

STATE OF NEW HAMPSHIRE

HILLSBOROUGH,
SOUTHERN DISTRICT

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

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

and

MANUEL ESPITIA, JR.; and
DANIEL WEEKS

Plaintiffs

v.

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

Defendants

**603 FORWARD PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE
COURT'S JUNE 26 ORDER**

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INTRODUCTION

The Court has asked the parties to address specific questions arising from the Court's interpretation of SB 418 as applying more broadly than to the limited class of first-time, same day election day registrants in New Hampshire. Specifically, the Court asks the parties the following questions: *first*, if the parties do not agree with the Court's broader interpretation of SB 418, the Court requests that the parties explain their basis for believing the provision applies only to new voters who register on election day. And *second*, if the Court's broader interpretation applies, the Court asks the parties to discuss any impact this broader interpretation has on standing.

The 603 Forward Plaintiffs believe that SB 418 is susceptible to two reasonable interpretations—the Secretary's and the Court's—but that this ambiguity is resolved by the legislative history, which clearly indicates that it was intended to apply only to the narrower class of first-time, same day registrants. The Secretary has indicated to the Plaintiffs that he intends to maintain his more narrow interpretation moving forward in future elections. The Secretary is New Hampshire's chief election officer and how he plans to enforce the law necessarily informs the approach of the 603 Forward Plaintiffs in this litigation. Accordingly, the 603 Forward Plaintiffs' allegations in the complaint and arguments in response to the motion to dismiss reflect and are responsive to their understanding of the Secretary's interpretation of SB 418 and the way in which the Secretary intends to enforce it. The 603 Forward Plaintiffs have standing to assert these claims and the Court should deny the State Defendants' pending motion to dismiss for the reasons already briefed and argued.

While the 603 Forward Plaintiffs believe the Secretary's reading is a reasonable interpretation of the statutory text and is most consistent with the legislative history of SB 418, they acknowledge that the Court has identified a plausible alternative reading which, if implemented, would impact a broader group of voters. Until the Secretary adopts such a reading,

or is compelled to do so, the 603 Forward Plaintiffs challenge the law as implemented. If the Secretary were to indicate that he intends to implement the law to reflect the broader reading—or if he were required to do so—the 603 Forward Plaintiffs would likely seek leave to amend their pleadings, including to provide additional allegations supporting their already sufficient standing theories to address the broader injury that would follow if SB 418 were interpreted to impact more voters. Nevertheless, such a change in the Secretary’s approach would not undermine the 603 Forward Plaintiffs’ standing. To the contrary, their injuries would only become more severe.

BACKGROUND

The 603 Forward Plaintiffs have challenged SB 418 as interpreted by the Secretary of State. That is because under New Hampshire law, the practical application of election laws and procedures—including SB 418 and its imposition of an affidavit ballot system—is a matter largely delegated to the Secretary of State. *See* RSA 652:23. The Secretary is the State’s chief elections officer, *id.*, and is responsible for preparing the Election Procedure Manual, the official “manual on the New Hampshire election laws and procedures for conducting elections[.]” *See* RSA 652:22; *see also* 603 Forward Compl. ¶ 21 (describing the responsibilities of Secretary as chief elections officer); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 207 (D.N.H. 2018) (similar). Further, under SB 418 itself, the Secretary is responsible for designing, producing, and distributing the relevant “affidavit voter package[.]” SB 418 § 2, II(a)-(b), as well as the “explanatory document . . . explaining the proof of identity requirements” to voters asked to cast an affidavit ballot, *id.*, § 4. He also has the duty to review the affidavit verification letters that determine whether to count affidavit ballots, and instructs municipal election officials on whether to ultimately count such ballots. *Id.* § 2, V. The Secretary’s interpretation of SB 418 is therefore not only instructive—it is

