and Jordan M. Thompson

v.

David M. Scanlan, in his official capacity as the New Hampshire Secretary of State; and John M. Formella, in his official capacity as the New Hampshire Attorney General; and New Hampshire Republican State Committee

and

Docket No. 226-2022-CV-00236

Manuel Espitia, Jr. and Daniel Weeks

v.

David Scanlan, in his official capacity as New Hampshire Secretary of State; and John Formella, in his official capacity as New Hampshire Attorney General; and New Hampshire Republican State Committee

INTERVENOR-DEFENDANT NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE RESPONSE TO COURT ORDER DATED JUNE 26, 2023

NOW COMES intervenor-defendant New Hampshire Republican State Committee (NHRSC), by and through counsel, Lehmann Major List, PLLC, and respectfully submits the following response to the Court's order with a clerk's notice dated June 26, 2023, and states as follows:

The Court has indicated its understanding "that SB 418 requires any voter who uses an affidavit to establish his or her identity to then cast an affidavit ballot" pursuant to RSA 659:23-a. *Order* at 4. To the extent that the parties may disagree with this proposed construction of the statute, it has requested the parties to "explain how they reach their position that the affidavit ballot procedure only applies to election-day first-time New Hampshire registrants, particularly in light of the language in RSA 659:13, I(c)(3)." *Order* at 5.

The Court’s proposed construction of the statute should not be adopted for several reasons. First, it is incompatible with the limiting language that requires affidavit ballots to be cast “in accordance with RSA 659:23-a.” RSA 659:13(I)(c)(3). Second, reconciling the proposed construction with the limiting language would render superfluous critical sections of RSA 659:23-a. Finally, the Court’s proposed construction is contrary to the clear intent of the legislature as demonstrated by the legislative history, both in terms of the language removed from the bill during the legislative process and the contemporaneous statements of legislators found in reports and floor debates.

In any event, should the Court nevertheless adopt its proposed construction, the individual plaintiffs still lack standing to bring the claims set forth in the complaints, as they have not suffered a direct harm and have not pleaded facts sufficient to establish taxpayer standing.¹

I. Principles of Statutory Construction

The goal of statutory construction “is to apply statutes in light of the legislature’s intent in enacting them, and in light of the policy sought to be advanced by the statutory scheme.” *Cloutier v. City of Berlin*, 154 N.H. 13, 17 (2006). When interpreting a statute, courts must “first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.” *Hynes v. New Hampshire Democratic Party*, slip op. *3 (June 1, 2023). “It is an elementary principle of statutory construction that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words.” *Merrill v. Great Bay Disposal Service, Inc.*, 125 N.H. 540, 543 (1984). To the extent “statutory language is ambiguous, [a court will] examine the statute’s overall objective

¹ For completeness, Intervenor notes that the organizational plaintiffs do not have standing for the reasons identified in the defendants’ motion to dismiss.

and presume that the legislature would not pass an act that would lead to an absurd or illogical result.” *Id.* Further, a court “will review legislative history [to aid its analysis] if the statutory language is ambiguous or subject to more than one reasonable interpretation.” *In re Scott*, 160 N.H. 354, 359 (2010). Indeed, the Supreme Court has stated that where statutory language is ambiguous, courts are “obliged to consult legislative history.” *Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673, 678 (2011)(quoting *Barksdale v. Town of Epsom*, 136 N.H. 511, 514 (1992)(emphasis added)). Where legislative history “plainly supports a particular construction of the statute, [the court] will adopt that construction, since [its] task in interpreting statutes is to determine legislative intent.” *Id.* (quoting *Goldstein v. Town of Bedford*, 154 N.H. 393, 395 (2006)).

The Court should also consider the Secretary of State’s interpretation of the statutory scheme. “[I]t is well established that an interpretation of a statute by the agency charged with its administration is entitled to deference.” *In re Town of Seabrook*, 163 N.H. 635, 644 (2012) (citing *Appeal of Morton*, 158 N.H. 76, 78-79 (2008); *Appeal of Weaver*, 150 N.H. 254, 256 (2003); *Appeal of Salem Regional Med. Ctr.*, 134 N.H. 207, 219 (1991); *New Hampshire Retirement System v. Sununu*, 126 N.H. 104, 108 (1985)). While this deference is not absolute, it yields only when the agency interpretation “clearly conflicts with the express statutory language...or if it is plainly incorrect.” *Id.* If the agency’s interpretation of the statute is reasonable, a court should defer to that interpretation. See, *B.S. Development, LLC v. New Hampshire Dept. of Env. Svcs.*, 2019 WL 5424977 *2 (deferring to agency statutory construction of RSA 4:39-d as precluding leases of public land to all but “adjacent” landowners because agency interpretation was reasonable). Thus, the agency’s interpretation should stand unless it is clearly contrary to the text, structure, and legislative history of the statute.

II. The Court's Proposed Construction Fails to Give Effect to the Entire Statutory Scheme

The Court's proposed construction of SB 418, which would apply affidavit balloting procedures to all voters, both registered and unregistered, who have not verified their identity, is incompatible with the text, structure, and legislative history of the statute. The crux of the Court's proposed construction rests on its observation that the text of the provision that describes the consequences for a voter who does not verify his or her identity, RSA 659:13, does not appear to distinguish between registered and unregistered voters. But appearances can be deceiving. And here they are. After accounting for the full text, structure, and context of the statutory scheme, including RSA 659:13's explicit incorporation of RSA 659:23-a, it is clear that affidavit balloting does not apply to registered voters.

