STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2026-0030

ADELE ROBERTSON; DANIEL FRYE; and REGINA WILSON,

Plaintiffs-Appellants,

v.

DAVID M. SCANLAN, in his official capacity as the New Hampshire Secretary of State; and JOHN M. FORMELLA, in his official capacity as the New Hampshire Attorney General,

Defendants-Appellees.

On Appeal from the New Hampshire Superior Court,
No. 218-2025-CV-00951, Before the Honorable David W. Ruoff

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INTRODUCTION

Plaintiffs alleged that Senate Bill 287 unconstitutionally infringes the fundamental right to vote by making it substantially harder for eligible absentee voters like them to request absentee ballots, for no good reason. That claim is governed by a well-established balancing test that turns on a series of factual issues. *See Guare v. State*, 167 N.H. 658, 663 (2015). The Superior Court erred by dismissing it at the pleading stage without crediting Plaintiffs' allegations.

Rather than defend the Superior Court's indefensible reasoning, Defendants rely on alternative arguments that even the Superior Court did not accept. Defendants first contend that SB 287 is exempt from constitutional review because it burdens absentee rather than in-person voting. But there is no support for that argument. They cite cases from a century ago holding absentee voting unconstitutional in New Hampshire, but that makes no difference because the Constitution now requires that it be offered to disabled voters like Plaintiffs. And the federal case Defendants cite, *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), involved a constitutional claim seeking to *expand the categories* of voters who could vote absentee, without any showing that in-person voting was difficult for them. Here, in contrast, Plaintiffs are already entitled to vote absentee; their claim is merely that New Hampshire has made the process for doing so unreasonably difficult. Courts across the country apply the usual right-to-vote balancing test to such claims, and this Court should too.

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Defendants next argue that the fact that Plaintiffs brought a facial challenge somehow makes their specific factual allegations irrelevant. But this Court has held just the opposite. In *New Hampshire Democratic Party v. Sec'y of State*, 174 N.H. 312, 328 (2021) ("*NHDP*"), the Court resolved a facial right-to-vote challenge by looking to the trial record in the case and rejecting the argument that the factual evidence of burden was too "anecdotal" to matter. This case is at an earlier procedural stage than *NHDP* was, but on a motion to dismiss, the factual record consists of Plaintiffs' allegations, which must be taken as true. The Superior Court failed to do so.

Only after floating those unappetizing alternatives do Defendants try to defend the Superior Court's even-less-defensible *Guare* analysis on its own terms. That is for good reason. The Complaint includes detailed factual allegations about the substantial burden that SB 287 imposes on Plaintiffs' right to vote, and Defendants admit that the Superior Court barely mentioned those allegations before professing itself "unpersuaded" about the burden and concluding that it is minor. *See* State Br. 18; Add.37. That violates the established motion-to-dismiss standard, as did the Superior Court's assumption—without any evidence at this stage—that SB 287 is necessary to serve state interests that outweigh that burden. There is a reason that courts have repeatedly held that right-to-vote balancing-test claims like this one almost invariably raise factual issues that preclude dismissal for failure to state a claim. *See* Opening Br. 20–21, 25–26.

The Court should reverse and remand.

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ARGUMENT

I. There is no absentee voting exception to New Hampshire's constitutional protection of the right to vote.

"[T]he right to vote is fundamental" in New Hampshire, and impingements on it are assessed by balancing the burden they impose against the precise interests the State offers to justify them. *Guare*, 167 N.H. at 663. There is no exception to this test for laws regulating absentee voting by eligible absentee voters, like SB 287. Defendants' contrary arguments have no support in New Hampshire law and have been roundly rejected by courts across the country.

Nothing in New Hampshire law supports Defendants' argument that absentee voting procedures are exempt from constitutional review as impingements on the fundamental right to vote under the *Guare* standard. Defendants cite two cases from 1863 and 1921 holding that New Hampshire's Constitution did not, at that time, allow for absentee voting. *See* State Br. 12–14 (first citing *In re Op. of Justices*, 44 N.H. 633 (1863); then citing *In re Op. of Justices*, 80 N.H. 595 (1921)). But the people of New Hampshire amended their Constitution in 1942 to authorize the General Court to allow absentee voting by certain voters, including disabled voters like Plaintiffs. *See* State of N.H., *Convention to Revise the Constitution* 94 (Sep. 1941). And the provision has since been further amended to *require* that such voters be allowed to vote absentee. *See* N.H. Const. pt. I, art. 11. The fact that absentee voting was *previously* unlawful provides no justification for the State's imposition of new and unreasonable burdens on that manner of voting by voters who are now entitled to vote absentee.

