THE STATE OF NEW HAMPSHIRE SUPREME COURT
MANUEL ESPITIA, JR. AND DANIEL WEEKS
v.
SECRETARY OF STATE AND ATTORNEY GENERAL AND
603 FORWARD, OPEN DEMOCRACY ACTION, LOUISE SPENCER,
AND EDWARD R. FRIEDRICH
v.
SECRETARY OF STATE AND ATTORNEY GENERAL DOCKET NO.
2023-0701

Case No. 2023-0701

Rule 7 Mandatory Appeal
From Hillsborough Superior Court Southern Division
Docket Nos. 226-2022-CV-00236 and 226-2022-CV-00233

BRIEF OF INTERVENOR NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE

(15 Minute oral argument requested)

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STATEMENT OF FACTS

This case concerns Laws 2022, ch. 239 (hereinafter "SB 418"), which the General Court and the Governor enacted on June 17, 2022, and took effect on January 1 of the following year. Under SB 418, persons seeking to register to vote in New Hampshire for the first time on election day who do not present photographic proof of identity at the polls are permitted to submit an "affidavit ballot." RSA 659:23-a, I. Each affidavit ballot submitted is sequentially marked, along with a "verification letter" given to the applicant. RSA 659:29-a, II(b), III. Those who submit affidavit ballots are afforded 7 days within which to submit photographic proof of identity and their copy of the verification letter containing the sequential number to the Secretary of State, either in person or by mail. RSA 659:23-a, II(b). The state supplies a pre-paid, pre-addressed envelope to each person who submits an affidavit ballot. RSA 659:23-a, II(a). The affidavit ballots of those who timely submit the required documentation are included in the final tally. RSA 659:23-a, V. The affidavit ballots of those who do not timely submit the required documentation are not included in the final tally. RSA 659:23-a, V. The government identifies the ballots to be excluded from the final tally by observing which sequential numbers are missing from among the returned verification letters. Thus, if the verification letters containing the numbers 1, 3, 4, and 5 are returned with proper identification, then the affidavit ballots with those numbers remain in the final tally and the affidavit ballot marked with a 2 is excluded. Appellants allege that "election officials will know how" a person whose affidavit ballot has been excluded from the final tally "voted for each affected candidate or issue." App. Br. at 9. But they provide no basis for that assertion.

The General Court concluded that some state taxpayer funds would need to be expended to implement SB 418 as drafted. Specifically, according to a fiscal note appended to the bill, state taxpayer funds would need to be expended to pay for postage, pay for drafting and distribution of the verification letter, and to train election officials to properly implement this new legislation.[1]

The General Court's reasons for enacting SB 418 are set forth in the "findings" section of the bill. Specifically, it found that "over the past 45 years" preceding its passage, "New Hampshire has had 44 state elections that ended in a tie or a one-vote victory." The General Court also found in the 2016 general election, at least 10 illegal ballots were cast by voters who admitted guilt and were prosecuted by the attorney general and counted." It also found that "New Hampshire law allows for votes to be cast and county by signing an affidavit, even when the voter fails to produce documents to prove his or identity, or that he or she is a New Hampshire citizen or an inhabitant of that town, city, ward, or district." *Id.* It observed that the existing law "does nothing to prevent the nullification of legitimate votes by the casting, counting and certification of illegitimate ballots."

Appellants do not contest these basic facts. Instead, they clutter their "statement of facts" with inflammatory allegations for which there is no factual basis in the record and that, in any event, are irrelevant to the question presented to this Court. For example, they assert that SB 418 is "the most recent effort by lawmakers in the General Court to place unnecessary

[1] Available at https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/billText.aspx?sy=2022&txtFormat=html&v=SA&id=30152022

roadblocks and burdens in front of New Hampshire voters in the guise of maintaining 'voter confidence.'" App. Br. at 5. To put it mildly, these allegations are not "facts." They are non-responsive to the legislative findings recounted above. And they are, in any event, entirely irrelevant, as Appellants' Complaint does not allege that SB 418 burdens the right to vote *at all*. Appellants have alleged only that SB 418 could be implemented in a way that might infringe upon the constitutional privacy interests of certain New Hampshire residents who are, in any event, not before the Court. Complaint at App. App'x at 33-43.

Likewise irrelevant to this case is Appellants' extensive discussion of the regulations of same-day registration that prevailed before SB 418. App. Br. at 7-8. Those rules have no bearing on whether SB 418 implicates the constitutional privacy rights of any New Hampshire residents. But to the extent it is relevant at all, the critical feature of that old regime is that it did not require same-day registrants to provide documentary proof of their qualifications to vote before their ballots were counted. SB 418 changes that, ensuring that every same-day registrant will have established their qualifications to vote before their ballots are permitted to affect who governs this state and this country.