effectively *determinative* as to how SB 418 is implemented in practice.¹

The Secretary has consistently made clear that he intends to enforce SB 418 only against first-time New Hampshire registrants using same day registration. *See, e.g.*, State Defs.’ Mot. to Dismiss ¶ 20 (a person is “subject to SB 418,” if “they are (1) election day (2) first time registrants in New Hampshire (3) without a valid photo identification document[.]”); *see also* Ex. A, Jan. 30, 2023 Mot. to Dismiss Hr’g Tr. at 5:21-25 (explaining those “subject to this statute” are “Election Day, first-time registrants in New Hampshire with no photo ID”). This view does not appear driven by the litigation itself, as legislative history shows the Secretary’s office adopted this view *prior* to litigation. During an April 26, 2022 hearing before the House Finance Committee, Senior Deputy Secretary of State Lovejoy explained SB 418, as amended, applied to “those who register to vote for the first time in New Hampshire without an ID.” Ex. B (further explaining the “original bill was for all affidavit voters”). Indeed, Governor Sununu appears to have signed SB 418 into law based on this understanding of the law as well.²

This view of the law is also now memorialized in the formal guidance that the Secretary has issued to local election officials, as well as in the finalized affidavit ballot materials that will

¹ Likewise, the Attorney General, among other powers, “shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state” and “shall enforce the criminal laws of the state.” RSA 7:6. The Attorney General—after referral by the Secretary—therefore controls whether a person who fails to return an affidavit verification letter will be criminally investigated. *See* SB 418 §, VII (explaining the Secretary shall refer voters who do not return verification letters to the Attorney General for investigation).

² *See* Adam Sexton, *CloseUp: Sununu discusses future of abortion issue in NH*, WMUR (May 8, 2022), <https://www.wmur.com/article/closeup-sununu-discusses-future-of-abortion-issue-in-nh/39936459> (in response to questioning about whether he would sign the bill which was “narrower than it was before,” and applied “only . . . to people showing up on Election Day registering for the first time without ID[.]” Governor Sununu responded that he believed he would because “it really doesn’t fundamentally change our system drastically”; while Plaintiffs disagree with the Governor’s assessment about the nature of the burden imposed by the law, the broader interpretation of the law would indisputably be a “drastic” change and it seems unlikely that the Governor would have described it in the way he did, if that is what he believed he was signing).

be provided to voters in future elections. The Secretary has represented to the Plaintiffs that he intends to continue implementing SB 418 in a manner consistent with this guidance moving forward.³ The 603 Forward Plaintiffs have thus challenged SB 418 based on how the Secretary intends to implement it against New Hampshire’s voters.

ANALYSIS

I. The text of SB 418 is arguably susceptible to two reasonable interpretations, but the legislative history makes clear that it was intended to apply only to first-time, same day registrants.

As the Court’s Order suggests, SB 418 is not a model of clarity—the statute is arguably ambiguous. Accordingly, the 603 Forward Plaintiffs take the position that the text of SB 418 is susceptible to more than one reasonable reading, but that the legislative history of the statute clarifies that it was intended to apply only to first-time, same day registrants. Given that the Secretary interprets the law in a way that is consistent with the clear intent of the legislature, the 603 Forward Plaintiffs have understood SB 418 to apply only to first-time, same day registrants, and have challenged the law accordingly.

A. The Secretary’s view and the Court’s view are both reasonable interpretations of SB 418’s plain text.

First, consistent with the Secretary’s view of the law, SB 418 can be interpreted to apply only to the narrower class of same day, first-time registrants on election day.⁴ In particular, RSA 659:23-a—added by SB 418 to create the system of affidavit ballots—reads:

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

³ The Attorney General, who under SB 418 is responsible for investigating referrals from the Secretary of voters who do not properly submit their verification letters (*see* SB 418 § 2, VII), has likewise represented he intends to maintain the same interpretation.

⁴ Additionally, as New Hampshire’s chief election officer and the official mostly charged with administering SB 418, the Secretary’s reading of the law may be entitled to some deference. *See, e.g., Rymes Heating Oils, Inc. v. Comm’r, N.H. Dep’t of Safety*, 151 N.H. 472, 474–75 (2004).

voter's identification, or does not meet the identity requirements of RSA 659:13, then such voter shall vote by affidavit ballot[.]

