

THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS
SOUTHERN DISTRICT**

SUPERIOR COURT

Docket No. 226-2022-CV-00233

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

v.

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

and

Docket No. 226-2022-CV-00236

Manuel Espitia, Jr. and Daniel Weeks

v.

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

ORDER

The plaintiffs have brought these actions challenging the constitutionality of a newly-enacted law affecting voters who are unable to prove their identity prior to voting. See Laws 2022, ch. 239 (“SB 418”). The defendants now move to dismiss on the basis of standing and ripeness.¹ The plaintiffs object. The Court held a hearing on this motion on January 30, 2023. For the reasons that follow, the Court would like the parties to brief an additional issue before it rules on the motion to dismiss.

Discussion

The governor signed SB 418 into law on June 17, 2022, and it took effect on January 1, 2023. SB 418 created a new type of ballot known as an “affidavit ballot” that some voters must use. The issue the Court would like the parties to brief concerns which class of voters must use the affidavit ballot. To be fair, it seems that the plaintiffs

¹ The intervenor, the New Hampshire Republican State Committee, joins in the defendants’ motion.

and the defendants are in agreement on that issue. For instance, in both complaints, the plaintiffs assert that only voters who register to vote on election day for the first time in New Hampshire are at risk for having to use an affidavit ballot. (See, e.g., 233 Compl. ¶ 82 (“While most voters will be able to cast regular ballots, those who seek to register to vote on Election Day without photo identification will be forced to cast inferior Affidavit Ballots.”); 236 Compl. ¶ 20 (“Under SB 418, a person who is registering for the first time in New Hampshire on election day without proof of identity will now be given an ‘affidavit ballot’ when voting[.]”).) The plaintiffs repeat that contention in their objection to the defendants’ motion to dismiss, noting that SB 418 “changes the state’s same-day registration rules for new voters who cannot present adequate identification.” (Pls.’ Obj. at 3.) The defendants have taken a similar position throughout this litigation. (See, e.g., Defs.’ Mot. Dismiss ¶ 20 (arguing that the individual plaintiffs lack standing because SB 418 only applies to voters registering for the first time in New Hampshire on election day, and all of the individual plaintiffs are already registered to vote); Court Doc. 44 (guidance to election workers issued by the Secretary of State indicating that affidavit ballots are only to be used when the voter is registering to vote on election day and the voter is registering to vote in New Hampshire for the first time, and further noting that SB 418 “does not change the established process for a registered voter without photo ID”); H’rg at 1:58 (defendants’ attorney arguing that “SB 418 . . . concerns election day first time registrants in New Hampshire with no photo ID. That’s the narrow class of individuals that are subject to this statute.” (emphasis added)).)

The Court, however, reads SB 418 as subjecting a much broader class of voters to the affidavit ballot procedure. Specifically, the Court believes that any election day

voter, regardless of when he or she first registered to vote, must use an affidavit ballot if the voter needs to execute an identity/challenged voter affidavit because: (1) the voter does not present proper photo identification when requesting a ballot; and (2) the voter is unable to have his or her identity verified by election officials through other means.² In reaching this conclusion, the Court notes that SB 418 extensively modified RSA 659:13, a statute which applies to all voters who seek to obtain a ballot, not simply election-day, first-time New Hampshire registrants. Relevant here, prior to the enactment of SB 418, RSA 659:13 provided:

The voter . . . shall then be asked to present proof of his or her identity meeting the requirements of paragraph II. If the voter presents such proof of identity to the ballot clerk, the ballot clerk shall give the voter one of each ballot to be voted on in that election[.] . . . If the voter does not have a valid photo identification, the ballot clerk shall inform the voter that he or she may execute a challenged voter affidavit.

RSA 659:13, I(b); I(c)(1) (2021) (emphasis added). Now, however, RSA 659:13 states:

The voter . . . shall then be asked to present proof of his or her identity meeting the requirements of paragraph II. If the voter presents such proof of identity to the ballot clerk, the ballot clerk shall give the voter one of each ballot to be voted on in that election[.] . . . If the voter does not have a valid photo identification, the ballot clerk shall direct the voter to see the supervisor of the checklist. The supervisor of the checklist shall review the voter's qualifications and determine if the voter's identity can be verified. If the supervisor of the checklist cannot verify the voter's identity, the supervisor of the checklist shall inform the voter that he or she may execute a challenged voter affidavit and cast an affidavit ballot in accordance with RSA 659:23-a.

RSA 659:13, I(b); I(c)(1)–(3) (emphasis added; cleaned up). Based on the difference between the old and new versions of the statute, as emphasized by the underlined

² There is an exception to the photo identification requirement when election officials are able to verify the voter's identity through other means, such as personal recognition, see RSA 659:13, II(b), or perhaps using "nonpublic data in the statewide centralized voter registration data," RSA 659:13, II(d). The Court anticipates that identity verification through these non-photo identification means is uncommon, particularly in larger voting precincts where election workers may not personally know many of the voters. In addition, it is not at all clear how a voter's identity can be verified using the statewide centralized voter registration data.

language above, it appears that SB 418 requires any voter who uses an affidavit to establish his or her identity to then cast an affidavit ballot.³ As such, the Court fails to discern why an affidavit ballot would only ever be used by same-day first-time New Hampshire registrants as the parties contend.