Another feature of this case is that Appellants are not subject to SB 418 at all. They are all already registered to vote in New Hampshire. Order at 3. As a result, SB 418 could not affect their constitutional rights in the slightest. Rather, it is worth noting that they are staunch political opponents of the bill. Plaintiff Espitia was a member of the House at the time and he voted against its passage. See, roll call vote on 2022 SB 418 at https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/Roll_calls/rc_ye

ahnay.aspx?yn=2&sy=2022&vs=227&lb=H&eb=SB0418&sortoption=&txtsessionyear=2022&txtbillnumber=sb418&ddlsponsors=&lsr=3015.

Appellants' counsel, Attorney Klementowicz, testified against the bill both in the Senate and the House. App. App'x at 136-142; App. App'x at 204-205. This suit is an attempt to achieve in the courts what they could not achieve in the legislature, notwithstanding that under our Constitution it is the General Court—and not the courts of law—that possess the "full power and authority" to make such laws as "*they* may judge for the benefit and welfare of this state, and for the governing and ordering thereof." N.H. Const. Pt. II, Art. 5 (emphasis added).

STATEMENT OF THE CASE

This is an appeal from an order dismissing a pair of consolidated cases that challenged various provisions of 2022 SB 418. The first case filed was a five-count complaint brought by 603 Forward, Open Democracy Action, Louise Spencer, Edward Friedrich, and Jordan Thompson against the Secretary of State and Attorney General. Docket No. 226-2022-CV-00233. These Plaintiffs alleged they had standing as organizations to levy a barrage of constitutional attacks at SB 418. The second case was filed by plaintiffs Manuel Espitia, Jr. and Daniel Weeks ("Appellants") against the same defendants. Docket No. 226-2022-CV-00236. These plaintiffs alleged they had standing as taxpayers to allege that SB 418 violated the right of privacy under Part I, Article 2-b.

In the proceedings below, the trial court, in a well-reasoned order, held that both the individual plaintiffs and the organizational plaintiffs lacked standing to challenge the law.

With respect to the individuals, the trial court concluded that they had "not identified any specific funds earmarked by the legislature to carry out SB 418," Order at 6, nor sought "a declaration that any of the [potential expenditures] identified in their complaint [are] illegal." *Id.* (citing *Carrigan v. N.H. Dep't of Health and Human Services,* 174 N.H. 362, 374 (2021)). Continuing, the court noted that "[w]hile it is true that there may be incidental postage and staffing costs incurred by the Secretary of State's Office in executing SB 418, these minimal expenditures bear little to no relationship to the merits of the plaintiffs' claims." *Id.* at 6-7. The court then noted that the "limited expenditures are too attenuated" from the alleged illegalities "to confer taxpayer standing in this case." *Id.* at 7. The court concluded that it does "not believe that [Part I, Article 8] is intended to give plaintiffs standing to test the constitutionality of an entire act when the expenditure of funds alleged is incidental to its implementation." *Id.* The court then dismissed the Appellants' complaint. *Id.* at 7.

This appeal from Espetia and Weeks followed. The organizational plaintiffs and other individual plaintiffs did not appeal. Accordingly, the only question presented to this Court is whether Appellants can assert taxpayer standing to challenge SB 418 on the theory that it violated the constitutional right of privacy of parties not presently before the Court, because it contained an expenditure that is neither illegal in itself nor related to the harm identified in the Complaint.

SUMMARY OF THE ARGUMENT

The plain text of Part I, Article 8 of the New Hampshire Constitution and this Court's recent decision in *Carrigan*, provide that Appellants only have

taxpayer standing to sue if they can establish that the state government "has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision." Pt. I, Art. 8. Appellants are unable to establish that any expenditure required or authorized by SB 418 in any way violates the law. Indeed, Appellants concede that the expenditure of funds itself is legal and within the legislature's authority.

In an effort to evade this requirement, Appellants identify *one provision* of the voter registration system enacted through SB 418, that they assert might someday result in a violation the right of privacy set forth in Part I, Article 2-b of the New Hampshire Constitution. They then assert a right to challenge that provision by seizing on *another unrelated provision of* SB 418 that authorizes the expenditure of taxpayer funds for postage costs, as well as expenses related to training election officials and other miscellany. From this, they allege that they have picked the lock on taxpayer standing and are free to seek an injunction against the enforcement of *every provision* of SB 418. Complaint at App. App'x at 42 (asking trial court to "Issue a permanent injunction prohibiting Defendants from implementing or enforcing SB 418.").

