

STATE OF NEW HAMPSHIRE

HILLSBOROUGH,
SOUTHERN DISTRICT

SUPERIOR COURT
Docket #226-2022-CV-00233
Docket #226-2022-CV-00236

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

and

MANUEL ESPITIA, JR.; and
DANIEL WEEKS

Plaintiffs

v.

DAVID M. SCANLAN, Acting New Hampshire Secretary of State;
and JOHN M. FORMELLA, New Hampshire Attorney General

Defendants

**603 FORWARD PLAINTIFFS' REPLY TO NHRSC'S RESPONSE TO THE COURT'S
JUNE 26 ORDER**

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INTRODUCTION

While all parties to this action are in agreement as to the meaning of SB 418, the NHRSC's response raises new, untimely challenges to the Plaintiffs' standing that in no way turn on the statutory interpretation question posed by the Court's June 26 order. Such arguments are untimely because they were not presented during the motion to dismiss briefing. *See* Joinder of NHRSC in Defs.' MTD, June 6, 2023; Joinder of NHRSC in Defs.' MTD, November 14, 2022; *see also* J. Status Rep. & Stip., Apr. 21, 2023 (acknowledging that "the pending motion to dismiss in this case requires no further briefing or argument and is ripe for decision"). The 603 Forward Plaintiffs nonetheless submit this brief response to the NHRSC's new arguments, which are all fundamentally flawed and should be rejected by the Court for the reasons set forth herein.

ARGUMENT

I. The Individual Plaintiffs have alleged standing under any construction of SB 418.

A. The Individual Plaintiffs have sufficiently alleged standing as taxpayers.

The Individual Plaintiffs have sufficiently alleged standing as taxpayers because SB 418 approves spending to implement an unconstitutional affidavit ballot scheme and commands the Secretary to spend taxpayer funds in violation of the Constitution. The Individual Plaintiffs' standing as taxpayers is not contingent on the scope of SB 418 because, under any reading, the law requires the State to spend money in violation of the Constitution. The New Hampshire Constitution grants every taxpayer eligible to vote the right to petition the Superior Court if they allege the State has spent or approved spending public funds in violation of the law. *See* N.H. Const. pt. I, art. 8. That is precisely what the Individual Plaintiffs—each of whom is a taxpayer registered to vote in New Hampshire, *see* Compl. ¶¶ 110-113—do here. They allege that, by enacting SB 418, the State has approved spending public funds in violation of the New Hampshire

Constitution, including its rights to free and fair elections, equal protection, privacy, and due process and its requirements for certifying elections. *See* Compl. ¶¶ 15-20. Indeed, it is uncontested that Defendant Scanlan now *has spent* money to implement an affidavit ballot scheme that the Plaintiffs allege to be unconstitutional. *See* 603 Forward Resp. at 10 (noting that SB 418 has been in force for several elections).

Despite having twice previously adopted the State Defendants' taxpayer standing arguments by joining their motion to dismiss, the NHRSC now introduces new arguments as to why Plaintiffs have not adequately alleged such standing. None of these new arguments relate to the statutory interpretation question posed by the Court, and they are accordingly untimely. *Cf. H.T. v. D.M.*, No. 2021-0597, 2022 WL 2718858, at *2 (N.H. June 20, 2022) (explaining that the Court does not consider issues raised for the first time in a reply brief).

But even if the NHRSC's new arguments were properly raised they would still be flawed. In sum, the NHRSC argues that Plaintiffs have failed to allege that Defendants have spent money or approved spending in violation of the Constitution because none of the *specific acts* they are charged with performing under SB 418 violate the Constitution. According to the NHRSC, because several of the Secretary's duties—preparing the voter affidavit package, preparing postage, reviewing the affidavit letter submissions—are “ordinary and incidental” functions of the office, they do not qualify as the kind of spending acts that confer taxpayer standing. *See* NHRSC Resp. at 21-22. That argument not only misunderstands the Constitution's taxpayer standing provision; it also mischaracterizes the Secretary's actions and misreads SB 418.