RSA 659:23-a (emphasis added). The text of this provision can be read as requiring the use of an affidavit ballot “if” (1) “a voter on election day is registering to vote for the first time in New Hampshire” does not have a valid photo identification establishing such voter’s identification, *or* (2) “if a voter on election day is registering to vote for the first time in New Hampshire” does not otherwise meet the identity requirements of RSA 659:13. *See id.* Here, importantly, the Legislature specifically added the language “*is registering to vote for the first time in New Hampshire*”—restricting the use of affidavit ballots to those “registering to vote for the first time in New Hampshire [who] do[] not have a valid photo identification establishing such voter’s identification”—during the amendment process. The law’s drafters could not have intended this new text to be swallowed by the pre-existing reference to RSA 659:13, rendering the amendment pure surplusage. *See infra* § I.B. “The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.” *Marcotte v. Timberlane/Hampstead Sch. Dist.*, 143 N.H. 331, 339 (1999).

Alternatively, consistent with the Court’s view, SB 418 can be interpreted “as subjecting a much broader class of voters to the affidavit ballot procedure.” June 26, 2023 Order (“Order”) at 2.⁵ That reading of RSA 659:23-a is that any New Hampshire voter must use an affidavit ballot “if” that “voter on election day” is *either* (1) “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) “does not meet the identity requirements of RSA 659:13[.]” RSA 659:23-a. Courts “first

⁵ If the Secretary’s implementation scheme were to change, or if this Court determines that the broader view of the law is the correct one, the 603 Forward Plaintiffs would likely seek leave to amend their complaint to reflect the law’s broader scope, as well as to address additional theories or allegations of standing.

look to the language of the statute itself,” and seek to “construe that language according to its plain and ordinary meaning.” *Pet. of Carrier*, 165 N.H. 719, 721, (2013) (citing *In re State Emps.’ Assoc. of N.H.*, 161 N.H. 730, 738 (2011)). The Court will “interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include[.]” *Id.*

In addition to RSA 659:23-a, Senate Bill 418, in relevant part, also amended RSA 659:13. A reading of these newly amended and newly created statutory provisions in conjunction also supports the Court’s interpretation. *See Pet. of Carrier*, 165 N.H. at 721 (explaining courts “do not consider words and phrases in isolation, but rather within the context of the statute as a whole”). When read together, RSA 659:13, I(b); I(c)(1)-(3) and RSA 659:23-a plausibly require all voters who do not present photo identification and cannot alternatively have their identity verified to use an affidavit ballot. *See* RSA 659:23-a (“[I]f a voter on election . . . 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[.]”); *cf.* RSA 659:13, I(b); I(c)(1)-(3) (“*The voter*. . . shall then be asked to present proof of his or her identity meeting the requirements 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[.]”). The Secretary’s view and the Court’s view are both reasonable interpretations of SB 418 as drafted.

B. The legislative history of SB 418 strongly supports the Secretary’s interpretation of the law.

Where the language of a statute is unclear, New Hampshire courts consider legislative history. *See, e.g., Everett Ashton, Inc. v. City of Concord*, 169 N.H. 40, 45 (2016). Here, the 603 Forward Plaintiffs believe the Secretary’s interpretation of SB 418 is the interpretation that is most

consistent the law’s legislative history, which clarifies that SB 418—though confusing—was intended to apply only to first-time registrants seeking to register on election day. SB 418’s multiple iterations show that the bill’s proponents narrowed the scope of the law in response to public criticism—including from the 603 Forward Plaintiffs, *see* Compl. ¶¶ 15, 18, n.3—to secure its passage. The Secretary confirmed during this legislative process that his office understood the amendment process to have limited SB 418’s scope. The 603 Forward Plaintiffs briefly summarize that legislative history here to aid the Court in its interpretation of the law.

SB 418 as first introduced stated that a person “shall vote by affidavit ballot” if “such voter’s name is not on the voter registration checklist for that town, city, ward, or district, or if such voter does not have a valid photo identification establishing such voter’s identity and domicile in that town, city, ward, or district, then such voter shall vote by affidavit ballot.” *See* Docket of SB 418, December 23, 2021 Version.⁶ In other words, the original version of the bill applied to (1) voters who did not have their names on the municipal checklist, or (2) who could not present photo identification establishing their identity and domicile in that specific town. *Id.*

On March 31, 2022, an amended version of SB 418 was introduced that removed the requirement of affidavit ballots for voters whose names did not appear on a municipal checklist and voters who could not establish domicile in a specific town with their photo identification. *See* Docket of SB 418, SB 418, Mar. 31, 2022 Version (Committee Amendment #2022-1096s).⁷ This amended version stated that a person shall cast an affidavit ballot “if a voter on election day does not have a valid photo identification establishing such voter’s identification or does not meet the

⁶ Available at https://legiscan.com/NH/text/SB418/id/2462044/New_Hampshire-2022-SB418-Introduced.html (last accessed July 17, 2023).