First, start with the text of RSA 659:13. It requires that affidavit ballots be cast "in accordance with RSA 659:23-a." And registered voters cannot cast a ballot "in accordance with RSA 659:23-a." That provision applies the affidavit ballot requirements only when "a voter on election day is registering for the first time in New Hampshire" and that voter fails to meet two specified conditions. Registered voters are nowhere to be found in RSA 659:23-a. Accordingly, reading RSA 659:13 to impose affidavit balloting requirements on such voters would delete the requirement that affidavit ballots be cast "in accordance with" RSA 659:23-a" out of the statute in violation of the "cardinal principle of statutory construction" to "save and not to destroy" statutory language. *United States v. Menasche*, 348 U.S. 528, 538 (1955); *Cohen v. Georgia-Pacific Corp.*, 819 F.Supp. 133, 138 n.17 (D.N.H.1993)(citing *Menasche* for the same principle).

RSA 659:23-a applies only to unregistered voters. The statute commands that when "a voter on election day is registering for the first time in New Hampshire and does not have a valid photo identification...or does not meet the identity requirements of RSA 659:13, then *such voter*

shall vote by affidavit ballot.” RSA 659:23-a (emphasis added). The “such voter” referenced in the statute can only be one type of voter: The type “registering to vote for the first time.” And that voter will be subjected to affidavit balloting if they cannot verify their identity, either because they do “not have a valid photo identification” or cannot “meet the identity requirements of RSA 659:13,” which provides for means other than photo identification for identity verification.

Reading RSA 659:23-a to subject both registered and unregistered voters to affidavit balloting is legally problematic and logically strained. It is legally problematic because it generates massive surplusage. It would effectively read RSA 659:23-a as follows:

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.

The reference to “registering to vote for the first time” would not be necessary, since the same consequences follow for both registered and unregistered voters. And the specific reference to “valid photo identification” would be unnecessary because such identification is part of the “identity requirements of RSA 659:13. A reading like one that applies RSA 659:23-a to registered and unregistered voters drains the meaning out of every word in the provision between “election day” and “does not meet,” contrary reams of Supreme Court precedent. “The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.” *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). That is precisely the case here. Further, such a reading is logically strained because, if that is what the legislature intended, it would not have gone through all the trouble of including so many unnecessary words.

In fact, if the procedures specified in RSA 659:23-a applied to unregistered and registered voters alike, it is difficult to understand why the legislature would have included RSA 659:23-a(I) at all. After all, RSA 659:13(I)(c)(3) would have commanded that affidavit balloting apply to all voters unable to verify identity. And RSA 659:23(II)-(IX) spells out the procedures for that form of balloting. RSA 659:23-a(I) is then left to do no work. It neither defines the scope of affidavit balloting – that work already has been accomplished by RSA 659:13(I)(c)(3) – nor does it identify any of the procedures to be followed – all such procedures being identified in the other subsections of RSA 659:23-a.

As support for its interpretation that RSA 659:23-a applies to all voters, the Court breaks down the statute to apply to a voter “registering to vote for the first time [who] does not have a valid photo identification,” and separately, to any voter who “does not meet the identity requirements of RSA 659:13.” *Order* at 4. The Court reasons that these identification-related provisions can’t separately apply to the voter registering for the first time because “any voter who lacks photo identification when registering would also not meet the identity requirements of RSA 659:13.” But that is not accurate. SB 418 and the Secretary of State’s instructions to local election officials for implementing it provide multiple alternative methods to verify the identity of unregistered voters who do not provide photo identification. Election officials can verify an election day registrant’s identity by the “personal recognizance” provision in RSA 659:13(II)(b). They can also reference “nonpublic data,” do a “check for prior registration” using ElectionNet, or rely on the information provided by the voter on the Voter Registration Form entry, which lists a previous registration address in a New Hampshire town or city ward. RSA 659:13(II)(d); See Exhibit 1, Memo to New Hampshire Election Officials from Secretary of State Scanlan, re SB 418 (2022), Affidavit Ballots, February 10, 2023. In other words, a first-time registrant could

show up without photo identification, and yet still meet the identity requirements of RSA 659:13, because she was verified by an official at the polling place. The language of RSA 659:23-a simply clarifies that unregistered voters can avoid special balloting procedures by verifying their identity in all the same ways that registered voters can.

In short, RSA 659:13's statement that "the supervisor of the checklist shall inform the [unidentified] voter that he or she may execute a challenged voter affidavit and cast an affidavit ballot in accordance with RSA 659:23-a" is not a unitary command. It does not mean that all unidentified voters must both "execute a challenged voter affidavit" and "cast an affidavit ballot." Indeed, it cannot mean that, since registered voters cannot cast affidavit ballots "in accordance with RSA 659:23-a." Rather, given the text and structure of RSA 659:23-a, the "in accordance with RSA 659:23-a" language should be understood to be synonymous with, and carry a meaning similar to, the phrase "as applicable and in the manner specified."² In effect, the statute instructs the supervisor to inform an unidentified voter that he or she "may execute a challenged voter affidavit and cast an affidavit ballot," in so far as RSA 659:23-a may apply to that voter. This leaves registered voters in the same position they were in before SB 418, while unregistered voters are subjected to the new affidavit balloting procedures. Not only does this give effect to every word in the statutory scheme, but, as shown below, it is the only reading consistent with legislative intent.

