THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2023-0701

Manuel Espitia, Jr. & a.

v.

New Hampshire Secretary of State & a.

BRIEF FOR THE NEW HAMPSHIRE SECRETARY OF STATE

THE NEW HAMPSHIRE SECRETARY OF STATE

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(Fifteen-minute oral argument requested)

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STATEMENT OF THE CASE AND FACTS[1]

A. Introduction

The Plaintiffs, Manuel Espitia, Jr. and Daniel Weeks, brought a lawsuit challenging the constitutionality of Laws 2022, Chapter 239 (effective January 1, 2023) ("SB 418"), which requires voters in a narrow set of circumstances to vote by affidavit ballot pursuant to RSA 659:23-a. The Superior Court (*Temple*, J.) ruled that the Plaintiffs lacked standing and dismissed the Plaintiffs' complaint. The Plaintiffs now appeal the trial court's ruling that the Plaintiffs lacked taxpayer standing under Part I, Article 8 of the State Constitution.

B. The SB 418 Affidavit Ballot Process

SB 418 created a procedure for the use of affidavit ballots in certain, limited circumstances. *See* RSA 659:23-a. Specifically, a person is required to use an affidavit ballot when voting only when all of the following conditions are met: (1) the person is registering to vote on election day; (2) the person has never previously registered to vote in New Hampshire; (3) the person does not have valid photo identification establishing their identity; and (4) the person does not otherwise meet the identity requirements of RSA 659:13, which may be met if the moderator, clerk, or supervisor of the checklist can verify the person's identity. *See* RSA 659:23-a, I; RSA 659:13, II(7)(b); *see also* SA# (Secretary of State's February 10, 2023, letter to New Hampshire election officials regarding the affidavit ballot process).

[1] The Plaintiff's Brief will be cited as "PB#"; the Plaintiff's Appendix will be cited as "PA#"; the Secretary of State's Appendix will be cited as "SA#."

If all of these conditions are met, the person must cast an affidavit ballot pursuant to RSA 659:23-a. *See* RSA 659:23-a, I; SA6-15. The person receives an affidavit ballot package, which includes a tracked, postage-prepaid United States Postal Service priority mail envelope addressed to the Secretary of State, and an affidavit verification letter that explains that a voter must provide the Secretary of State with a copy of a qualified photo identification along with the completed letter. *See* RSA 659:23-a, II; SA8-10.

The person then receives and is able to cast an election-day ballot that is marked "Affidavit Ballot" with a sequential identifying number. RSA 659:23-a, III; SA10. The person's affidavit ballot is counted on election day along with all other validly cast ballots. *See* RSA 659:23-a; SA10-12.

If the person does not return the affidavit ballot verification letter, with proof of identification, to the Secretary of State's Office within seven days after the election, the Secretary of State must instruct the moderator of the town or ward in which the person voted to retrieve the associated numbered affidavit ballot. RSA 659:23-a, V; SA12-13. Town officials report the votes cast on that ballot to the Secretary of State, and those votes are subsequently deducted from the original vote counts for that election. RSA 659:23-a, VI; SA12-13.

SB 418 did not appropriate any money for the State to enforce the provisions of the law. *See generally* Laws 2022, Ch. 239; PB41.

C. Procedural History

On June 21, 2022, the Plaintiffs filed the underlying complaint,[2] seeking a declaration under RSA 491:22 that SB 418 violates Part I, Article 2-b of the State Constitution. PA42; *see also* N.H. CONST., pt. I, art. 2-b ("An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."). The Plaintiffs argued that SB 418 violated Part I, Article 2-b because the law allows the Secretary of State's Office "to know how affidavit ballot voters who did not return proof of identify within seven days cast their votes."