⁷ Available at https://legiscan.com/NH/text/SB418/id/2561986/New_Hampshire-2022-SB418-Amended.html (last accessed July 17, 2023).

identity requirements of RSA 659:13.” *Id.* It therefore applied to anyone appearing to vote on election day who could not present photo identification confirming their identity *or* satisfy the requirements of RSA 659:13. *Id.* The Legislature then held several hearings on this version of the bill in early April 2022, during which the proposed bill received significant public backlash, including from members of the 603 Forward Plaintiffs. *See, e.g.*, Compl. ¶¶ 15, 18, n.3.

SB 418 was then again amended, this time by the House Finance Committee. This *third* version of SB 418 is substantially the bill that was passed into law, and which added the language relevant to the Court’s order. *See* Docket of SB 418, April 14, 2022 Version⁸ (Amendment #2022-1487h). Specifically, it added language clarifying that only those voters “registering to vote for the first time in New Hampshire [who] do[] not have a valid photo identification establishing such voter’s identification” shall vote using an affidavit ballot.⁹

The legislators supporting this amendment, and the bill generally, stated that the amendment was intended to limit SB 418 to first-time, same day registrants on election day. At the April 13, 2022 House Election Law Committee Hearing, Representative Berry moved to adopt the amendment, explaining it would exclude those “already on the rolls” from SB 418 even if they “show up [to vote] without an ID.” Compl. Ex. E, Apr. 13, 2022 House Election Law Comm. Hr’g Tr. at 13. Instead, the “scope[]” of the law would be limited to people “showing up to the polling location on Election Day with nothing.” *Id.* Representative Berry again explained, this time to the full House, that “with the amendment that this body passed . . . *we scoped this bill down to address people. . . who are not registered to vote.*” *See* Compl. Ex. D, Apr. 21, 2022 Full House Debate

⁸ Available at https://legiscan.com/NH/text/SB418/id/2573421/New_Hampshire-2022-SB418-Amended.html (last accessed July 17, 2023).

⁹ Though, as the Court noted, it also retained language stating the bill applied to those who “do[] not meet the identity requirements of RSA 659:13.” *See* Order at 4.

Tr. at 6 (emphasis added). The legislative history is replete with identical statements from SB 418’s supporters.¹⁰ Nothing in the legislative record from the bill’s proponents or critics suggests the law, as amended, applies beyond first-time New Hampshire registrants on election day.

The Secretary of State also adopted his current reading of the law during this amendment process. As mentioned, Senior Deputy Secretary Lovejoy testified before the New Hampshire House Finance Committee that the bill “changed quite a bit with” *this* “amendment.” Ex. B, April 26, 2022 House Fin. Comm. Hr’g Tr. at 2-3. Specifically, she expressed the Secretary’s understanding that, following the most recent amendment, SB 418 was “now calling for provisional ballots for those who register to vote for the first time in New Hampshire without an ID” whereas “the original bill was for all affidavit voters.” Ex. B, April 26, 2022 House Fin. Comm. Hr’g Tr. at 2-3. Governor Sununu, too, publicly indicated that he was prepared to sign SB 418 into law because it had been narrowed. *See supra* at n.2.

This testimony from everyone involved in SB 418’s enactment—its sponsors, supporters, critics, as well as those tasked with its implementation—underscores the intent of the Legislature to refine the enforcement targets of SB 418 to a limited class of first-time, same day registrants.

II. The 603 Forward Plaintiffs have standing to challenge SB 418 under both interpretations of the law.

The 603 Forward Plaintiffs have standing to challenge SB 418 under both the Secretary’s narrower interpretation of the law and the Court’s broader interpretation of the law.