To the extent there is doubt remaining as to whether SB 418 applies only to registered voters, the clear intent of the General Court as reflected in the legislative history of SB 418 eliminates it. The Court should have no qualms about resorting to legislative history to resolve

² As a practical matter, the words "if applicable" can be inferred to be part of all statutes, as the inclusion of the converse, "unless inapplicable" to a statute would quickly lead to awkward and unwieldy legislation.

this matter, as the New Hampshire Supreme Court routinely examines such materials when needed as an aid to its statutory construction duties.

Senate Bill 418 has an unusually compelling legislative history, establishing that it applies only to unregistered voters and that the legislature intended the statute to effect no change upon registered voters. As the Court notes in its order, the parties have thus far been in agreement on the question of which class of voters use the affidavit ballot. *Order* at 1-2. This is likely because various parties and counsel to these cases were able to follow the bill as it wended its way through the legislative process. This Court, of course, is without the benefit of that experience. As will be set forth below, the legislative history contains a clear record of amendments to the bill's text and contemporaneous statements of legislators demonstrating beyond any question that the legislature intended for only previously unregistered voters without photo identification or who are not identifiable by other specified means to vote by affidavit ballot.

As originally introduced in the Senate, the plain language of the bill would have applied to all voters without a valid photo identification in the manner suggested by the Court. As introduced, SB 418, in part, read:

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 RSA 659:13, then such voter shall vote by affidavit ballot pursuant to this section.

See Exhibit 2, SB 418 As Introduced.

The Senate then amended the bill, expanding the use of affidavit ballots to include people who were registering to vote for the first time in New Hampshire and who were not in possession of proper documentation establishing citizenship and domicile in the voting district. The relevant amendment read:

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 RSA 659:13, then such voter shall vote by affidavit ballot pursuant to this section.

I(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.

N.H.S. Jour. 334-337 (2022). This amendment, which passed the Senate, thus would have required the use of affidavit ballots by two groups: (1) all voters without valid photo identification or who could not otherwise meet the identity requirements of RSA 659:13 to vote by affidavit ballot; and (2) all first-time election day registrants who did not possess proper documentation establishing citizenship and domicile.

The House substantially altered the bill by adopting amendment #2022-1487h. 10 *N.H.H.R. Jour.* 38-40 (2022). That amendment removed all of subsection I(b) addressing citizenship and domicile. Further, the House expressly narrowed the scope subsection I(a) so that it applied only to voters registering to vote for the first-time New Hampshire. In graphical form, the House amendment made the following changes to the Senate-passed version of the bill³:

I(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.

~~I(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,~~

³ The amendment is presented to the Court using the common format showing added language in bold and italics, and language removed from the bill in strikethrough. This format is used to provide the Court with the greatest degree of clarity possible, but that format was not used in the amendment as drafted in the House. It is, however, an accurate representation of the effect of the amendment.

~~ward, or district, then such voter shall vote by affidavit ballot pursuant to this section.~~

The amendment's sponsor, Rep. Ross Berry, presented this amendment to the House Election Law Committee on April 13, 2022. While discussing affidavit ballots, he stated the following:

The first major change is in section 1, ***I removed the requirement for anybody who is already on the rolls that shows up without an ID.*** As is common knowledge, now you don't actually need an ID to vote when you are voting in NH, they ask you for your ID, you don't actually have to show it. I'm not going to change that....

<https://tinyurl.com/4y8s69km> at 1:12:21 (Emphasis added). This amendment was adopted by a majority of the Committee. The Committee Report published in the House Calendar read as follows:

Rep. Ross Berry for the Majority of Election Law. As amended, this bill attempts to close one of New Hampshire's most glaring election integrity shortfalls which is that ***New Hampshire does not currently require a voter registering on election day to present any form of identification (ID) and may instead sign an affidavit.*** This means that any person can walk into any polling location in the state and be handed a ballot in exchange for signing some pieces of paper referred to as affidavits. This system breeds distrust in the election process and results in lower voter turnout. In the 2020 election, a total of 4,244 affidavits were completed by voters and of those, 733 were completed by voters who had no ID. ***This bill as amended requires anyone registering to vote on election day present an ID or they must vote using an Affidavit Ballot.*** That voter must then produce proper identification within the next seven days, or their ballot will be removed and their vote subtracted from the total.

N.H.H.R. Cal. No. 15, April 15, 2022 (emphasis added). On April 21, 2022, SB 418 came to the House floor. During the floor debate on the bill, Rep. Berry again spoke in support of the bill.

Concerning the purpose of the bill, he stated:

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 who they say they are.... This is a compromise of the original bill.

<https://tinyurl.com/8ah8ffaw> at 2:33:00 (emphasis added). The House passed the bill as amended, the Senate concurred with the House amendments, *N.H.S. Jour.* 657 (2022), and Governor Sununu signed the amended bill into law in its current form on June 17, 2022.