Appellants' arguments must fail. First, they provide no authority for the proposition that a *legal* expenditure in a piece of legislation provides taxpayer standing to challenge other portions of the act. Second, this Court recently rejected a similar claim of taxpayer standing when a plaintiff challenged the expenditures and operations of the New Hampshire Department of Health and Human Services in its response to child abuse and neglect cases. See, *Carrigan.* 174 N.H. 362 (2021). There, this Court held that the taxpayer standing provision of Part I, Article 8 confers upon taxpayers only the limited ability to "call on the courts to determine whether *a specific act*

or approval of spending conforms with the law." *Id.* at 374. That holding is sufficient to shut the door on Appellants' claims. Second, Appellants have failed to identify any reversible error in the trial court's Order. At most, they nibble around the edges, arguing that the trial court should not have required them to identify a specific "earmark," or have required a showing of a nexus between the spending and the alleged harm. App. Br. at 17, 22. But they fail completely to address both Part I, Article 8's plain text and this Court's decision in *Carrigan,* which require them to identify illegal spending to have taxpayer standing. Indeed, accepting their conclusion that no nexus is required between the spending and the illegality, would not only nullify *Carrigan*, it would revolutionize taxpayer standing, converting it from a limited exception to normal standing rules when illegal expenditures are at stake into a license to challenge any and all government conduct -- an open an obvious threat to the separation of powers.

In an apparent effort to avoid this obvious shortcoming in their position, Appellants turn to a single shard of legislative history that they claim establishes a legislative intent to return taxpayer standing to its pre-*Baer* status. See, *Baer v. N.H. Dep't of Educ.*, 160 N.H. 727 (2010). But this effort fails for two reasons. First, a closer examination of the legislative history reveals that the amendment to Part I, Article 8 approved by the voters is substantially narrower than Appellants' argument suggests. And second, even the pre-*Baer* case law would not support Appellants' claim. The cases cited by Appellants all involve claimed acts of illegal spending or claims that government acts are *ultra vires.* Appellants make no such arguments here.

For these reasons, this appeal fails.

ARGUMENT

I. *Carrigan* Forcloses Appellants' Standing as Taxpayers.

Appellants argue that they have standing to challenge provisions of SB 418 that do not entail expenditures merely because the legislature has made other policy choices that do entail expenditures to implement still other, unrelated provisions of that same act. App. Br. at 24-26. They are wrong. As the superior court correctly held, Appellants' arguments are squarely foreclosed by this Court's recent decision in *Carrigan*. Under *Carrigan*, taxpayer standing exists only to challenge expenditures themselves. *Carrigan,* 174 N.H. at 374. Part I, Article 8 does not swing open the courthouse doors for plaintiffs seeking to challenge anything else, including government conduct that is the "product or result of" expenditures. And it certainly isn't a gateway to challenge government conduct, as in this case, that bears no relationship at all to any expenditure other than having been enacted in the same piece of legislation.

In *Carrigan*, this Court authoritatively interpreted Part I, Article 8 of the New Hampshire Constitution, and it could scarcely have been clearer about its meaning. Part I, Article 8 creates an exception to the general standing requirements so that taxpayers can "petition the Superior Court to declare whether the State…has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision" without carrying the usual burden of demonstrating "that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer." This language, the Court determined, confers upon taxpayers the limited ability to "call on the courts to determine whether *a specific act or approval of spending* conforms with the law." *Id.*

at 370 (emphasis added). Thus, per *Carrigan*, Part I, Article 8 makes available to taxpayers one form of relief from which they might be shut off if they had to demonstrate personal harm: a declaration "that [a] specific expenditure[]…[is] illegal." *Carrigan*, 174 N.H., at 374.

Carrigan is fatal to Appellants' standing as taxpayers because they do not seek the one form of relief Part I, Article 8 affords them. As the superior court correctly observed, they do not seek "a declaration that any of the potential expenditures identified in their complaint are illegal." Order at 6. Appellants even *concede* that this is the correct rule of law, noting that a challenge to "a specific spending action" is "required" to support taxpayer standing. App. Br. at 15 ("all that is required is that taxpayers challenge a specific spending action."). Appellants say that SB 418 compels expenditures on three items: postage, document creation and distribution, and election administration training. But, critically, they do not challenge the legality of any of those. And of course, any such allegation would be frivolous, as nothing in the New Hampshire Constitution even plausibly restricts the legislature from expending funds on those items or activities. Thus, in *Carrigan*'s plain terms, Appellants do not have taxpayer standing because they have neither challenged "the legality of any specific acts of…spending" nor have they alleged that "any specific expenditure…is illegal" *Id.* at 374.