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Moreover, even in rejecting absentee voting as unconstitutional before an amendment authorized it, this Court recognized that absentee voting would be a means by which voters "exercise . . . *the right of suffrage*." *In re Op. of Justices*, 80 N.H. at 603 (emphasis added). Burdensome absentee voting procedures therefore impinge on Plaintiffs' "right of suffrage" in the same way that any other voting restrictions do. Plaintiffs' claim that the challenged law makes voting unreasonably difficult for them must therefore be analyzed like any other claim that the State has made voting unreasonably difficult—using the *Guare* balancing test.

Defendants' only other support, *McDonald*, involved a fundamentally different type of challenge. Unlike Plaintiffs, the *McDonald* voters were *ineligible* to vote absentee as a matter of state law because they were "one of a number of classes for whom no provision for absentee voting has yet been made by the Illinois legislature." 394 U.S. at 803. The *McDonald* voters therefore sought to expand the categories of voters eligible to vote absentee by bringing a "challenge to the allegedly unconstitutional incompleteness of Illinois' absentee voting provisions." *Id.* at 810. They did not, however, offer evidence that voting in person was unreasonably difficult for them: "there [was] nothing in the record to indicate that the challenged . . . statute had any impact on the [challengers'] exercise of their right to vote." *Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975) (citing *McDonald*, 394 U.S. at 807–09). And the Supreme Court later explained that the "disposition of the claims in *McDonald* rested on failure of proof"—the plaintiffs had failed to show they could not reasonably vote in some other way. *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974).

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McDonald therefore holds, at most, that a voter who is not eligible to vote absentee under state law has no constitutional right to do so if in-person voting is available. That does not help Defendants, because unlike the voters in *McDonald*, Plaintiffs do not seek to *expand the categories* of voters who may vote absentee. Plaintiffs are already eligible. Rather, Plaintiffs challenge the *procedures* for absentee voting by eligible absentee voters as unreasonably burdensome.

Courts across the country have held that such claims present a different question from the one in *McDonald*. The Third Circuit, for example, recently rejected the argument that *McDonald* affected the validity of an unnecessary signature date requirement on Pennsylvania mail ballots. *Eakin v. Adams Cnty. Bd. of Elections*, 149 F.4th 291, 306–09 (3d Cir. 2025), *pet. for cert. filed*, No. 25-967 (U.S. Feb. 11, 2026). The court explained that "[e]ven if no . . . right to vote by mail exists, we still must scrutinize Pennsylvania's mail-in voting regime to ensure that it complies with the Constitution." *Id.* at 308. It therefore applied the *Anderson-Burdick* standard—the federal analogue of *Guare*—to assess whether the challenged law was unreasonably burdensome. *Id.* at 306–09.

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Other courts agree. *See, e.g.*, *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1186–87 (9th Cir. 2021) (analyzing mail-ballot signature procedures under *Anderson-Burdick*); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318–19 (11th Cir. 2019) (similar); *Richardson v. Trump*, 496 F. Supp. 3d 165, 180 (D.D.C. 2020) (distinguishing *McDonald* because "Plaintiffs are eligible to vote by mail under their respective state laws" but challenged a policy that might prevent them from doing so); *Fay v. Merrill*, 338 Conn. 1, 43 n.32 (2021) ("Numerous cases . . . illustrate the

proposition that, once a state provides for absentee voting, it may not impose irrational or undue burdens on the exercise of that right."). Defendants do not cite a single contrary case.

Finally, to the extent that Defendants argue that Plaintiffs are not eligible to vote absentee, State Br. 11, that argument must be rejected at this stage. The Complaint alleges that Plaintiffs are "blind" or "visually impaired" individuals who have voted absentee in previous elections and who expect and intend to vote absentee in future elections. App.4–5 (Compl. ¶¶ 6–8). The Court must take those allegations as true and "construe all reasonable inferences in the light most favorable to the plaintiff." *Ortolano v. City of Nashua*, 177 N.H. 359, 361 (2025). It is a reasonable inference that the reason Plaintiffs have voted absentee, and plan to do so again, is that they are legally eligible to do so, whether by reason of what Defendants admit are Plaintiffs' physical disabilities or otherwise. *See* RSA 657:1. The Court must draw that inference in Plaintiffs' favor.