The weight of this legislative history clearly demonstrates that the Court’s proposed construction - that all voters, whether previously registered or previously unregistered, without proper identification are required to use an affidavit ballot - directly contradicts the clear legislative intent. The legislature specifically considered and rejected language that would have effectuated the policy suggested by the Court’s proposed interpretation of the statute. “Few principles of statutory construction are more compelling than the proposition that [the legislature] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *I.N.S. v. Cordoza-Fonseca*, 480 U.S. 421, 442-43 (1987). “Where the language under question was rejected by the legislature and thus not contained in the statute it provides an indication that the legislature did not want the issue considered.” *Forster v. Town of Henniker*, 167 N.H. 745, 756 (2015) (citing Singer & Singer, *Statutes and Statutory Construction* §48:16 (7th ed. 2007); *United States v. Howe*, 167 N.H. 143, 151 (2014) (citing Singer & Singer § 48:4, at 562–63 (7th ed.2007) (stating that “the history of events during the process of enactment, from its introduction in the legislature to its final validation, has generally been the first extrinsic aid to which courts have turned in attempting to construe an ambiguous act” and noting that “[l]egislative history can...consider part of a statute that never came into existence” because, for instance, “the language under question was rejected by the legislature.”). The General Court’s specific rejection of language that would have effectuated the Court’s proposed interpretation demonstrates that judicial adoption of that interpretation would contravene the clear legislative intent. Based on the overwhelming indicia of legislative intent revealed by the

legislative history, the Court should find that the statutory scheme does not require previously-registered voters to vote using the affidavit ballot process.

The Court's order suggests that the legislative findings contained in SB 418 could be read to favor a broad reading of the statute, including the application of the affidavit ballot provisions to both registered and unregistered voters. *Order* at 5. The Court should not be swayed by this statement of findings for several reasons. First, while the legislative finding seems to be broader than the curative language that ultimately became law, it was also broader than the scope of the bill as introduced. The finding states that "New Hampshire law allows for votes to be cast and counted by signing an affidavit, even when the voter *fails to produce documents* to prove his or her identity, or that he or she is a New Hampshire citizen or inhabitant of that town, city, ward, or district." Laws 2022, ch. 239:1, II (emphasis added). Yet every version of SB 418 has allowed some voters to vote without *producing documents* to prove identity pursuant to the alternative identification procedures in RSA 659:13, I(c). In other words, the finding upon which the Court has seized has been an overbroad descriptor of the operative legislative provisions throughout the entire legislative process. The Court should not ground its understanding of the legislative intent on a solitary finding that has not been accurate at any stage of the process. In any event, even if some legislators wanted SB 418 to have a broad reach, and even if they succeeded in securing a legislative finding embodying that broader reach, it would be erroneous to inject that finding, which is contrary to the remaining legislative record, into the statute's operative provisions. As the Supreme Court has observed, "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the

statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (*per curiam*).

III. Even Under The Court's Proposed Statutory Construction, The Plaintiffs Still Lack Standing.

Even assuming the Court's interpretation, plaintiffs lack standing regardless because the complaints still do not allege an injury in fact to the plaintiffs and do not identify an illegal expenditure of public funds giving rise to taxpayer standing under Part I, Article 8 of the New Hampshire Constitution.

A. Even Under The Court's Proposed Construction, The Individual Plaintiffs Lack Standing

Even if the affidavit ballot requirement applied to registered voters, the plaintiffs still would not have standing. The Court's proposed construction would require registered voters to cast an affidavit ballot only if: (1) they are without photo identification; and (2) the voter cannot have their identity verified by the moderator, clerk, or a supervisor of the checklist; and (3) their identity cannot be verified by election officials based upon their prior registration status or other nonpublic data. Unless a voter falls within the class of persons for whom each of these three circumstances is true, the voter will not be required to use an affidavit ballot. None of the individual plaintiffs in these consolidated cases allege that they are a member – or even likely to become a member – of this putative class.

In order to establish standing, a party must demonstrate that he or she "suffered a legal injury against which the law was designed to protect." *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195 (2008) (quoting, *Asmussen v. Comm'r, N.H. Dept. of Safety*, 145 N.H. 578, 587 (2000)). "A party will not be heard to question the validity of a law, or any part of it [under RSA 491:22], unless he shows that some right of his is impaired or prejudiced thereby."

Id. (quoting *Baer v. N.H. Dept. of Educ.*, 160 N.H. 727, 730 (2010)). Additionally, a party must show that their constitutional challenge is not “based on a hypothetical application [of the statute], but presented an actual controversy....” *Asmussen*, 145 N.H. at 587-88.

The five individual plaintiffs do not allege facts sufficient to provide them with standing, and an interpretation of SB 418 that requires registered voters who appear at a polling place to vote without photo identification does not change that fact. None of the individual plaintiffs allege they have ever failed to satisfy New Hampshire’s long-standing identification requirements. None allege they do not have a qualifying photo identification. None allege that they are concerned that if they do not bring their photo identification with them to the polls that they will not be able to be positively identified by election officials, either through personal knowledge or through the nonpublic ElectionNet databases. And none of them allege that they have had, for example, so many addresses that they have a reasonable fear that they will fail to provide accurate information to officials seeking to identify them. Indeed, given their status as community activists, *603 Forward Compl.* ¶15 (Spencer); ¶19 (Thompson), authors of tracts on voting law issues, *603 Forward Compl.* ¶18 (Friedrich); election officials, *603 Forward Compl.* ¶15 (Spencer); ¶19 (Thompson); and even officials elected to office at the polling place where SB 418 will supposedly be enforced against them, *Espitia Compl.* ¶3, these plaintiffs do not even allege that they will be required to cast an affidavit ballot, as it is a virtual sure thing that their identities can be confirmed by election officials without photo identification. For his part, plaintiff Weeks alleges only that he owns a home and pays taxes, but makes no further allegation that suggests that SB 418 will be enforced against him. *Espitia Compl.* ¶4. Accordingly, plaintiffs’ injuries are purely hypothetical and the allegations in the complaint are insufficient to confer standing.