Plaintiffs Espitia and Weeks are New Hampshire residents and registered New Hampshire voters. PB39. Because the Plaintiffs were already registered New Hampshire voters at the time they filed their complaint, the Plaintiffs could never personally have to vote using the affidavit ballot process. *See* RSA 659:23-a (limiting the affidavit ballot process to persons who have never before registered to vote in New Hampshire). Accordingly, the Plaintiffs assert standing solely under RSA 491:22 and Part I, Article 8 of the State Constitution. *See* PA35; PB40; RSA 491:22 (authorizing a "person claiming a present legal or equitable right or title" to petition the superior court for declaratory relief against "any person claiming adversely to such right or title"); N.H. CONST., pt I, art. 8 ("[A]ny individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or

[2] The Plaintiffs' complaint was consolidated at the trial court with a separate complaint brought by 603 Forward, Open Democracy Action, Louise Spencer, Edward Friedrich, and Jordan Thompson. *See* PB39. The trial court dismissed this consolidated matter, and none of the plaintiffs from this consolidated matter appealed to the trial court's dismissal order. *See* PB37-48.

political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision.").

The Defendants, Secretary of State David Scanlan and Attorney General John Formella, moved to dismiss the Plaintiffs' complaint for lack of standing. PB 40; PA304. Regarding standing, the Defendants argued that the Plaintiffs lack standing to seek declaratory relief under RSA 491:22 because the Plaintiffs could never be subject to SB 418's affidavit ballot process, and therefore SB 418 could never violate the Plaintiffs right to privacy under Part I, Article 2-b. *See* PB40.

The Plaintiffs objected, arguing that they had taxpayer standing under Part I, Article 8. PB40. The Plaintiffs' complaint did not identify any money that the State allegedly spent in carrying out SB 418's requirements. Rather, the Plaintiffs relied solely on the fiscal note attached to SB 418 during the legislative process. PA39; PB41 (estimating expenditures of $48,000 in 2023 and $72,000 in 2024).

In that fiscal note, Department of State estimated the costs for providing affidavit ballot packets, postage for returned envelopes, and any necessary overtime based on the number of voters in 2020 who voted using the challenged voter affidavit process. PA50-51; *See also* RSA 659:13, I(c)(3) (requiring a voter to execute a challenged voter affidavit if the voter cannot meet the identity requirements of RSA 659:13, II, regardless of whether that voter is registered to vote or has previously registered to vote in New Hampshire). However, the Department of State noted that it was "not able to separate how many of the voters in the November 2020 election were registering to vote for the first time in NH" (and thus would

have been affidavit ballot voters had SB 418 been in place in 2020) "versus those who were already registered and didn't have an ID on election day" (and thus would not have been required to vote by affidavit ballot had SB 418 been in place in 2020). PA50-51. In other words, the Department of State's estimate was artificially high because the Department of State had no way to accurately estimate the number of voters who would have to vote by affidavit ballot.

The New Hampshire Republican State Committee ("NHRSC") moved to intervene, and the trial court (Colburn, J.) initially denied NHRSC's motion. NHRSC appealed that decision to this Court in Docket 2023-0041. *See* PA407. This Court subsequently granted a joint motion to remand the matter back to the Superior Court. *See* PA407. On remand, the Plaintiffs and NHRSC stipulated to NHRSC's intervention. SA21-24. The trial court approved the stipulation on May 2, 2023. SA21.

The trial court held a hearing on the Defendants' motion to dismiss on January 30, 2023.[3] PB37.

After being granted intervenor status on May 2, 2023, NHRSC joined in the Defendants' motion to dismiss for lack of standing. PA408-09.

On June 23, 2023, the trial court ordered the parties to submit briefing on the scope of voters who may be subject to SB 418's affidavit ballot procedure. PB37. The parties submitted supplemental briefing, in which all parties argued that SB 418's affidavit ballot procedure applies

[3] Intervenor NHRSC did not participate in this hearing because it had not been granted intervenor status at the time of the hearing. PA404-05.

only to persons registering to vote for the first time in New Hampshire on election day and without valid photo identification or otherwise meeting the identity requirements of RSA 659:13. The trial court held a hearing regarding this supplemental briefing on September 11, 2023. PB37.