¹⁰ *See, e.g.*, Ex. C, Apr. 27, 2022 House Finance Committee Executive Session Hr’g Tr. at 4 (“Now the House amendment allows the bill to only apply to those registering for the first time on Election Day without proof of his or her identity.”) (statement of Rep. Mooney); Compl. Ex. F, May 5, 2022 Full House Debate Tr. at 4 (“[W]e’re only talking about election day registration.”) (statement of Rep. Griffin). Even those opposing SB 418 shared this understanding. *See* Compl. Ex. D, Apr. 21, 2022 Full House Debate Tr. at 6 (statement of Rep. Muirhead) (referring to the “two classes of voters” created by SB 418, including the class of individuals that “registers to vote on voting day[.]”).

For the reasons set forth in the 603 Forward Plaintiffs’ Complaint and response to the Defendants’ motion to dismiss, the 603 Forward Plaintiffs have standing to challenge how the Secretary plans to implement and enforce SB 418. *See* Compl. ¶¶ 9-20; *see also* 603 Forward Plaintiffs’ Resp. to MTD (“MTD Resp.”) at 8-14. Plaintiffs Louise Spencer, Edward R. Friedrich, and Jordan Michael Thompson are taxpayers of the state of New Hampshire, *see* Compl. ¶¶ 15-20, who plausibly allege that enactment of SB 418 “approved spending, public funds in violation of a . . . constitutional provision,” N.H. Const. Pt. 1, Art. 8. At this point there is no dispute that the Secretary has *spent* money in violation of the Constitution by implementing SB 418 for town elections and a State Representative runoff that have already occurred. *See* Ex. A, Jan. 30, 2023 Mot. to Dismiss Hr’g Tr. at 58:24-59:3 (noting upcoming special election in three weeks and town elections in March).

Likewise, 603 Forward and Open Democracy Action each have standing directly as organizations to challenge how the Secretary is currently enforcing SB 418. Both 603 Forward and Open Democracy Action have plausibly alleged and affirmed in affidavits that they have been injured by SB 418. *See* Compl. ¶¶ 9-14 (describing missions and initiatives of organizations and their diversion of resources in direct response to SB 418); Resp. at 14-19 (same); *see also* Resp. Ex. A, Aff. of Lucas Meyer (“Meyer Aff.”); Ex. B, Aff. of C. Olivia Zink (“Zink Aff.”). As detailed in 603 Forward Plaintiffs’ complaint and response to the State Defendants’ motion to dismiss, both organizations maintain robust voter education programs, and focus resources on educating prospective voters on registration rules and procedures, and they have been forced to divert limited time and resources to support educational and other programming regarding SB 418. *Id.* The Court should therefore conclude that under the Secretary’s present interpretation—the interpretation the Plaintiffs understood him to hold when they filed suit—Plaintiffs “have standing to challenge the

constitutionality” of SB 418. *N.H. Democratic Party v. Gardner*, No. 2017-CV-00432, 2018 WL 5929044, at *3 (N.H. Super. Ct. Apr. 10, 2018) (quoting *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 584 (E.D. Va. 2016)) (organizations are injured for standing purposes where law requires “diversion of time, talent, and resources to educate [organization’s] voters and implement the requirements of the [new registration] law.”).

If the Court were to find as a matter of law that the plain text of SB 418 applies to a broader class of voters, and the Secretary were to plan to enforce the law accordingly, the 603 Forward Plaintiffs would still have standing to challenge the law under this interpretation. Indeed, the 603 Forward Plaintiffs’ injuries would be more severe. *See* Order at 4-5. For one, a broader interpretation of SB 418 would not affect the individual plaintiffs’ taxpayer standing—if anything, a broader interpretation could enhance their standing. In addition to having standing by virtue of being affected as civically-engaged taxpayers, under a broader interpretation of SB 418, Ms. Spencer, Mr. Friedrich, and Mr. Jordan would separately have standing as individuals subject to the law’s photo identification requirement. *See Martin v. Kohls*, 444 S.W.3d 844, 849 (Ark. 2014) (explaining registered voters had standing because they were “among the class of persons affected by the legislation” and “subject to the proof-of-identity requirement”); *Gentges v. Okla. State Election Bd.*, 319 P.3d 674, 677 (Okla. 2014) (similar); *see also Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 35 (2005) (explaining “a party has standing to raise a constitutional issue . . . when the party’s own rights have been or will be directly affected”).