The case law cited in the Court's order does not change this conclusion. The Court cites *Martin v. Kohls*, 444 S.W.3d 844, 849 (Ark.2014), for the proposition that the plaintiffs in that case had standing because they were "subject to" the proof of identity requirements in the Arkansas statute. *Order* at 6. First, the Arkansas court in that case was applying Arkansas standing law, which is significantly less exacting than New Hampshire standing law. In *Martin*, the Arkansas Supreme Court stated that "as registered voters, [plaintiffs] were only required to demonstrate that they were among the class of persons *affected by* the legislation." *Id.* at 849 (emphasis added). But, Arkansas law takes an exceptionally broad view of the class of people "affected by" its statutes for standing purposes. For instance, *Jegley v. Picado*, 80 S.W.3d 332 (2002), which was cited by the court in *Martin*, involved a pre-enforcement challenge to an Arkansas anti-sodomy statute. Despite the fact that "none of the [plaintiffs] have been prosecuted under [the act]; nor have they alleged a specific prosecutorial threat made under the statute," the court still found that they had standing to sue. *Id.* at 340-341. Likewise in *Magruder v. Arkansas Game and Fish Commission*, 698 S.W.2d 299 (1985), the Arkansas Supreme Court allowed a challenge to an administrative regulation prohibiting the taking of black bass under fifteen inches from a certain lake. It ruled that a licensed fisherman had standing to challenge the constitutionality of the regulation because "if the commission's regulation is to be enforced it will have an effect on persons who fish in [the lake]." *Id.* at 300. None of these Arkansas cases required the plaintiffs to either suffer enforcement of the challenged law or prove that there was a credible threat of an enforcement action being brought against them.

The New Hampshire Constitution requires more. "Except as provided in Part II, Article 74, and similar to the case or controversy requirement of Article III, standing under the New

Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical, dispute, which is capable of judicial redress.” *Duncan*, 166 N.H. 630, 642 (2014)(cleaned up). Our Supreme Court has emphasized “allowing parties to bring declaratory judgment actions without having to claim a concrete, personal injury, [would permit] the court to render private individuals advisory opinions, outside the context of concrete, fully-developed factual situations.” *Carrigan*, 174 N.H. 362, 368 (2021)(citing *Duncan*). See also, *Frese v. MacDonald*, 425 F.Supp.3d 64, 74 (D.N.H. 2019)(“In certain circumstances, the threatened enforcement of a law may suffice as an imminent Article III injury in fact.... An allegation of future injury may suffice if the threatened injury is certainly impending or if there is a substantial risk that the harm will occur.” (internal quotations omitted)). Comparing the Arkansas standing cases, which did not require a showing of a concrete injury or a substantial risk that the harm will occur, with the New Hampshire Supreme Court’s insistence on concrete personal injury, and the Article III requirement of proof of substantial risk that the harm will occur, it is clear that under Arkansas law, standing requirements are less stringent than are standing requirements under New Hampshire law. Accordingly, *Martin* does not provide persuasive precedent.

Second, the plaintiffs in *Martin* were challenging new proof-of-identification requirements that applied universally to all voters. Therefore, every registered voter, including the plaintiffs, was a “person affected by” the new regulation. Here, the plaintiffs do not (and indeed cannot) challenge the existence of New Hampshire’s long-standing proof-of-identification requirements. Rather, they challenge only SB 418’s newly enacted procedures for processing the votes of voters who fail to establish their identity on election day. Thus, SB 418 affects only a narrow subset of voters rather than the entire population of voters affected by the

new law at issue in *Martin*. And here, the plaintiffs have failed to allege that they are members of that limited subset or that they are at risk of being required to vote by way of affidavit ballot. Thus, *Martin* is plainly distinguishable in the scope of the “persons affected” by the challenged rule and by the fact that the plaintiffs here do not fall within the subset of affected persons.

The second case cited by the Court, *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir.2009), is likewise strongly distinguishable. The court’s observation that “the lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person” is both dicta and irrelevant to this case.⁴ It is dicta because the plaintiffs in *Common Cause* did, in fact, lack the identification at issue in the case. *Id.* And it is irrelevant to this case for the same reason *Martin* is irrelevant. Namely, this case is not about whether plaintiffs are affected by New Hampshire’s long-standing identification requirements. It is about whether they might happen to be among the small class of persons arguably affected by SB 418’s new balloting procedures for those voters – however defined – who fail to satisfy those requirements. And as discussed, plaintiffs’ complaints contain no facts that could support any inference that they might be within that class.

Here, unlike the cases highlighted by the Court, no individual plaintiff has alleged that SB 418 will require them to do anything they would not otherwise do in order to vote. Indeed, no individual plaintiff has identified any way whatsoever that SB 418 will affect them in any way, regardless of how broadly the court construes the application of that statute. Indeed, their concerns are couched almost entirely in terms of their concerns about other persons not present

⁴ It is also most likely wrong. While the *Common Cause/Georgia* court correctly notes that a poll tax inflicts harm on a voter, regardless of ability to pay, *id.*, it is difficult to see how that says anything about the harm (or lack thereof) suffered by a voter required to produce an identification document that they indisputably have in their possession. Requiring a person to pay a tax harms them whether they can afford it or not. But requiring them to produce an identification card they already have inflicts no harm on them whatsoever.

before the Court and in terms of their concerns about whether the election law system as a whole meets their approval. These are not the kind of concrete injuries sufficient to confer standing.