On November 1, 2023, the trial court granted the Defendants' motion to dismiss for lack of standing. PB37-48. The trial court noted that SB 418 could not interfere with any individual Plaintiff's personal right to vote or right to privacy. PB40. Rather, the Plaintiffs claimed to have taxpayer standing under Part I, Article 8. PB40. The trial court, relying on this Court's decision in *Carrigan v. N.H. Dep't of Health and Human Servs.*, 174 N.H. 362 (2021), reasoned that Part I, Article 8 provides a plaintiff with taxpayer standing to "call on the courts to determine whether a specific act or approval of spending conforms with the law." PA41 (quotation omitted). However, Part I, Article 8 does permit a taxpayer "to challenge any legislation merely because of an incidental expenditure of state funds." PA41 (quotation omitted). Because "almost all legislation involves some public spending, and most activities can be viewed as having some relationship to expenditures, such a broad reading of Part I, Article 8 would create standing for any citizen who had to desire to challenge virtually all governmental acts," thereby transforming state courts "into forums in which to air generalized grievances about the conduct of state government." PA41-42 (cleaned up).

The trial court noted that the Plaintiffs neither "identified any specific funds earmarked by the legislature to carry out SB 418" nor "seek a declaration that any of the potential expenditures identified in their complaint are illegal." PA42 (cleaned up). Rather, the thrust of the

Plaintiffs' complaint is that SB 418 could infringe on the constitutional right to privacy of other voters—not that the minimal, incidental expenditures needed to carry out SB 418 are somehow unconstitutional. PA42-43. The trial court concluded that such limited expenditures were "too attenuated from the alleged constitutional violations flowing from SB 418 to confer taxpayer standing." PA43. The Court therefore dismissed the Plaintiffs' claims for lack of standing. PA43.

The Plaintiffs did not file a motion for reconsideration.

This appeal followed.

SUMMARY OF THE ARGUMENT

A. The Plaintiffs lack individual standing under RSA 491:22

The Plaintiffs seek declaratory judgment ruling that SB 418 unconstitutional violates the right to privacy under Part I, Article 2-b of the State Constitution. The Plaintiffs argue that when a person votes by affidavit ballot pursuant to SB 418 and then fails to submit proof of their identity, State election officials could view how that person voted, thereby violating that person's right to privacy.

However, the Plaintiffs were already registered New Hampshire voters at the time they filed their complaint, *see* PB39, and no person who has previously registered to vote in New Hampshire can ever be subject to the SB 418 affidavit ballot process. *See* RSA 659:23-a, I. Because the Plaintiffs could never be required to vote by affidavit ballot, SB 418 could never violate the Plaintiffs' constitutional right to privacy under Part I, Article 2-b.

Therefore, the Plaintiffs lack individual standing under RSA 491:22 to challenge the constitutionality SB 418. *See* RSA 491:22 (authorizing a person claiming a "present legal or equitable right or title" to "maintain a petition claiming adversely to such right or title to determine the question as between the parties"); *see also State v. Roberts*, 74 N.H. 476 (1908) (A plaintiff will not be heard to question the validity of a law, or of any part of it, unless the law impairs or prejudices some right held by the plaintiff).

B. The Plaintiffs lack taxpayer standing to challenge SB 418

Even though SB 418 could never violate the Plaintiffs' right to privacy, the Plaintiffs assert that Part I, Article 8 of the State Constitution

provides them with taxpayer standing to challenge SB 418 because enforcing the law will require postage, training state and local election officials, and wages for state election officials.

Part I, Article 8 does not provide taxpayers with standing to challenge any government action. Rather, Part I, Article 8 only provides a plaintiff with standing to "call on the courts to determine whether a specific act or approval of spending conforms with the law." *See Carrigan*, 174 N.H. at 369-70 (emphasis added); N.H. CONST., pt. I, art. 8 (providing taxpayer standing to petition the Superior Court to declare that the State "has spent, or has approved spending, public funds in violation of [law]"). For example, Part I, Article 8 could provide taxpayer standing to challenge an unlawful government decision to purchase vehicles, to construct a sports stadium, or to enter multi-year service contracts. *See Carrigan*, 174 N.H. at 371-72 (collecting cases).