This holds true not just for individual plaintiffs, but for all individuals who would be subject to SB 418 under the broader interpretation. If the Secretary were to enforce SB 418 against a “much broader class of voters,” Order at 2, it would naturally harm a larger class of *individuals* generally—in fact, *any* New Hampshire voter wishing to vote on Election Day would now be

subject to the law. These voters must “produce photo identification to vote in person” or cast an unconstitutional affidavit ballot. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009) (holding that “lack of an acceptable photo identification is not necessary to challenge a statute that requires photo identification to vote in person” because the imposition of such a requirement is itself an actionable injury); *see also Fish v. Schwab*, 957 F.3d 1105, 1120 (10th Cir. 2020) (holding that plaintiffs who intended to vote in future elections and would be required to present identification in those elections had standing even though “no individual [plaintiff] lack[ed] photo identification”); *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1197-98 (N.D. Ala. 2020) (holding that even if plaintiffs had identification available, they would still have standing to challenge a voter identification law); *One Wis. Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 966 (W.D. Wis. 2016) (similar).

In addition to the increased harm on the individual plaintiffs, implementation of the law’s broader reading would also exacerbate the ongoing diversion of resources that SB 418 has already imposed on 603 Forward and Open Democracy Action. As described above, even under the Secretary’s current interpretation, these groups have already plausibly alleged that they have been forced to divert limited resources in response to the law. *See supra* 10-11; *see also* Meyer Aff.; Zink Aff. Dramatically expanding the number of voters harmed by the law will, in turn, naturally require 603 Forward and Open Democracy Action to even *further* divert their “time, talent, and resources to educate their voters and implement the requirements of the [new registration] law.” *Gardner*, 2018 WL 5929044, at *3 (quoting *Lee*, 188 F. Supp. 3d at 584). This increased resource allocation would come at even greater cost to 603 Forward and Open Democracy Action’s existing mission-critical activities.

CONCLUSION

For the foregoing reasons, the 603 Forward Plaintiffs respectfully submit this supplemental

briefing for the Court's consideration and renew their request for the Court to deny Defendants' motion to dismiss.

Dated: July 20, 2023

Respectfully submitted,

/s/ Steven J. Dutton

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CERTIFICATE OF SERVICE

I certify that on July 20, 2023, I served the foregoing pleading on all counsel of record through the Court's electronic filing system.

/s/ Steven J. Dutton
Steven J. Dutton

Exhibit A

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT SOUTH

603 FORWARD, ET AL.,) 226-2022-CV-00233
 Plaintiffs,)
 vs.)
 DAVID M. SCANLAN, ACTING NEW)
 HAMPSHIRE SECRETARY OF STATE,)
 ET AL.,)
 Defendants.)

MANUEL ESPITIA, JR., ET AL.,) 226-2022-CV-00236
 Plaintiffs,)
 vs.) Nashua, New Hampshire
 DAVID M. SCANLAN, ACTING NEW) January 30, 2023
 HAMPSHIRE SECRETARY OF STATE,) 1:56 p.m.
 ET AL.,)
 Defendants.)

HEARING ON MOTION TO DISMISS
 BEFORE THE HONORABLE CHARLES S. TEMPLE
 JUDGE OF THE SUPERIOR COURT

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1 (Proceedings commence at 1:56 p.m.)

2 THE COURT: All right. I'm all set. Welcome,
3 everybody. Good afternoon.

4 UNIDENTIFIED SPEAKER: Good afternoon, Your Honor.

5 THE COURT: Go ahead, Kathleen.

6 THE CLERK: Matters before the Court at this time.
7 This first docket number 226-2022-CV-233, 603 Forward, et al.
8 v. David M. Scanlon, acting secretary -- acting New Hampshire
9 Secretary of State, et al. And docket number 226-2022-CV-236,
10 Manuel Espitia, Jr., et al. v. David Scanlon, New Hampshire
11 Secretary of State, et al.