The Court need go no further to affirm the superior court.

II. Appellants Have Not Identified Any Error, Let Alone Reversible Error, in the Superior Court's Order.

Appellants' efforts to infuse error into the superior court's order all run headlong into *Carrigan*.

First, they contend that the superior court erred by requiring their Complaint to have identified funds "earmarked by the legislature to carry out SB 418." App. Br. at 22. This is a circular detour. For one, the superior court did no such thing. The superior court's solitary use of the word "earmarked," does not drive any of its analysis, which was firmly and explicitly grounded in *Carrigan*'s holding requiring Appellants to have sought a "declaration that any of the [potential] expenditures identified in [their] complaint [are] illegal." Order at 6 (alterations in original). Beyond that lies *Carrigan*, which, as noted, limits taxpayer standing to challenges to the legality of expenditures. Whether the term "earmark" is narrower than "expenditures" does not matter in this case. Appellants have challenged the legality of neither.

Next, Appellants contend that the superior court erred in concluding that the expenditures identified in their Complaint are "minimal" or merely "incidental" to the challenged conduct. App. Br. at 22-26. According to Appellants, this holding was both "wrong" factually and "irrelevant" legally. *Id.* The truth, however, is that all of this is beside the point. In applying *Carrigan*, there is no need to evaluate whether the spending is "minimal" and "incidental," as the superior court concluded, or "integral" and "important," as Appellants maintain.[2] Under *Carrigan*, the challenge must be to the spending itself. The strength or degree of the "nexus" between the spending and the allegedly illegal conduct simply does not enter the analysis. The only thing that matters under *Carrigan* is that Appellants have not lodged a challenge to the legality of any spending.

[2] Nor must the Court conjure a judicially manageable legal standard by which a trial court would determine whether spending approved by a legislative body met such a test of "minimal," "incidental," "integral" or "important" spending.

Carrigan itself establishes that when plaintiffs have not challenged the legality of spending the question of whether there is any "nexus" between spending and conduct is irrelevant. Under *Carrigan*, taxpayer standing does not exist to "request[] a declaration that, *as a product or result of…spending*…the defendants are failing to meet legal obligations." *Id.* at 374-75 (emphasis added). In other words, plaintiffs cannot rely on taxpayer standing to challenge the legality of conduct merely because it has some connection, however close or attenuated, to at least one expenditure.

Appellants' attempt to expand taxpayer standing to reach claims based on a "product" or "result" of spending would produce absurd results. It would mean, for example, that any New Hampshire citizen could challenge the constitutionality of any criminal law if its implementation has consequences for the public fisc. And enforcement of any criminal statute necessarily involves the expenditure of public funds for policing, prosecution, adjudication, and corrections. Or it would allow into court any New Hampshire citizen philosophically opposed to occupational licensing, which is implemented by a publicly financed Office of Professional Licensing and Certification, *see* RSA 310-A:1, *et seq.* without regard to whether the person is subject to the licensing scheme. Such a broad regime of taxpayer standing would convert courts into a freestanding institution of legislative review. That has never been the law in New Hampshire. See, *Duncan v. Dep't of Educ.,* 166 N.H. 630, 643 (2014)("the doctrine of standing serves to prevent the judicial process from being used to usurp the power of the political branches."); *Teigen v. Wisconsin Elections Commission,* 2022 WI 64 ¶163, 976 N.W.2d 519, 565 (Wis. 2022) (Hagerdon, J. concurring) (rejecting argument that illegal expenditure

can be established by tax dollars supporting distribution of memos and staff time).

In any event, Appellants' allegations fail regardless of whatever nexus between spending and illegality may be required to invoke taxpayer standing. Appellants cannot even establish a weak nexus between conduct and spending. There is no connection between removing an incomplete affidavit ballot from the final tally of votes on the one hand and expenditures on postage, document creation and distribution, or training on the other. Appellants concede as much by acknowledging that the decisions to have the state pay for these items are mere "policy choice[s]." App. Br. at 25. The removal of incomplete affidavit ballots does not depend, in any way, upon the legislature having made those policy choices rather than others available to it. For example, the removal of incomplete affidavit ballots would occur in the same way had the legislature "downshifted" these expenses to local municipalities, as Appellants concede it could have, or even had it "outsourced" those costs through federal or private grants. Similarly, the removal of incomplete affidavit ballots would occur in the same way had the legislature decided not to incur those costs at all, as would be the case if it had required submissions to be made in person or through pre-existing dropboxes, directed instructions to be given orally rather than by letter, or resolved that additional training was not necessary. In other words, relieving SB 418's taxpayer burdens would do nothing whatsoever to remedy Appellants' concerns about the affidavit ballot system.