Here, SB 418 is not a specific act or approval of spending. Rather, SB 418 is simply one of numerous laws that governs election procedure in this State. *See generally* RSA chs. 652-60. The mere fact that the Department of State incurs expenses incidental to enforcing this State's election procedure laws, including SB 418, does not transform SB 418 and every other election procedure law into a specific act or approval of spending that any taxpayer can challenge pursuant to Part I, Article 8.

The State can only act through agents, including Executive Branch employees who carry out the requirements of state law and enforce violations of state law. Because Executive Branch employees are paid with public funds, all government action involves at least some incidental expense of public funds. If taxpayers had standing to challenge every

government action that required any incidental expense, then taxpayers would be able to challenge all government actions. This outcome directly contradicts the plain language of Part I, Article 8 and this Court's holding in *Carrigan* that Part I, Article 8 provides taxpayers with standing to challenge only discrete spending actions—not all government actions. *See Carrigan*, 174 N.H. at 369-72. This interpretation of Part I, Article 8 also raise separation of powers concerns because it would allow the Superior Court to issue advisory opinions regarding the lawfulness of all government actions, thereby violating Part II, Article 74 of the State Constitution. *See* N.H. CONST., pt. II, art. 74 (authorizing only the Supreme Court to issue advisory opinions, and only to the Legislature or Governor and Council upon request, and only regarding "important questions of law and … solemn occasions."

Therefore, the Defendants respectfully request that this Court affirm the trial court's ruling that the Plaintiffs lack taxpayer standing to challenge SB 418 for allegedly violating the privacy rights of third parties.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing a motion to dismiss, this Court's standard of review "is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Sanguedolce v. Wolfe*, 164 N.H. 644, 645 (2013). The Court assumes the plaintiff's pleadings to be true and construe all reasonable inferences in the light most favorable to him. *Id*. However, the Court need not assume the truth of statements in the plaintiff's pleadings that are merely conclusions of law. *Id*. The Court then engages in a threshold inquiry that tests the facts in the writ against the applicable law, and if the allegations do not constitute a basis for legal relief, the Court must affirm the trial court's grant of a motion to dismiss. *See id*.

When a motion to dismiss does not contest the sufficiency of a plaintiff's claims, but instead challenges the plaintiff's standing to sue, the trial court must look beyond the allegations and determine, based upon the facts alleged, whether the plaintiff has demonstrated a right to claim relief. *Carrigan*, 174 N.H. at 366. Because no party disputes that the Plaintiffs here are New Hampshire taxpayers and eligible voters, this Court reviews the trial court's standing determination *de novo*. *Id*.

II. THE PLAINTIFFS LACK STANDING UNDER RSA 491:22 TO SEEK DECLARATORY JUDGMENT REGARDING THE CONSTITUTIONALITY OF SB 418

RSA 491:22 authorizes a plaintiff to challenge the validity of a law only when the law impairs or prejudices some right held by the plaintiff. Here, the Plaintiffs claim that SB 418 is unconstitutional because it could

violate the constitutional right to privacy of a voter who casts an absentee ballot pursuant to SB 418 and thereafter fails to provide identifying information to the Secretary of State's Office. However, because the Plaintiffs are registered New Hampshire voters, they can never be subject to SB 418's affidavit ballot procedure. Therefore, the Plaintiffs lack standing to challenge the constitutionality of SB 418 under RSA 491:22 because SB 418 could never impair or prejudice the Plaintiffs' right to privacy.

A. RSA 491:22 authorizes a plaintiff to seek declaratory judgment regarding the validity of a law only if that law impairs or prejudices a right held by the plaintiff

The doctrine of standing limits the judicial role "to addressing those matters that are traditionally thought to be capable of resolution through the judicial process." *Carrigan,* 174 N.H. at 366 (reasoning that a claim cannot be subject to judicial resolution unless the parties' "actual interests are at stake"). To that end, a "party must allege a concrete, personal injury, implicating legal or equitable rights, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress by a favorable decision." *Id*. "Requiring that a party claim a personal injury to a legal or equitable right "capable of being redressed by the court tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id*. (quoting *Duncan v. State*, 166 N.H. 630, 643, 647-48 (2014)).