The organizational plaintiffs likewise lack standing and the Court's proposed application of SB 418 to a broader category of persons does not change that. The *603 Forward* plaintiffs note in their objection to the defendants' motion to dismiss that this Court previously granted organizational standing to the New Hampshire Democratic Party and to the League of Women Voters of New Hampshire. *603 Forward Plf's Memorandum* at 17 (citing *New Hampshire Democratic Party v. Gardner*, 2018 WL 5929044 (N.H.Super. April 10, 2018)). However, the nature of the organizational parties in *Gardner* differed substantially from the nature of the organizational parties before the court in this case. The lead plaintiff in *Gardner* was a statewide political party which the court found had standing because it "claim[ed] direct injury to its *raison d'être* – electing candidates who support the democratic platform." *Id.* at *2 (citing *Lee v. Va. State Bd. of Elections*, 155 F.Supp.3d 572, 578 (E.D.Va. 2015)(emphasis added)). The other plaintiff in *Gardner* was the League of Women Voters of New Hampshire, which, as its name suggests, is primarily a voting rights organization. Notably, this Court's standing decision in *Gardner* was not part of the appeal of that case to the New Hampshire Supreme Court. See, *New Hampshire Democratic Party v. Sec'y of State*, 174 N.H. 312 (2021). Thus, the Supreme Court did not address the organizational standing issue.

The organizational plaintiffs here, by contrast allege that they are primarily engaged in advocacy "in policy areas like public education reform, healthcare access, and voting rights," *603 Forward Compl.* ¶9, and "bring[ing] about and safeguard[ing] 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.'" *603 Forward*

Compl. ¶11. Simply put, it cannot reasonably be said that these organizations have alleged injury to their *raison d'être* to the same extent as was the case in *Gardner*.

B. The Plaintiffs Have Not Alleged An Illegal Expenditure Conferring Taxpayer Standing

When a court is called upon to interpret a provision of the constitution, “the first resort is the natural significance of the words used by the framers.” *Board of Trustees of New Hampshire Judicial Retirement Plan v. Secretary of State*, 161 N.H. 49, 53 (2010). “The language used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted. *Carrigan* 174 N.H. at 369 (quoting *Petition of Below*, 151 N.H. 135, 139 (2004)). “The simplest and most obvious interpretation of the constitution, if sensible, is most likely that meant by the people in its adoption.” *Id.* (quoting *Duncan*, 166 N.H. at 643. Taken together, these provisions command that the Court must focus on the text.

While the text is paramount, the circumstances surrounding the adoption of a constitutional amendment can provide important context to a court called upon to construe a constitutional provision. The plaintiffs assert that the taxpayer standing provision of Part I, Article 8 was adopted in response to the Supreme Court’s decisions in *Baer* and *Duncan*. While it is undoubtedly true that those cases provided the impetus for the people of our State to amend our Constitution, that superficial fact should not lead this Court to adopt the conclusions the plaintiffs assert. Indeed, a closer examination of the history recounted in *Baer* and *Duncan* clearly demonstrates that the text ratified by the people in 2018 cuts against the position advanced by the plaintiffs.

As the Supreme Court noted in *Duncan*, “[t]he legislature passed [an] amendment to the declaratory judgment statute, [RSA 491:22] in direct response to our holding in *Baer*.” *Duncan*,

166 N.H. at 638 (cleaned up). The amendment to RSA 491:22, adopted by the General Court in 2012, read:

The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section ***when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.*** The preceding sentence shall not be deemed to convey standing to any person (a) to challenge a decision of any state court if the person was not a party to the action in which the decision was rendered, or (b) to challenge the decision of any board, commission, agency, or other authority of the state or any municipality, school district, village district, or county if there exists a right to appeal the decision under RSA 541 or any other statute and the person seeking to challenge the decision is not entitled to appeal under the applicable statute.

Duncan, at 637-38 (emphasis added). Thus, under the plain language of the statutory amendment to RSA 491:22, taxpayer standing was extended to any taxpayer to seek declaratory judgment that the government has engaged, or proposes to engage, in *conduct* that is unlawful or unauthorized. In *Duncan*, the Supreme Court held this legislatively adopted amendment unconstitutional.

At the next legislative session, the General Court passed a constitutional amendment and put the question of ratification to the people. And while it is fair to say that the amendment was in response to *Baer* and *Duncan*, the amendment the people ultimately adopted is far narrower in its scope than that the statute adopted by the legislature and found unconstitutional in *Duncan*.

The amendment to Part I, Art. 8 reads:

Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides ***has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision.*** In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a

taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding.

The amendment's text is different and substantially narrower than the text of the statute found unconstitutional in *Duncan*. That textual distinction is crucial, as it clearly reflects that the provision applies far more narrowly than the statute did. In *Carrigan*, the Supreme Court wrote, “[t]he simplest, most obvious reading of the phrase ‘has spent, or has approved spending’ is that it refers to a *specific government spending action or approval of spending*.” *Carrigan*, 174 N.H. at 370 (quoting *Duncan*, 166 N.H. at 640)(emphasis added). “That is, a plaintiff with standing under Part I, Art. 8 can call on the courts to determine whether a *specific act or approval of spending* conforms with the law.” *Id.* (emphasis added).