12 If parties could please identify themselves for the
13 record, beginning with counsel for Plaintiff.

14 MR. DODGE: Christopher D. Dodge, The Elias Law
15 Group, on behalf of the 603 Forward Plaintiffs.

16 THE COURT: Good afternoon, Attorney Dodge.

17 MR. DODGE: Good afternoon.

18 MR. KLEMENTOWICZ: Henry Klementowicz from the
19 American Civil Liberties Union of New Hampshire, on behalf
20 Manny Espitia and Dan Weeks (phonetic).

21 THE COURT: Attorney Klementowicz.

22 MR. DUTTON: Good afternoon. Steve Dutton from
23 McLane Middleton on behalf of the 603 Forward Plaintiffs

24 THE COURT: Good afternoon, Attorney Dutton.

25 MR. TWOMEY: Paul Twomey, on behalf of the 603

1 Forward Plaintiffs.

2 THE COURT: Attorney Twomey, good afternoon.

3 MR. MATTESON: Good afternoon, Your Honor. Myles
4 Matteson, appearing on behalf of the State Defendants.

5 THE COURT: Attorney Matteson.

6 MR. CONLEY: Matthew Conley, appearing on behalf of
7 all Defendants, Your Honor.

8 THE COURT: Very good. Good afternoon.

9 All right. We have the motion to dismiss in these
10 consolidated actions at court index number 10-2022-CV-233.
11 I've reviewed the motion to dismiss, and then we have the
12 objections in the same consolidated actions at court index
13 number 18 and court index number 19. I've reviewed those
14 particular pleadings and any other pleadings that I thought
15 were applicable to this. I did review prior to the hearing
16 also, the Court's order -- Judge Coburn's order on the motion
17 to intervene.

18 So I'll turn to Defense counsel. Attorney Matteson,
19 it looks like you're going to speak first as it relates to the
20 motion to dismiss in this matter.

21 MR. MATTESON: Yes, Your Honor. Thank you. SB418,
22 the legislation at issue in this case, concerns Election Day,
23 first-time registrants in New Hampshire with no photo ID.
24 That's the narrow class of individuals that are subject to
25 this statute. And this legislation specifies the ballot that

1 they will use. And that process is not identical, but it is
2 consistent with, long-standing New Hampshire law.

3 SB418 is a natural extension of a comprehensive
4 response to a complex issue, that of voter eligibility
5 verification. There's one piece of that complex issue. The
6 use of provisional ballots or affidavit ballots is federally
7 mandated in many states. It's not a unique mechanism. It is
8 the expectation under federal law in many circumstance. So
9 it's not a unique mechanism to be utilized here in New
10 Hampshire.

11 So before you today, the matters of standing and
12 also ripeness. The Defendants believe that there is no
13 standing for the individual Plaintiffs, as they are not
14 subject to SB418 and they never will be. There's no taxpayer
15 status, as the Plaintiffs' standard ignores Kerrigan, case on
16 point here, and would sweep in any governmental action. It is
17 overbroad and it is unworkable.

18 None of these claimed injuries are their own.
19 Plaintiffs are appearing on behalf of others that are not
20 before this Court.

21 As to ripeness, the requirements there are that a
22 matter be primarily legal, that there be no factual
23 development, and that the challenged action be final. That's
24 not true here. Even though SB418 is now in effect, the
25 implementing guidance which is necessary component, has not

1 And then finally, I guess, Your Honor, I heard
2 State's counsel suggest that under our test for taxpayer
3 standing, any piece of legislation, ever, that requires a
4 government employee to bill an hour of his time to it would
5 qualify as taxpayer standing because you're paying an employee
6 to spend a few minutes thinking on an issue. The Court need
7 not read taxpayer standing so broadly as that to find that the
8 individual Plaintiffs here have standing.

9 Again, it is undisputed that in this case, you have
10 a fiscal note, regardless of State's counsel's speculation to
11 the contrary. You have a fiscal note that spells out in
12 express terms the approved funds as part of this bill. And
13 you have testimony from the Secretary of State acknowledging
14 that the money to implement this bill will come out of his
15 budget. The Court need go no further than finding that that
16 is sufficient to find taxpayers standing to permit this case
17 to proceed, regardless of any hypotheticals raised by State's
18 counsel.