"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*. (quotation omitted) (emphasis added).

The claims raised in a declaratory judgment action "must be definite and concrete touching the legal relations of the parties having adverse interests." *Asmussen v. Comm'r, N.H. Dep't of Safety*, 145 N.H. 578, 587 (2000) (quotation omitted). "The action cannot be based on a hypothetical set of facts, and it cannot constitute a request for advice as to future cases." *Id*. (quotation omitted). "[T]he controversy must be of a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character." *Id*. (quotation omitted).

Further, the legal or equitable rights sufficient to give rise to a declaratory judgment action must be "substantive rights" belonging to the plaintiff, such as constitutional rights, property rights, and contractual rights. *See Emps. Liab. Assur. Corp. v. Tibbetts*, 96 N.H. 296, 298 (1950); *Benson v. N.H. Ins. Guar. Ass'n*, 151 N.H. 590, 593 (2004) (explaining a medical society lacked standing under RSA 491:22 "as a matter of law" to maintain a declaratory judgment action on behalf of its members because the medical society itself had not asserted its own legal or equitable right).

Therefore, the Plaintiffs cannot maintain a declaratory judgment action challenging the constitutionality of SB 418 unless that law impairs some substantive right belonging to the Plaintiffs.

B. <u>The Plaintiffs have not alleged that SB 418 impairs or prejudices any substantive right of the Plaintiffs</u>

Here, the Plaintiffs seek declaratory judgment ruling that SB 418 unconstitutional violates the right to privacy under Part I, Article 2-b of the State Constitution. PA40-42; *see also* N.H. CONST., pt. I, art. II-b ("An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."). The Plaintiffs

argue that when a person votes by affidavit ballot pursuant to SB 418 and then fails to submit proof of their identity, State election officials could view how that person voted, thereby violating that person's right to privacy. PA42.

To challenge the constitutionality of SB 418 under RSA 491:22, SB 418 must impair or prejudice the Plaintiffs' right to privacy—not some third party's right to privacy. *See Carrigan*, 174 N.H. at 366. The Plaintiffs do not allege here, nor could they, that SB 418 impairs their own right to privacy.

SB 418 requires a person to vote by affidavit ballot only if all of the following conditions are met: (1) the person is registering to vote on election day; (2) the person has never previously registered to vote in New Hampshire; (3) the person does not have valid photo identification establishing their identity; and (4) the person does not otherwise meet the identity requirements of RSA 659:13. *See* RSA 659:23-a, I ("For all elections, if a voter on election day is registering to vote for the first time in New Hampshire and does not have a valid photo identification establishing such voter's identification, or does not meet the identity requirements of RSA 659:13, then such voter shall vote by affidavit ballot pursuant to this section." (emphasis added)).

As relevant here, the Plaintiffs were already registered New Hampshire voters at the time they filed their complaint. PB39. Thus, the Plaintiffs could never meet all the conditions required to vote by affidavit ballot. See RSA 659:23-a, I. Because SB 418 could never require the Plaintiffs to vote by affidavit ballot, SB 418 could never violate the Plaintiffs' right to privacy under Part I, Article 2-B. Accordingly, the

Plaintiffs lack individual standing under RSA 491:22 to challenge the constitutionality SB 418. *See* RSA 491:22 (authorizing a person claiming a "present legal or equitable right or title" to "maintain a petition claiming adversely to such right or title to determine the question as between the parties"); *see also Carrigan*, 174 N.H. at 367; *Avery v. N.H. Dep't of Educ.*, 162 N.H. 604, 608 (2011) ("A party will not be heard to question the validity of a law, or of any part of it, unless he shows that some right of his is impaired or prejudiced thereby" (quoting *Baer v. N.H. Dep't of Educ.*, 160 N.H. 727, 730 (2010)).