Appellants' assertion that imposing postage costs on taxpayers might have been needed to overcome concerns about SB 418's constitutionality and to secure its enactment does nothing to establish a link between conduct and

spending. First, it is pure *post hoc* speculation. Nothing in their Complaint that even conceivably supports this conjecture. Second, it is far from clear that SB 418 implicates constitutional concerns about "the right to vote" at all since it regulates only same-day registration. Notably, even Appellants do not appear to think the right to vote is at stake since their Complaint does not allege any violation of that right. Third, even if pre-paid postage was essential to SB 418's constitutionality, it would not follow that taxpayer funding is required. And of course, even if Appellants could show that taxpayer-funded postage was somehow constitutionally required, that would do nothing more than bring them right back to *Carrigan*, which shuts and seals the door on precisely that type of argument, holding that it is not enough to allege that illegal conduct is the "product or result" of lawful spending. *Id.* at 374.

Finally, Appellants' attacks on the trial court for invoking precedents from other states' high courts miss the mark. First, it is not unusual for New Hampshire Courts to review how courts from other jurisdictions have confronted similar cases, particularly in the context of similar constitutional or statutory text. Indeed, this Court did just that in *Carrigan*. *Id.* at 372. Second, Appellants' efforts to distinguish those on-point authorities are unavailing. Appellants, for example, say the trial court's reliance on *Rudder v. Pataki*, 711 N.E.2d 978 (N.Y. 1999), is inapplicable because it centered around a review of "nonfiscal activities." App. Br. at 32. But so too does Appellants' case. And *Rudder* stands for the proposition that without a substantial nexus requirement, taxpayer standing unduly threatens the separation of powers. *Id.* at 706 *& see also infra*. Appellants' attempt to distinguish *Reeves-Toney v. Sch. Dist. No. 1 in City & Cnty. Of Denver*, 442 P.3d 81 (Colo. 2019), is also off base. Appellants say that Colorado's "injury-in-fact" requirement for taxpayer standing is

contrary to Part I, Article 8, which eliminates the need for a taxpayer to "demonstrate that his or her personal rights" have been impaired. But that does not hold up under scrutiny. As in New Hampshire, Colorado taxpayers need not show, for example, that the state has taken funds from *their* pockets. They need only show that the conduct in question has inflicted harm on taxpayers, generally. *Id.* at 86. In other words, they must challenge conduct that has a sufficient nexus to spending. *Carrigan* requires at least as much, if not more. As in *Rudder*, the modest requirement that a case challenges the legality of an expenditure safeguards the separation of powers and prevents courts from being transformed "into forums in which to air generalized grievances about the conduct of state government." *Id.* at 88.

In the end, Appellants do not have standing as taxpayers. Under *Carrigan*, even a "nexus" between spending and conduct does not establish taxpayer standing, which exists only to challenge the legality of expenditures. And, in any event, Appellants have not established even a weak nexus between conduct and spending. The superior court correctly dismissed Appellants' Complaint for lack of taxpayer standing.

III. Appellants' Attempts to Expand Taxpayer Standing Beyond the Confines of *Carrigan* Should Be Rejected.

Appellants' efforts to broaden *Carrigan* beyond challenges to expenditures distort its language, are not faithful to the text of Part I, Article 8, clash with its legislative history, and generate unnecessary conflict with constitutional values like the separation of powers.

A. Neither *Carrigan* nor Part I, Article 8 Affords Taxpayers Standing Merely To Challenge "Specific Government Actions."

Appellants say that "all that is required" under *Carrigan* is for them to have challenged the "legality of specific governmental actions." App. Br. at 22. *Carrigan*, however, was quite clear that it was not simply carving out one type of challenge from the reach of Part I, Article 8. Rather, it understood that provision to give taxpayers standing to challenge only a "specific category of governmental action." *Carrigan,* 174 N.H. at 370. The Court determined the scope of that "specific category" by reference to Part I, Article 8's critical phrase "has spent, or has approved spending." *Id.* And after applying the traditional tools of constitutional interpretation, the Court concluded that the "most obvious reading" of that language "is that it refers to "a specific governmental *spending action* or *approval of spending*." *Id.* (emphasis added). Accordingly, the most obvious reading of the Court's opinion is that "spending actions" are the "the specific category of governmental action" that taxpayers may challenge through the standing conferred upon them by Part I, Article 8.