Although the new language in RSA 659:13, I(c)(3) seems to be dispositive, other language in SB 418 also suggests that an affidavit ballot must be used by all voters who lack photo identification or whose identity cannot be verified prior to voting. For instance, RSA 659:23-a, an entirely new statute added by SB 418, provides:

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.

RSA 659:23-a, I. This provision could be read as only applying the affidavit ballot requirement to first-time New Hampshire voters who register on election day. However, such a reading would leave the clause "or does not meet the identity requirements of RSA 569:13" without any real meaning, as any voter who lacks photo identification when registering would also not meet the identity requirements of RSA 659:13.

Another, perhaps more plausible, interpretation is that RSA 659:23-a, I requires an affidavit ballot to be used in two circumstances: (1) "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 (2) "if a voter on election day . . . does not meet the identity requirements of RSA 659:13." This alternative interpretation is consistent with the language discussed above from RSA 659:13, I(c)(3), and is

³ Judge Colburn reached a similar conclusion when she ruled on the motion to intervene. (See Dec. 21, 2022 Court Order at 4 n.2 ("SB 418 appears to affect all voters—not just those registering on election day."))

harmonious with the legislature's express findings leading to the enactment of SB 418.

Notably, one of the legislative findings states:

Currently, New Hampshire law allows for votes to be cast and counted by signing an affidavit, even when the voter fails to produce documents to prove his or her identity, or that he or she is a New Hampshire citizen or an inhabitant of that town, city, ward, or district. Although these laws do allow for the post-election investigation of these unverified ballots, this merely identifies when unqualified votes have been cast. It does nothing to prevent the nullification of legitimate votes by the casting, counting, and certification of illegitimate ballots.

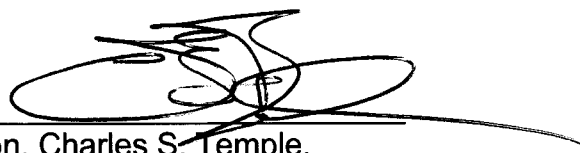
Laws 2022, ch. 239:1, II (emphases added). This finding indicates that the legislature was concerned with the integrity of any and all ballots cast by voters who failed to present documented proof of identity, not just those cast by voters registering to vote in New Hampshire for the first time on election day who lacked photo identification. Thus, it is logical that the legislature sought to extend the affidavit ballot procedure to all voters who are unable to present photo identification before voting.

In short, under the Court's interpretation of SB 418, all voters—even those who have been registered to vote for decades—who do not present a photo identification (or are otherwise unable to have their identity "verified") must execute a "challenged voter affidavit" to establish identity, which, in turn, requires the voter to then cast an affidavit ballot. RSA 659:13, I(c)(3). As this interpretation conflicts with the parties' interpretation of SB 418, the Court would like the parties to address this issue as follows. If the parties continue to disagree with the Court's interpretation, the Court would like the parties to explain how they reach their position that the affidavit ballot procedure only applies to election-day first-time New Hampshire registrants, particularly in light of the language in RSA 659:13, I(c)(3). If the parties agree with the Court's interpretation, the Court would like the parties to re-address the standing issue under

that interpretation. Indeed, if any voter who does not present photo identification when requesting a ballot will be subject to the affidavit procedure, it seems that a much broader class of individuals may have standing to challenge the constitutionality of SB 418. See, e.g., Martin v. Kohls, 444 S.W.3d 844, 849 (Ark. 2014) (voters had standing to challenge constitutionality of voter ID law because they were “subject to the proof-of-identity requirement in [the law]”); Common Cause/Georgia v. Billups, 554 F.3d 1340, 1352 (11th Cir. 2009) (holding that “the lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person”). To be frank, this not a procedure this Court uses frequently or lightly. However, given that the defendants’ primary standing argument is premised on a contrary interpretation of SB 418,⁴ the fact that the Secretary of State has issued (potentially erroneous) guidance to election officials based on a contrary interpretation, and that any ruling on the merits in this case should be based on a thorough review and understanding of SB 418’s reach, the Court finds it necessary here. The parties shall each have twenty days from the clerk’s notice of decision to file their briefing.⁵ Although not required, each party will then be afforded ten days to file a response to any other party’s brief. Once the Court receives the requested briefing, it may hold a hearing prior to ruling.

So ordered.

Date: June 23, 2023



Hon. Charles S. Temple,
Presiding Justice

⁴ (See, e.g., H’rg at 2:12–13 (defendants’ attorney arguing that, “It is uncontested that all [of the individual plaintiffs] are registered voters and therefore not subject to SB 418. And they never can be subject to SB 418, because SB 418 concerns the narrow class of individuals of election day first time registrants in New Hampshire with no photo ID. None of the individuals in this case can ever be in that universe, as they are all registered in New Hampshire already.”).)

⁵ The intervenor is permitted to file a brief and/or a response, but is not required to do so.