III. THE PLAINTIFFS LACK TAXPAYER STANDING UNDER PART I, ARTICLE 8 TO CHALLENGE THE CONSTITUTIONALITY OF SB 418

The Plaintiffs did not assert in their complaint that they were challenging SB 418 as an allegedly unconstitutional spending action. *See generally* PA33-43 (Plaintiffs' complaint does not include any mention Part I, Article 8). Nor did the Plaintiffs assert in their complaint that SB 418 unlawfully appropriated any public funds. *See id*. Rather, the Plaintiffs now assert that they have taxpayer standing to challenge SB 418 because the law (like all election procedure laws) will require state funds to administer. PB40-41.

As described below, Part I, Article 8 does not provide taxpayers with authority to challenge all government actions. Rather, Part I, Article 8 provides taxpayers with authority to challenge only a limited class of government actions: specifically, when the government "has spent, or has approved spending, public funds in violation of [the law]." N.H. CONST., pt. I, art. 8. Here, SB 418 does not constitute a discrete spending action that

may be challenged under Part I, Article 8, and the mere fact that the Department of State may incur incidental expenses in enforcing State election procedure laws like SB 418 does not transform SB 418 into a discrete spending action within the meaning of Part I, Article 8.

A. Part I, Article 8 taxpayer standing is limited to challenging specific governmental spending actions

In 2018, New Hampshire voters amended Part I, Article 8 to provide as follows:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The public also has a right to an orderly, lawful, and accountable government. 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.

Part I, Article 8 provides individual taxpayers who are eligible to vote in this State with authority to challenge certain governmental actions, regardless of whether the taxpayer's personal rights have been impaired or prejudiced beyond their status as a taxpayer. However, Part I, Article 8

does not authorize taxpayers to challenge all governmental laws or actions. Rather, the language "to declare whether the State or political subdivision … has spent, or has approved spending, public funds in violation of [law]" defines a "specific category" of governmental action that Part I, Article 8 permits courts to adjudicate. *See Carrigan*, 174 N.H. at 369-70. "The simplest, most obvious reading of the phrase 'has spent, or has approved spending' is that it refers to a specific governmental spending action or approval of spending." *Id*. at 370. In other words, a plaintiff with standing under Part I, Article 8 can "call on the courts to determine whether a specific act or approval of spending conforms with the law." *Id*.

For example, before *Baer*, 160 N.H. 727, this Court had found that taxpayers had standing to challenge a city council's decision to enter a ten-year streetlight operating contract, *see Blood v. Electric Company*, 68 N.H. 340, 340-41 (1895), a city's decision to build a baseball park with city funds, *see Sherburne v. Portsmouth*, 72 N.H. 539, 540, 543-44 (1904), the lawfulness of a town renting equipment to or performing services for private individuals on private property, *see Clapp v. Jaffrey*, 97 N.H. 456, 458-61 (1952), and the decision of city officials to purchase a truck and police cruiser without authority to do so, *see Green v. Shaw*, 114 N.H. 289, 290-91 (1974). Each of these cases involved a challenge to a specific spending act on the ground that the spending act itself was unlawful.

In *Carrigan*, this Court explained that the legislative history of Part I, Article 8 indicated that the 2018 amendment's intent was "to return taxpayer standing in New Hampshire to its status prior to [its] decisions in *Baer* and *Duncan*." *Carrigan*, 174 N.H. at 368. This Court made clear, however, that Part I, Article 8 does not provide an individual with authority

to challenge a governmental body's overall management of its operations and functions. *Id*. Nor does Part I, Article 8 provide an individual with authority to challenge a governmental body's "allocation of appropriations," outside of discrete acts or decisions approving certain spending. *Id*. Moreover, none of this Court's pre-*Baer* taxpayer standing decisions involved taxpayers challenging the constitutionality of law that was not itself a spending action and that only required incidental expenditures to carry out. *See Green*, 114 N.H. at 190-91; *Clapp*, 97 N.H. at 458-61; *Sherburne*, 72 N.H. at 543-44; *Blood*, 68 N.H. at 340-41.