To start, these actions are not the routine clerical tasks of the Secretary's office. Prior to SB 418, the concept of an “affidavit voter package” was foreign to New Hampshire elections. In other words, the Secretary has never been responsible for creating and implementing an affidavit voter

package. SB 418 *mandates* for the first time that the *Secretary* “design[], produce[], and distribute[]” the affidavit voter package at a cost of “\$5 per packet equating to \$15,000” per statewide election. *See* SB 418, § 2, II(a)-(b), Fiscal Note. Preparing and distributing the affidavit voter package is not a routine clerical task or some incidental part of SB 418—it is central to the challenged law and reflects how the Secretary chooses to implement it.

The packet explains to voters why they are being forced to cast an affidavit ballot—“because they registered to vote on election day, are a first-time registrant in New Hampshire, and did not present a qualified photo identification”—and includes the verification letter that they must submit for their votes to be counted. *See* SOS’s Aff. Ballot Verification Letter (filed Feb. 15, 2023); *see also* SOS’s SB 418 Guidance to NH Election Offs. at 3 (filed Feb. 15, 2023) (“SOS Guidance”) (explaining that the affidavit voter package must include an ‘Affidavit Verification Letter’ explaining to voters why they must vote by affidavit ballot). ***This is as a direct result of SB 418.*** SB 418 then also requires that the Secretary’s office review the returned affidavit voter packages for compliance with the law, which the law’s Fiscal Note acknowledges will “incur \$3,000 in overtime pay” per statewide election. 603 Forward Compl, Ex. A (Fiscal Note); *see also* SOS Guidance at 7 (explaining the Secretary “will notify the Moderator to retrieve an affidavit ballot if a voter does not return an Affidavit Verification Letter as required by law” and that the moderator must deduct such a ballot). The law will also have “a fiscal impact on local expenditures” because SB 418 forces municipal officials to engage in additional duties, like hand counting affidavit ballots and deducting unverified affidavit ballots from vote totals. SB 418, § 2, IV-V. Each of these specific acts—delegated to the Secretary and local election officials by the Legislature under the terms of SB 418—are not actions these officials would take (and previously did not take) absent SB 418’s command. Each contributes to the implementation of SB 418’s unconstitutional affidavit

ballot regime and requires the Secretary to spend taxpayer money in violation of the Constitution. Even under the NHRSC's cramped reading of the taxpayer standing amendment, the Plaintiffs have more than adequately alleged their standing.

Plaintiffs also need not plead taxpayer standing with the degree of granularity demanded by the NHRSC, though they do so anyway. The plain text of Constitution—passed into law by an overwhelming majority of New Hampshire voters—permits taxpayers to sue when “the State or political subdivision ... has spent, or has approved spending, public funds in violation of a law, ordinance or constitutional provision.” N.H. Const. pt. I, art. 8. “The simplest, most obvious reading of” this language “is that it refers to a specific governmental spending action or approval of spending.” *Carrigan v. N.H. Dep’t of Health & Hum. Servs.*, 174 N.H. 362, 370 (2021) (citing *Duncan v. State*, 166 N.H. 630, 640 (2014)). SB 418, on its face, is a “specific governmental spending action or approval of spending” that authorizes spending from the State’s general fund to implement an affidavit ballot regime that violates the Constitution. *See* SB 418, Fiscal Note. The Constitution imposes no additional requirement to allege that every derivative act of that expenditure—down to purchasing each postage stamp and envelope—is itself unconstitutional. “[U]nder Part I, Article 8,” the Individual Plaintiffs “can call on the courts to determine whether a specific act or approval of spending conforms with the law.” *Carrigan*, 174 N.H. at 370. SB 418 is that act and approval of spending.

Plaintiffs have plausibly alleged both that the enactment of SB 418 itself approved spending in a manner that violates the Constitution, and that the law specifically requires Defendant Scanlan to spend money on specific duties that likewise violate the law. That more than suffices to grant the Individual Plaintiffs standing ensure that taxpayer dollars do not support unconstitutional schemes like SB 418.

B. The Individual Plaintiffs would also have standing as voters subject to the law's requirements under the broader reading of SB 418.