None of the expenditures identified in the complaints meets the requirements of specificity and illegality required under the plain language of the text and under the interpretation provided in *Carrigan*. None of the expenditures that the plaintiffs have identified violates any law. The plaintiffs fail to provide any argument supporting their claim that the Secretary acts illegally when he provides voters with mailing envelopes or postage, or trains election officials, or pays for staff to work overtime. These expenditures are not contrary to the law. The plain language of the constitutional provision allows taxpayer standing to challenge the *spending* of public funds that is *itself* alleged to be in violation of a law, ordinance, or constitutional provision. It does not permit standing when the government engages in otherwise permissible spending that is incidental to a public policy decision.

Granting the plaintiffs' taxpayer standing based on expenditures that are incidental to the statute or action being challenged would gut the spending restriction in Part I, Art. 8. Some degree of government spending is required every time the government takes any action

whatsoever, whether it is in the form of printing costs, training costs, mailing out copies of new regulations, or any other of the thousands of potential expenses that are part of simply operating a government. Authorizing taxpayer standing based on such ordinary and incidental costs would expand the availability of taxpayer standing to virtually any claim. The text, history, and context of the adoption of the taxpayer standing amendment to Part I, Art. 8 does not support such a broad reading and should be rejected.

IV. CONCLUSION

For the foregoing reasons, intervenor-defendant urges this Court to adopt the statutory interpretation of SB 418 that it does not require previously registered voters to vote using affidavit ballots. Further, even if the Court does not adopt such an interpretation, the Court should find that this interpretation does not affect the standing analysis presently pending before the Court.

Respectfully Submitted

By his attorneys,
Lehmann Major List, PLLC

/s/Richard J. Lehmann

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CERTIFICATION

I hereby certify that a copy of this pleading was this day forwarded to opposing counsel via the court's electronic service system.

/s/Richard J. Lehmann

Richard J. Lehmann

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.

2022 SESSION

22-3015
11/04SENATE BILL ***418-FN***

AN ACT relative to verification of voter affidavits.

SPONSORS: Sen. Giuda, Dist 2; Sen. Bradley, Dist 3; Sen. French, Dist 7; Sen. Gannon, Dist 23; Rep. Howard, Belk. 8

COMMITTEE: Election Law and Municipal Affairs

ANALYSIS

This bill provides for verification of voter affidavits by establishing affidavit balloting.

Explanation: Matter added to current law appears in ***bold italics***.Matter removed from current law appears [~~in brackets and struck through.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

22-3015
11/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT relative to verification of voter affidavits.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Findings.

I. According to the secretary of state, over the past 45 years, New Hampshire has had 44 elections that ended in a tie or in a one-vote victory. On average, that is almost once per year. This clearly proves that just one improperly cast vote can adversely influence an election each year. Every improperly cast vote also invalidates one legal vote. In the 2016 general election, one woman was caught voting in both Massachusetts and in Plymouth, New Hampshire. She only paid a \$500 fine; hardly a deterrent. In that same election, the attorney general's office, after extensive investigation, was unable to verify the identity of 66 domicile affidavit voters and 164 qualified affidavit voters. To turn a blind eye to this level of uncertainty does a grave disservice to both the electoral process of the state of New Hampshire and its citizens. Something must be done, immediately.

II. Currently, New Hampshire law allows for votes to be cast and counted, even when the voter fails to produce documents to prove his or her identity, or that he or she is a New Hampshire citizen or inhabitant of that town, city, ward, or district. Although current New Hampshire laws do allow for the post-election investigation of these voting attempts, all this does is identify when unqualified votes have been cast and allowed to nullify legitimate votes. It does nothing to prevent the damage in the first place; that being the casting and counting of illegitimate votes.

2 New Section; Election Procedure; Affidavit Ballot. Amend RSA 659 by inserting after section 23 the following new section:

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.

II. The registering official at the polling place shall hand the affidavit ballot voter an affidavit voter package and explain its use. The affidavit voter package shall be designed, produced, and distributed by the secretary of state, and shall contain the following:

(a) A serialized affidavit voter ballot of a different color to distinguish it from regular ballots, with a serialized tear-off strip on the bottom. The tear-off strip shall contain both the serial number and the name and address of the affidavit voter. All such strips shall be mailed by the local election officials to the secretary of state the day after the election using registered mail, return receipt requested.

(b) A prepaid Federal Express envelope addressed to the secretary of state for the affidavit voter to return the affidavit verification page described in subparagraph (c) and missing documentation to the secretary of state. The return address on this envelope shall also be for the secretary of state.

(c) An affidavit voter verification page which lists the specific documents required to qualify to vote in the state of New Hampshire. The election official registering the affidavit voter shall mark on the verification page which identification requirements were fulfilled and which identification requirements were not fulfilled and thereby required affidavit voting. The voter shall be required to return a copy of the affidavit verification page and any required documentation in the provided prepaid Federal Express envelope within 10 days of the date of the election in order for the ballot to be certified.

III. Affidavit ballots shall be of a different color, distinguishing them from regular non-affidavit ballots, and shall have a unique serial number assigned to the ballot. Each affidavit voter ballot shall have a tear-off strip containing the name and address of the affidavit voter and the serial number of the ballot which they cast.

IV. All affidavit ballots shall be cast in person at the polling place. After the close of polls on election day, all affidavit ballots shall be hand counted and included in the vote totals announced by the moderator. The total number of affidavit ballots shall also be noted.