B. The Plaintiffs do not challenge a specific governmental spending action or approval of spending

As the trial court correctly noted, the thrust of the Plaintiffs' complaint is that SB 418 infringes on the constitutional rights of other New Hampshire citizens. PB42; *see also* PA36 (Plaintiffs' complaint identifying RSA 491:22, not Part I, Article 8, as the source of the Court's jurisdiction). SB 418 does not appropriate any funds for its enforcement, and the Plaintiffs have not identified any specific funds that the legislature otherwise appropriated to carry out SB 418's requirements. *See* PB42; Laws 2022, Ch. 239. Nor did the Plaintiffs's complaint "seek a declaration that any of the potential expenditures identified in their complaint are illegal." PB42 (quoting *Carrigan*, 174 N.H. at 374 (brackets and quotation omitted)).

Rather, the Plaintiffs assert that they have taxpayer standing to challenge SB 418 because the State will have to expend resources to enforce the law, including postage for returned verification packets, resources to train state and local election officials, resources to inform the

public about SB 418's requirements, and potential overtime pay for Department of State workers to administer SB 418. PA39; PB41. SB 418 is an election procedure law—it is not a discrete spending action, and the fact that SB 418 will require incidental expenditures to enforce does not transform the law into a spending action.

SB 418 is not a discrete spending action. SB 418 does not appropriate any funds. SB 418 does not require the Secretary of State to purchase personal property or construct real property. *Cf. Green*, 114 N.H. at 290-91 (finding taxpayer standing to challenge the purchase a truck and police cruiser); *Portsmouth*, 72 N.H. at 540, 543-44 (finding taxpayer standing to challenge the construction of a baseball park). Nor does SB 418 require the Secretary of State to contract with third parties. *Cf. Blood*, 68 N.H. at 340-41 (finding taxpayer standing to challenge a city agreeing to a ten-year service contract); *Clapp*, 97 N.H. at 458-61 (finding taxpayer standing to challenge a city renting equipment and performing services for private parties).

Rather, SB 418 is just one of many laws governing election procedure in this State. *See generally* RSA chs. 652-60. The Secretary of State, as the State's chief election officer, oversees this State's election procedure laws, including the affidavit ballot procedure that SB 418 created. *See* RSA 652:33; RSA ch. 5 (setting forth the Department of State's responsibilities); RSA ch. 659 (setting forth the procedures for state elections and local official ballot elections).

In managing the Department of State's operations and functions, the Secretary of State will of course have to allocate appropriated funds and employee resources. But the Secretary of State's allocation of

appropriations and other government resources to enforce this State's election laws does not transform each election law into a "spending action" that a taxpayer may challenge under Part I, Article 8. *See Carrigan*, 174 N.H. at 370 (reasoning that the people would not have understood the phrase "has spent, or has approved spending" to mean a governmental body's overall management of its operations and functions, including its allocation of appropriations, as opposed to one or more discrete acts or decisions approving certain spending."); *cf. Jones v. Samora*, 395 P.3d 1165, 1173 (Colo. Ct. App. 2016) (ruling that a plaintiff lacked taxpayer standing under Colorado law because they did not show a clear nexus between their status as a taxpayer and the challenged government activity, and thus "did not assert any injury based on an unlawful expenditure of his taxpayer money" (quotation and brackets omitted)).

C. Plaintiffs' interpretation of Part I, Article 8 is not reasonable

The Plaintiffs argue that they should have taxpayer standing to challenge SB 418 because the law would require incidental governmental resources to enforce, including for postage, for conducting trainings on SB 418's requirements, and for the time that Department of State employees will spend carrying out SB 418's requirements. The Plaintiffs' interpretation of Part I, Article 8 is not reasonable.

As this Court noted in *Carrigan*, Part I, Article 8 makes it clear that it does not provide taxpayer standing to challenge all government actions. *Carrigan*, 174 N.H. at 369-70. Rather, Part I, Article 8 expressly limited its scope to situations where the government "has spent, or has approved spending," thereby restricting taxpayer standing to challenges of discrete spending actions. *Id*. If every governmental action that requires any

incidental expense constituted a discrete spending action under Part I, Article 8, then it is hard to envision any government action that would not be subject to challenge. To enforce any law, the Executive Branch must expend funds to receive complaints and investigate and prosecute potential violations of State law. Even for laws that don't need to be enforced, the State will still expend funds publishing its laws both in print and electronically. Similarly, all other government actions will require the expenditure of State funds because the State can only act through its agents, and State resources fund employee and contractor wages.