The Individual Plaintiffs would also have personal standing to challenge the broader version of the law, if it were ever enforced against them, for the reasons explained in their supplemental brief. *See* 603 Forward Resp. at 9-10. The NHRSC says otherwise, NHRSC Resp. at 13-18, but its arguments are, for now, hypothetical, given the Secretary's and Attorney General's confirmation that they intend to continue implementing SB 418 as they previously had. The NHRSC's arguments are also premature because, as the 603 Forward Plaintiffs explained, they would likely move to amend their pleadings if the broader reading of SB 418 came into effect. *See* 603 Forward Resp. at 5 n.5. But even so, the NHRSC's arguments are wrong on their face.

If the Secretary were to enforce the broader reading of SB 418, the pool of impacted individuals would significantly expand as *all* New Hampshire voters wishing to vote on Election Day would then be subject to the law. June 26 Court Order at 6. New Hampshire courts have made clear that “a party has standing to raise a constitutional issue... when the party's own rights have been or will be directly affected.” *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 35 (2005). And courts across the country have held that being required to present photo identification—irrespective of whether a voter lacks ID—is sufficient to demonstrate that their rights have been directly affected such that they have standing to sue. *See, e.g., Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009); *Fish v. Schwab*, 957 F.3d 1105, 1120 (10th Cir. 2020).

The NHRSC tries to push these cases aside by suggesting that they are from jurisdictions with different standing principles. NHRSC Resp. at 15-18. But this is inconsistent with the conclusions of the New Hampshire Supreme Court, which has explained that, “as a practical matter, Part II, Article 74 imposes standing requirements that are similar to those imposed by Article III of the Federal Constitution.” *Duncan*, 166 N.H. at 642 (citing *Lujan v. Defs. of Wildlife*,

504 U.S. 555, 560–61 (1992)). The federal decisions cited by the Court and the 603 Forward Plaintiffs on this point are therefore, at minimum, persuasive authority as to whether the Individual Plaintiffs would have personal standing to challenge a broader implementation of SB 418 under New Hampshire law. And while the Court need not reach that issue at this juncture, they strongly counsel in favor of finding that the Individual Plaintiffs would have standing under this alternative reading of the statute.

Equally infirm is the NHRSC’s suggestion that *Billups* would not be relevant because the Individual Plaintiffs are not among the class of voters arguably impacted by SB 418. NHRSC Resp. at 17. That is only true under the Secretary’s *current* reading of the law. If the alternative reading were enforced, “all voters”—“even those who have been registered to vote for decades”—would be impacted by the law because they would have to either present identification at the polls or cast a constitutionally-dubious affidavit ballot. June 26 Order at 5. The Individual Plaintiffs would have standing to challenge that newfound imposition on their voting rights. *See* 603 Forward Resp. at 12 (collecting cases).

II. 603 Forward and Open Democracy Action also have standing under any construction of SB 418.

The NHRSC’s additional, and again untimely, argument as to why 603 Forward and Open Democracy Action lack standing as organizations are also without merit. NHRSC Resp. at 18-19.

The NHRSC acknowledges that this Court in *Gardner* found that an organization plausibly alleged a diversion of resources injury because it was “primarily a voting rights organization,” NHRSC Resp. at 18, that demonstrated a “sufficient injury primarily in the form of diversion of time, talent, and resources to educate their voters and implement the requirements of the [new registration] law,” *N.H. Democratic Party v. Gardner*, No. 2017-CV-00432, 2018 WL 5929044, at *3 (N.H. Super. Apr. 10, 2018) (quoting *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 584

(E.D. Va. 2016)). The NHRSC also acknowledges that 603 Forward and Open Democracy Action engage in similar voting rights work as the plaintiff in *Gardner* and does not dispute that they have alleged a similar diversionary injury. NHRSC Resp. at 17-18. Nevertheless, the NHRSC tries to escape the clear conclusion that these plaintiffs similarly have standing, by arguing that voting rights are not the “*raison d’etre*” of 603 Forward and Open Democracy Action. In support, NHRSC relies largely on the differences between the organizations’ names, noting that the name of the plaintiff organization in *Gardner*—the League of Women Voters—directly references voters, arguing this suggests a greater connection to voting rights. *Id.* at 18.