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II. The Superior Court erred by failing to credit Plaintiffs' factual allegations about burden.

The Superior Court did not follow Defendants' flawed approach of holding absentee voting regulations exempt from constitutional scrutiny—it purported to apply the *Guare* balancing analysis. Add.4–5. In doing so, however, the Superior Court failed to credit and draw favorable inferences from Plaintiffs' factual allegations about the substantial burdens that SB 287 imposes. Opening Br. 17–22. Defendants' retort that the facts were irrelevant is irreconcilable with the governing standard.

A. Plaintiffs' factual allegations of burden must be credited even in this facial challenge.

Defendants first argue that Plaintiffs' factual allegations about the challenged law's burden are irrelevant because this is a facial challenge where the Court must "simply . . . apply[] the relevant constitutional test to the challenged statute." *NHDP*, 174 N.H. at 325. But the "relevant constitutional test" is *Guare*, which turns on the extent of the challenged statute's burden, so the Court cannot apply that test as *NHDP* requires without deciding the extent of the burden at issue.

The extent of the burden is a factual question as to which Plaintiffs' allegations must be credited at this stage. *NHDP* itself confirms as much. *NHDP* was a facial challenge governed by the *Guare* standard. *See* 174 N.H. at 327. To decide whether the law challenged in *NHDP* was unreasonably burdensome, *NHDP* considered whether "the sufficiency of the evidence support[ed] the trial court's findings" of a substantial burden and held that it did. *Id. NHDP* conducted this inquiry not in the abstract or based on assumptions about how the challenged law might affect voting, but based on specific evidence offered in the trial court. *See id.* at 328. This case, of course, has not gone to trial—it was dismissed for failure to state a claim. And at that stage, a court's analysis of those burdens is based on the factual allegations in a plaintiff's complaint, which must be taken as true. *See Ortolano*, 177 N.H. at 361.

Defendants also misread *NHDP* in insisting that Plaintiffs' claim concerns "hypothetical application[s]" of SB 287. State Br. 16–17 & n.4. This Court has cautioned that courts should not "conjure up hypothetical situations in which application of the statute might be valid" in order to

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uphold a law against a facial challenge. *NHDP*, 174 N.H. at 324 (citation omitted). But nowhere has this Court held that a court may disregard a plaintiff's burden allegations as "hypothetical." *NHDP* itself credited analogous evidence of particular burdens, rejecting the argument that such evidence should be dismissed as irrelevant "anecdotes and non-specific hearsay." *Id.* at 328.

B. The Superior Court failed to credit Plaintiffs' burden allegations.

When Defendants finally turn to the Superior Court's rationale, they admit that Plaintiffs have provided extensive allegations, "likely to be largely uncontested," that SB 287's requirements will burden particular groups of absentee voters across the state. State Br. 17–18; *see also* Opening Br. 17–18. Defendants acknowledge that the Superior Court was required to credit those allegations and to draw all reasonable inferences from them in Plaintiffs' favor. *Orfolano*, 177 N.H. at 361; State Br. 17. And they acknowledge the Superior Court's decision largely failed to discuss them. *See* State Br. 18.

Defendants argue, however, that the Superior Court implicitly credited these allegations and then concluded as a matter of law that they were not severe enough to require heightened review. *Id.* But that is not what the Superior Court said. *See* Add.36–37. Instead, it said it was "unpersuaded" by Plaintiffs' allegations of burden. *Id.* at 37. And Defendants urge a similar conclusion in suggesting that the burden is not great after all because of the "ubiquitous nature of the technology at issue" and the existence of "three alternative options for absentee voters." State

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Br. 19.[1] But whether those factors reduce the burden is a factual question to be resolved by evidence at a later stage of the case—for now, the Court must credit the allegations as Plaintiffs made them.

Moreover, as Plaintiffs explained, Opening Br. 20, determining "the magnitude of the asserted injury" from a challenged election procedure itself presents "factual questions that cannot be resolved on a motion to dismiss"—it is *not* a pure question of law. *Mecinas v. Hobbs*, 30 F.4th 890, 905 (9th Cir. 2022); *see also Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000); *Libertarian Party of N.H. v. Gardner*, No. 14-cv-00322-PB, 2014 WL 7408214, at *4 (D.N.H. Dec. 30, 2024). That is why New Hampshire courts have adjudicated *Guare* claims as a matter of law only by assuming that the highest standard of scrutiny applies. *See, e.g.*, *Op. of the Justices*, 171 N.H. 128, 135 (2018). Defendants offer no answer to this argument, and they do not cite any motion-to-dismiss case to the contrary. *See* State Br. 17–19. They rely on *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), but *Crawford* was decided after discovery on summary judgment and turned on the limited evidence of burden in "the record that ha[d] been made" in that case. *Id.* at 187, 201–02.