Appellants are simply wrong that the only limit *Carrigan* placed on taxpayer standing is that it cannot be invoked to challenge a "governmental body's comprehensive response to a complex issue." App. Br. at 21. That assertion is impossible to square with the rest of *Carrigan*, and its conclusion that taxpayer standing exists only to challenge "specific… expenditure[s]." Simple logic dictates that just because a lawsuit does not challenge a "comprehensive response" does not mean it challenges a "specific expenditure." And it also misreads *Carrigan*. There, plaintiffs asserted that Part I, Article 8 conferred standing upon them to challenge the state's

"comprehensive response" to child abuse and neglect simply because their complaint was "about spending," specifically whether state spending was sufficient to meet constitutional obligations. *Carrigan,* 174 N.H. at 370. The Court flatly rejected this argument. *Id.* It concluded that being "about spending" is not enough to bring a challenge to a "comprehensive response" within the scope of Part I, Article 8. *Id.* To the contrary, in all taxpayer standing cases, the challenge must be to "a specific 'governmental action,'" namely "a particular governmental spending action" and not merely a challenge to "spending policies." Id. at 372-373.

B. Part I, Article 8 Did Not Restore Taxpayer Standing to its Status Before *Baer* and *Duncan*, and Appellants Would Lack Standing Even If It Had.

As the Court recounted in *Carrigan*, New Hampshire's path to what is now Part I, Article 8 has not been linear. In 2010, this Court provided a judicial construction of the declaratory judgment statute, RSA 491:22, that concluded that it did not confer standing on taxpayers. *Baer v. New Hampshire Dept. of Educ.*, 160 N.H. 727 (2010). The legislature superseded that ruling by statute in 2012. Laws 2012, ch. 262:1, eff. Jan 1, 2013. This Court declared that statute unconstitutional in 2014. *Duncan v. State,* 166 N.H. 630 (2014). And the citizens of New Hampshire subsequently amended the Constitution in 2018. See, *State of New Hampshire, New Hampshire Manual for the General Court*, No. 66 (2019) at 455.

In deciphering the meaning of this history, the details matter.

When the legislature responded to the *Baer* decision by statute in 2012, it enacted a law that, in effect, codified the earlier judge made standing rule that *Baer* had discarded. This statute contained *no* requirement that the

taxpayer identify any expenditure of public funds, let alone allege that any such expenditure was itself illegal. Rather, it conferred standing on any taxpayer who alleged "that the taxing district or any agency or authority thereof *has engaged, or proposes to engage, in conduct that is unlawful or unauthorized*." Laws 2012, ch. 262:1. Two years later, however, this Court held in *Duncan* that RSA 491:22 was inconsistent with the scope of power conferred by Part II, Article 74, which limits the courts "to deciding *actual*, not hypothetical, cases." *Duncan,* 166 N.H. at 641 (emphasis in original).

Thereafter, in 2015, legislative attention turned to a constitutional amendment. The Senate acted first, passing an amendment that would have, in effect, constitutionalized RSA 491:22 by conferring standing upon any taxpayer to seek a declaration that the government "has engaged in conduct in violation of a law, ordinance or constitutional provision." N.H.S. Jour. 205-06 (2015). But this amendment failed in the House. N.H.H.R. Jour. 21 (2016).

When the legislature again turned its attention to this issue a few years later, the House acted first, and the amendment it put forward was notably different than what had come before. This proposal conferred standing on any taxpayer only to seek a declaration that the government "has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision." Available at https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/billText.aspx?sy=2018&v=HI&id=23742018&txtFormat=html. This limitation on challenges to the legality of "spending" was new and quite different from all earlier judicial, legislative, and constitutional efforts to confer standing on taxpayers to challenge any "unlawful or unauthorized" conduct. Both the House, N.H.H.R. Jour. 94 (2018), and the Senate, N.H.S. Jour. 511 (2018), passed this

amendment, and the people of New Hampshire ratified it in 2018. *N.H. Manual for the General Court*, No. 66 at 455.