V. If the affidavit voter fails to return a satisfactorily completed verification letter with the missing documentation within the allotted time frame, the secretary of state shall instruct the town, city, ward, or district in which the affidavit vote was cast to retrieve the serialized ballot and deduct from the election totals the votes contained on the serialized ballot. The counting of votes on those serialized affidavit ballots identified by the secretary of state as invalid 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 non-affidavit ballots.

VI. No later than 14 days after the election, the town, city, ward, or district shall provide a summary report with its aggregated affidavit vote reductions to the secretary of state. This total shall be the final official vote count to be certified by the appropriate certifying authority.

VII. The names of affidavit voters whose verification letters are either not returned to the secretary of state or which do not provide the required voter qualifying information shall be referred by the secretary of state to the New Hampshire attorney general's office for investigation in accordance with RSA 7:6-c.

VIII. Any written, electronic, or other information related to an affidavit voter who provides the required information verifying their right to vote shall not be subject to disclosure under RSA 91-A or any other law.

IX. No affidavit ballots, regardless of whether qualified or unqualified, shall be subject to disclosure under RSA 91-A or any other law.

X. All written documentation relating to affidavit ballots shall be delivered to the secretary of state by local election officials in sealed packages using a secure means of transportation, and stored pursuant to RSA 659:95-103.

3 New Section; General Provisions for Recounts; Affidavit Ballots. Amend RSA 660 by inserting after section 17 the following new section:

660:17-a Affidavit Ballots; Recounts. In any election or referendum, if the total number of affidavit ballots submitted in any one town, city, ward, or district would, if counted in favor of either candidate or position, alter the outcome of the election, the deadlines for filing recount requests imposed by RSA 660:1, 660:7, 660:10, 660:12, and 660:13 shall be extended until after the deadline for submitting affidavit verification materials in RSA 659:23-a. In such instance, the secretary of state shall publish new deadlines for filing recounts.

4 Election Procedure; Obtaining a Ballot. Amend RSA 659:13, I(c) to read as follows:

(c)(1) 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 *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.

(2) If the voter executes a challenged voter affidavit *and casts an affidavit ballot*, the moderator or the moderator's designee shall take a photograph of the voter and immediately print and attach the photograph to, and thus make it a part of, the affidavit form. However, if a photograph was taken under RSA 654:12, then a notation shall be made on the challenged voter affidavit stating that the photograph is attached to the qualified voter affidavit or sworn statement on the general election day registration form. The photograph shall be 2 inches by 2 inches, or larger, and may be in color or in black and white. The moderator or his or her designee who took the photograph and the voter shall then sign the challenged voter affidavit. The moderator or designee shall delete the photograph from the camera in the presence of the voter. If the moderator or his or her designee is unable to take the voter's photograph due to equipment failure or other cause beyond the moderator's or his or her designee's reasonable control, the voter may execute a challenged voter affidavit *and cast an affidavit ballot* without a photograph.

(3) If the voter objects to the photograph requirement because of religious beliefs, he or she may execute an affidavit of religious exemption in accordance with RSA 659:13-b, which shall be attested to by an election officer and attached to the challenged voter affidavit.

(4) The person entering voter information into the centralized voter registration database shall cause the records to indicate when a voter has not presented a valid photo identification and has executed a challenged voter affidavit *and cast an affidavit ballot*.

5 Election Procedure; Obtaining a Ballot. Amend RSA 659:13, II(b) to read as follows:

(b) In addition to the forms of photo identification authorized in subparagraph (a), the identification requirements of paragraph I may be satisfied by verification of the person's identity by a moderator or supervisor of the checklist or the clerk of a town, ward, or city, provided that if any person authorized to challenge a voter under RSA 659:27 objects to such verification, identifies the reason for the objection in writing, and states the specific source of the information or personal knowledge upon which the challenge of the photo identification is based, the voter shall be required to execute a challenged voter affidavit *and cast an affidavit ballot* as if no verification was made.

6 Effective Date. This act shall take effect upon its passage.

LBA
22-3015
Redraft 12/23/21

**SB 418-FN- FISCAL NOTE
AS INTRODUCED**

AN ACT relative to verification of voter affidavits.

FISCAL IMPACT: State County Local None

STATE:	Estimated Increase / (Decrease)			
	FY 2022	FY 2023	FY 2024	FY 2025
Appropriation	\$0	\$0	\$0	\$0
Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable	Indeterminable
Funding Source:	<input checked="" type="checkbox"/> General	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input type="checkbox"/> Other

LOCAL:

Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable	Indeterminable	Indeterminable

METHODOLOGY:

This bill establishes affidavit balloting for voters who are not registered on the checklist or who do not have a valid photo identification. The affidavit balloting would include a ballot in a different color than other ballots. It would contain a serialized

tear-off strip and would require local election officials to mail the strips to the Secretary of State using registered mail and return receipt requested.

The Department of State indicates there would be an indeterminable increase in General Fund expenditures. The increase would be due to printing costs, mailing costs and potential increased staffing costs. The Secretary of State also notes they would be required to mail and process the new voter packet.

The New Hampshire Municipal Association (NHMA) states there would be an indeterminable fiscal impact on local expenditure. The NHMA states they are unsure if municipalities or Department of State would be responsible for the new ballots and the mailing paraphernalia. They explain there could also be an increase in staffing expenditures on election days due to the new requirements.

AGENCIES CONTACTED:

Department of State and New Hampshire Municipal Association

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