But pleading standing does not turn on something as trivial as whether a plaintiff organization’s name includes the word “Voters” as compared to “Democracy.” Nor does it turn on finely slicing whether an organization diverts resources to support its “*raison d’etre*” as compared to a critical priority. This Court in *Gardner* used that phrase with respect to a *different* plaintiff—the New Hampshire Democratic Party—and nowhere suggested that organizational standing *turned* on whether the organization’s resources were diverted in support of its primary and singular mission. *Gardner*, 2018 WL 5929044, at *2 (quoting *Lee*, 155 F. Supp. 3d at 578).

In any event, both organizations *do* allege that voting rights are at the core of their work. 603 Forward’s “mission is, above all else, the maintenance and promotion of a healthy democracy.” 603 Forward Compl. ¶ 10. And “Open Democracy Action’s mission is to bring about and safeguard political equality for the people of New Hampshire, which its founders believe will only happen through an open, accountable, and trusted democratic government ‘of, by, and for the people.’” *Id.* ¶ 11. “Inherent to that mission is an electoral system that allows eligible citizens to vote and have their vote counted.” *Id.* Both groups have long-established voter education programs and both must now divert resources from *other* efforts in response to SB 418. *Id.* ¶¶ 9-14; *see also* Zink Aff. ¶ 18

(explaining that Open Democracy Action has to divert resources away from its campaign finance research projects, democracy education programs, and grassroots mobilization efforts to “refocus programming efforts and volunteer time on educating new voters about the need to obtain photo identification ahead of an election”); Meyer Aff. ¶¶ 10, 14 (explaining that 603 Forward has had to divert resources away from its work to “advocate for better funding for higher education in New Hampshire” and “create more affordable housing options” to raise “new funds for programming in the communities that will be disproportionately impacted by SB 418”). That both groups also pursue other important social goals, if anything, *supports* their standing for this reason—their other efforts will be deprived of resources reallocated to addressing SB 418. *See, e.g., Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2022 WL 4725887, at *34 (N.D. Ga. Sept. 30, 2022) (finding a church plausibly alleged a diversionary injury where it diverted resources away from its soup kitchen, youth programming, and the church’s other “dozens of programs” to counteract a voting law); *see also OCA-Greater Houston v. Texas*, 867 F. 3d 604, 612 (5th Cir. 2017) (finding that organization that listed “one of its primary missions” as “promot[ing] civic participation and provid[ing] civic education” had standing where it diverted resources from its “routine community outreach activities” to educate voters about a harmful voter suppression law); *Ark. United v. Thurston*, 626 F. Supp. 3d 1064, 1077 (W.D. Ark. 2022) (similar).

Finally, as the NHRSC does not dispute, these diversions will likely only increase in severity if the alternative interpretation is enforced, which would require organizations to reach an even broader class of voters to attempt to ameliorate its injurious effects. If *all* election day voters—and not just first-time registrants—were to be subject to SB 418, Open Democracy Action would likely need to divert more resources than it already has away from its campaign finance research projects, democracy education programs, and grassroots mobilization efforts to educate a

broader pool of voters about the need to obtain photo identification. Zink Aff. ¶ 18. Similarly, because the communities impacted by SB 418 would significantly expand if a broader interpretation of SB 418 were adopted, 603 Forward’s higher education and affordable housing work would likely suffer even more greatly because the organization would need to raise additional funding to support voter education programming related to SB 418. Meyer Aff. ¶¶ 14, 10.

603 Forward and Open Democracy Action have therefore satisfied the exact same pleading standard this Court adopted in *Gardner* and the same would be true so under the broader reading of the law as well. *Gardner*, 2018 WL 5929044, at *3 (holding that organizations had standing where they suffered a “sufficient injury primarily in the form of diversion of time, talent, and resources to educate their voters and implement the requirements of the [new registration] law”).

CONCLUSION

For the foregoing reasons, the 603 Forward Plaintiffs respectfully submit this reply to the NHRSC’s response and renew their request for the Court to deny Defendants’ motion to dismiss.

Dated: July 27, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 27th day of July 2023, I hereby certify that I served the foregoing through the Superior Court's electronic filing system on all parties and counsel of record.

/s/ Steven J. Dutton
Steven J. Dutton

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