Appellants implausibly read this history to conclude that, like the 2012 statute, the 2018 amendment was "intended to return taxpayer standing to its status prior to [the Court's] decisions in *Baer* and *Duncan*," App. Br. at 15 (cleaned up); *id.* at 16 ("The trial court's decision ignores the history of the taxpayer standing doctrine in New Hampshire, which demonstrates that the purpose of the 2018 constitutional amendment" which was to restore a line of cases…."); *id.* at 20 ("[t]his amendment was intended to return taxpayer standing in New Hampshire to its status prior to the [the Court's] decisions in *Baer* and *Duncan*."). But this fails to account for the legislature's *express rejection* of the 2012 statute's "unauthorized conduct" language or the critical shift to new language explicitly tying standing to "spending…in violation" of the law." By contrast, *Carrigan*'s holding that taxpayer standing requires a challenge to the legality of an expenditure is expressly built upon this critical language. *Carrigan*, 174 N.H. at 369 ("[i]n this case, the question of the plaintiff's standing turns on the scope of the issues that Part I, Article 8 permits courts to adjudicate: whether the plaintiff alleged that the State 'has spent, or has approved spending, public funds in violation of' the law.' "). And that is how it should be. See *In re Below,* 151 N.H. 135, 139 (2004) (citing *Opinion of the Justices,* 126 N.H. 490, 495 (1985)) (constitutional provisions are to be interpreted according to their "purpose and intent" giving words "the meaning" they would "have had to the electorate" that ratified them); *id.* (citing *Warburton v. Thomas,* 136 N.H. 383, 387 (1992) (courts interpreting the Constitution must "gather [the parties'] intention from the language used, viewed in the light of the surrounding circumstances.")).

Appellants make no real effort to account for any of this. Their only support for the novel idea that the legislature's rejection of the language used in the 2012 statute–and ratification of quite different language in 2018–is a single statement from one of the 2018 amendment's sponsors. App. Br. at 20. But that solitary remark by one of the hundreds of legislators who ultimately voted to approve the amendment does not control statutory interpretation. *In re Routhier*, 143 N.H. 404, 408 (1999) (observing that courts should be "reluctant to give too much weight to comments offered by proponents of bills"). Nor does it matter that *Carrigan* noted this statement in recounting the history of the 2018 amendment. Nothing in *Carrigan* turned on whether the amendment did or did not restore taxpayer standing to its status before *Baer* and *Duncan*. At best, the Court simply assumed that premise to conclude that the plaintiffs still could not establish taxpayer standing even if it were true. And of course, in the final analysis, *Carrigan*'s holding turned on *the text* and *history* of the 2018 amendment, as is appropriate. *Carrigan*'s dicta does not support Appellants' effort to expand that case beyond its holding.

In any event, Appellants do not have standing even under the pre-*Baer* and pre-*Duncan* caselaw. The taxpayer standing cases before *Baer* and *Duncan*, were challenges to either spending or to government action that was *ultra vires*. As established, Appellants have not challenged any spending. And they have not alleged any government official has engaged in *ultra vires* conduct. As a result, they do not have taxpayer standing today any more than they would have had taxpayer standing in 2009 or in 1909.

A quick review of the New Hampshire caselaw establishes that Appellants' case does not fit within it. Start with *Blood v. Electric Company*, 68 N.H. 340 (1895). There, the plaintiffs sought to enjoin the expenditure of

taxpayer funds spent on a contract they alleged the town entered into without authority because the term of the contract was longer than the elected officials' term of office. *Id.* 68 N.H. at 340-341. The Court held that they had standing to do so because "taxpayers have a right to resort to equity to restrain a municipal corporation and its officers *from appropriating money raised by taxation to illegal or unauthorized uses*." *Id.* (emphasis added). In other words, *Blood* addressed a complaint that the expenditure of funds *itself* was contrary to law – a claim that the government lacked authority to spend money on the contract in question. That is not this case.

The next case *Sherburne v. City of Portsmouth,* 72 N.H. 539 (1904), is, if anything, less helpful to Appellants. That case involved a city council's effort to spend public funds to build a baseball field on a public commons, and the Court held that taxpayers could challenge the legality of that expenditure, since the relevant statute limited the purposes for which the city could use the funds in question. *Id.* at 40 ("Even if the city councils may permit an individual to build a baseball park at the Plains, they cannot build one with the city's money, for they can use that only for the purposes" named in statute.). Here again, the challenge was to the government's authority to spend the money on the activity in question. That is also not this case, since Appellants haven not alleged that the government may not spend money on postage, letters, and training—and no one doubts that it may.