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[1] While there are three ways to comply with SB 287, Plaintiffs alleged that *each* option presented substantial burdens, and even the Superior Court acknowledged that "each of these methods may impose an additional requirement on absentee voters requesting absentee ballots." Add.36–37. "[C]ourts . . . routinely find that burdens have been imposed on one method of voting despite the existence of other voting methods." *Curling v. Raffensperger*, 702 F. Supp. 3d 1303, 1374 (N.D. Ga. 2023). Defendants do not address this.

III. The Superior Court erred in concluding as a matter of law that state interests justified the burdens imposed by SB 287.

Defendants' treatment of the other side of the *Guare* analysis is even more cursory. Like the Superior Court, Defendants invoke generalized state interests to justify SB 287 despite the lack of any evidence supporting those interests at this stage, and while making no effort to explain how the law advances such interests. *See* State Br. 19–20; Add.37–38. This Court should reject Defendants' contention that SB 287's burdens were adequately justified for several reasons.

First, the Superior Court should have credited Plaintiffs' factual allegations regarding the burdens of SB 287, *see supra* Part II, so it should have applied at least intermediate scrutiny where "the State was required to prove that the challenged law is substantially related to an important governmental objective," *NHDP*, 174 N.H. at 329 (citation modified). Defendants do not even argue that they satisfy this standard. State Br. 19–20.

Moreover, under *Guare*, *any* burden on voting rights must be connected to a legitimate state interest advanced by the challenged regulation. *See Guare*, 167 N.H. at 669; *NHDP*, 174 N.H. at 329. Federal circuit courts have recognized the same of the analogous federal constitutional standard. *See, e.g.*, *Eakin*, 149 F.4th at 312–13; *Tedards v. Ducey*, 951 F.3d 1041, 1066 (9th Cir. 2020); *Lee*, 915 F.3d at 1318–19; *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 632 (6th Cir. 2016); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 112 (2d Cir. 2008).

Defendants do not make that connection. They vaguely invoke the State's purported interest in "ensuring public confidence and legitimacy in

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elections," along with "confirm[ing] important voter qualifications and deterring voter fraud." State Br. 20. But as Plaintiffs have explained, SB 287 does not help to establish or confirm that the absentee voter is who they claim to be and thus is an ineffective tool to address concerns about fraud or election integrity. *See* Opening Br. 24–25; App.45–46. Defendants have no answer to this. *See* State Br. 20. They also fail to address Plaintiffs' allegations that New Hampshire's elections are already extremely secure and that numerous other safeguards already exist that further Defendants' supposed goals. *See* Opening Br. 24–25; State Br. 20.

Instead, Defendants provide only a single, bare reference to SB 287's legislative record. *See* State Br. 20. In the cited journal entry, however, SB 287's proponent provided no more than a simple *description* of what the law does—"align[] the process of requesting an absentee ballot more closely with the requirements for in-person voting"—without a word of the actual objectives (*i.e.*, state interests) that such alignment seeks to achieve. N.H.H.R. Jour. Vol. 47, No. 16, at 132 (June 5, 2025). Defendants therefore do not show "*precise* governmental interests" that "necessitat[e] the burdens [SB 287] imposes on the right to vote." *NHDP*, 174 N.H. at 329 (emphasis added). "This silence . . . support[s] the view that the [law] is not of great import for any particular regulatory purpose." *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (per curiam).

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CONCLUSION

This Court should reverse and remand.

Dated: June 17, 2026

Respectfully submitted,
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CERTIFICATE OF SERVICE

Pursuant to this Court's Rule 26(3)(b), a copy of the foregoing was transmitted by electronic filing to all counsel of record on this 17th day of June, 2026.

/s/ Steven J. Dutton
Steven J. Dutton

CERTIFICATE AS TO COMPLIANCE WITH WORD LIMIT

I hereby certify that the within document complies with the word limit for reply briefs because it contains 2,998 words that count against the limit.

Dated: June 17, 2026

/s/ Steven J. Dutton
Steven J. Dutton

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