If Part I, Article 8 allows taxpayers to challenge every government action requiring any expenditure of State funds, and every government action requires at least some expenditure of State funds, then Part I, Article 8 would allow taxpayers to challenge every government action. This outcome is contrary to the plain language of Part I, Article 8 and contrary to this Court's holding in *Carrigan* that Part I, Article 8 does not provide taxpayer standing to challenge all government actions.

Such a broad reading of Part I, Article 8 would create standing for any citizen to challenge virtually all government acts, thereby transforming the courts into a forum in which citizens could air generalized grievances about all State government conduct.[4] *See Duncan*, 166 N.H. at 640-47 (the State Constitution does not authorize the Supreme Court to render advisory

[4] For example, regardless of whether they are personally affected, every taxpayer could challenge every absentee voting law just because the State must spend public funds to print and deliver absentee ballot materials to towns and wards. *See* RSA 657:4 (Secretary of State must prepare absentee ballot application forms prior to every state election); RSA 657:5 (Secretary of State must prepare absentee ballots, affidavit envelopes, return envelopes, and mailing envelopes prior to every state election).

opinions to private individuals, and explaining that the requirement of a personal injury ensures "concrete adverseness which sharpens the presentation of issues" (quotation omitted)); *Shavers v. Attorney General*, 267 N.W.2d 72, 114 (Mich. 1978) (deciding issues without an adversarial claim lacks procedural safeguards and results in a decision based on a "generalized approach to an abstract problem"); *see also* PA41-42 (collecting cases reasoning that taxpayer standing must involve a clear nexus between taxpayer status and the challenged activity because almost all legislation involves some public spending).

Interpreting Part I, Article 8 as allowing every taxpayer to challenge every government act that requires even incidental expenditures of public funds would raise separation of powers concerns because it would allow the Superior Court to provide advisory opinions to private litigants. *See Duncan*, 166 N.H. at 640-45. This would violate Part II, Article 74, which authorizes only the Supreme Court to issue advisory opinions, and only to the Legislature and to the Governor and Council upon request, and only regarding "important questions of law and … solemn occasions." *See* N.H. CONST., pt. II, art. 74. It is well established that "the constitution as it now stands is to be considered as a whole as if enacted at one time." *Bd. of Trustees of N.H. Jud. Ret. Plan v. Sec'y of State*, 161 N.H. 49, 53-54 (2010). There is no indication that the voters who adopted the 2018 amendments to Part I, Article 8 intended it to fundamentally alter the balance of powers the Constitution otherwise embodies.

A proper reading of Part I, Article 8, as written, does not raise these constitutional problems. It preserves Part II, Article 74's limit on advisory opinions by restricting taxpayer challenges to discrete, identifiable

expenditures. It is therefore both consistent with the plain language of Part I, Article 8 itself and, more generally, with the Constitution "as a whole." *Id*.

CONCLUSION

The Plaintiffs, two New Hampshire residents, challenge the constitutionality of a law that could never violate the Plaintiffs' constitutional rights. Accordingly, the Plaintiffs lack standing under RSA 491:22 because SB 418 does not impact any present legal or equitable right held by the Plaintiffs. The Plaintiffs also lack taxpayer standing under Part I, Article 8 because SB 418 is not a discrete spending action, and interpreting Part I, Article 8 as providing standing for taxpayers to challenge any government action requiring even incidental expenses of public funds would result in the Superior Court providing advisory opinions in violation of Part II, Article 74.

The Defendants request fifteen-minute oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Brendan A. O'Donnell, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,569 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

Date: April 16, 2024 /s/ *Brendan A. O'Donnell*
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's brief was sent through the Court's electronic filing system to all parties of record:

Date: April 16, 2024 /s/ *Brendan A. O'Donnell*
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