The last two cases did expand taxpayer standing beyond challenges to expenditures, but not in a way that is helpful to Appellants. In *Clapp v. Jeffrey*, 97 N.H. 456, 468 (1952), the Court held that "taxpayers are entitled to injunctive relief if the acts of the town are *ultra vires* even though they cannot show any loss to the town." And in *New Hampshire Wholesale Beverage Ass'n v.*

New Hampshire State Liquor Commission, 100 N.H. 5, 6 (1955), the Court held that the plaintiffs were "entitled to maintain an action for the determination of whether the defendants have acted within their authority as public officers," when they awarded off-site beverage licenses to certain competitors of the plaintiffs. In both cases, the court held that taxpayer standing exists to challenge government conduct alleged to be *ultra vires*. In other words, claims that the public officers lacked any authority whatsoever to perform *the act* in question. Here, however, Appellants have not alleged that any public official lacks authority to remove incomplete affidavit ballots. They have alleged only that *the manner* by which that act might be performed could infringe upon the privacy rights of unknown individuals who are not before the court. No case, whether before or after *Baer* or *Duncan*, supports taxpayer standing to bring that type of challenge. Tellingly, Appellants also fail to cite any caselaw from any other jurisdiction that would give rise to this seemingly novel form of taxpayer standing.

C. Expanding Taxpayer Standing Beyond Challenges to the Legality of Expenditures Threatens the Separation of Powers.

Finally, as the Court observed in *Carrigan*, limiting taxpayer standing to challenges to specific expenditures avoids unnecessary conflicts with other constitutional values, notably the separation of powers. While Part I, Article 8 may have affected the separation of powers, as *Carrigan* recognized, it did not eviscerate it. See *Carrigan* 174 N.H. at 397 (noting that the Court "must construe constitutional provisions so as to avoid conflict with one another"). Here, Appellants are asking the Court to allow them to seek an injunction against the enforcement of every aspect of a system the legislature designed to

protect New Hampshire's elections and enhance public trust in our democracy. It is one thing for courts to do this when plaintiffs have alleged that their pocketbook is at risk from unlawful expenditures or when they claim *their own* constitutional rights are at stake. It is quite another thing to do so in a case where there are no allegations of the sort. The separation of powers can readily accommodate the former, while the latter puts that constitutional value under great stress.

To be sure, in both cases, the courts might end up blocking the implementation of the will of the people as expressed through their elected representatives. But in the former, they would be doing so because of a constitutional obligation to protect the property or constitutional rights of those standing before them. No similar constitutional obligation underwrites the latter case. With no party with rights at stake before the court, an injunction against an entire act of the legislature risks failing to demonstrate "the respect due coordinate branches of government." *Carrigan,* 174 N.H. at 374. In fact, if this case proceeds, the courts will be called upon not just to make difficult determinations, in a vacuum, about the right of privacy, but also about whether the remainder of SB 418 can stand in its absence. In other words, as in *Carrigan*, adjudicating this case will call on the courts to do far more than simply adjudicate "whether any specific act or approval of spending is illegal." *Id.* at 373.

The decisions of appellate courts In other jurisdictions with taxpayer standing regimes validate this Court's careful work to ensure it does not undermine or erode the separation of powers. In New York, taxpayers cannot proceed without establishing a "sufficient nexus" between conduct and spending. *Rudder,* 711 at 982. The same is true in Pennsylvania, Colorado, and

Kentucky and Colorado. *Wilt v. Beal*, 363 A.2d 876, 879 (Comm. Ct. Pa. 1967) (although "requirements of pecuniary interest or a special and direct injury have been greatly eased…the cases do not dispense with the necessity to establish some nexus between the complainants in a given case and the challenged expenditure."); *TABOR Found. v. Colorado Dept. of Health Care Policy and Financing*, 487 P.3d 1277, 1281 (Colo. Ct. App. 2020) (finding no taxpayer standing because "there is no nexus between the member plaintiffs taxpayer dollars and the hospital programs."); *Ward v. Westerfield*, 653 S.W.3d 48, 56 (Ky. 2022) ("[b]ut Appellants' procedural claims are too attenuated from the expenditure of public funds for the invocation of taxpayer standing). Just like *Carrigan*, these decisions are the result of courts' careful balancing of competing interests, affording taxpayer standing to the extent required by law, confining courts to the "judicial power" assigned to them by the Constitution, and protecting the legislature's authority to regulate with respect to public policy questions large and small. Appellants offer no good reason to disturb that delicate equilibrium.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,831 words, which is fewer than the words permitted by the Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 16, 2024

/s/ Richard J. Lehmann
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CERTIFICATE OF SERVICE

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

April 16, 2024

/s/ Richard J. Lehmann
_____
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