19 Unless Your Honor has any further questions, I'll go
20 to my colleague.

21 MR. KLEMENTOWICZ: I don't have anything further,
22 Your Honor.

23 THE COURT: All right. And Attorney Dutton?
24 Anything from you at all?

25 MR. DUTTON: Nothing further.

1 THE COURT: Attorney Twomey, same answer?

2 MR. TWOMEY: Same answer, Your Honor.

3 THE COURT: Great job, you two. Appreciate it.

4 All right. Thank you for those arguments. I'll
5 take a very careful look at this and do the appropriate
6 research based on the arguments that have been made, both in
7 writing and today in court, and issue a decision.

8 One question I have for everybody is, obviously, we
9 have this election coming up on, you said, February 21st, I
10 believe, Attorney Klementowicz?

11 MR. KLEMENTOWICZ: That's right.

12 THE COURT: I know this doesn't relate to the
13 merits, obviously, of the claims that are made here but
14 obviously relates to standing and ripeness only. Is there any
15 need to get this decision out before that election?

16 MR. DODGE: Yeah. Your Honor, I will raise one
17 issue, and it might be slightly premature. And I invite
18 State's counsel to offer his thoughts as well, obviously.

19 The 603 Forward Plaintiffs served written discovery
20 on the State Defendants two or three weeks ago. My
21 understanding is that the State intends to oppose responding
22 to that discovery until Your Honor resolves their motion to
23 dismiss.

24 I think we would oppose that issue the way we would
25 oppose such a stay, and I think we would do so in substantial

1 part because of the fact that you have the Rochester special
2 election three weeks from tomorrow. You have town elections
3 not long after that in March.

4 And so Plaintiffs are seeking this discovery, at
5 least in part, to be able to evaluate what the lay of the land
6 is going to look like with these very soon, forthcoming
7 elections. And so I wouldn't say that the Court has to
8 necessarily resolve the motion by these elections. I think it
9 would certainly be appreciated. But I would just flag as well
10 that Plaintiffs are now in the position as well where they
11 need discovery to be able to evaluate how this law is going to
12 play out in those elections.

13 THE COURT: All right. Attorney Matteson, any
14 response to that?

15 MR. MATTESON: Your Honor, you have before you a
16 dispositive motion that could dispose of the entirety of the
17 case or various aspects of it and various Plaintiffs. The
18 State does not believe that it's appropriate at this time to
19 produce the onerous and discovery that the Plaintiffs have
20 requested, given this dispositive motion, and any other motion
21 or answer that may be filed, following this Court's ruling on
22 this motion to dismiss.

23 So I can appreciate the Plaintiffs' efforts to jump
24 the gun on this. But it's not a timely request right now.
25 And the State would be requesting the consideration from the

1 determination, your order in this, and to be able to respond
2 in a timely fashion following that, rather than in advance of
3 any order from this Court.

4 THE COURT: All right. And the other question I
5 had was, obviously, the guidance, especially on the ripeness
6 issue, has been discussed, and it's coming out in a week or
7 two. From my standpoint, I'd like, as the Court was looking
8 at that, some notice as to when it comes out and what it is.
9 I don't know if they wait for pleadings from the State in a
10 response from the Plaintiffs or not. But that's just
11 something that's coming to my mind now, based on your answer
12 to that question.

13 MR. MATTESON: Yes, Your Honor. And subject input
14 from Plaintiffs' counsel, whether the State should file that
15 guidance with the Court or any other appropriate mechanism, or
16 just make you aware that that it has been issued. I'll defer
17 to the Court for any preference there or counsel then, to
18 weigh in.

19 THE COURT: Yeah, I think I would want to know what
20 it is.

21 MR. KLEMENTOWICZ: And I have no problem with the
22 Secretary of State filing that guidance. I think we'd all
23 like to see it as soon as it comes out. I don't think it --
24 beyond perhaps ending the State's ripeness challenge, I don't
25 think that it otherwise matters for this Court's decision --

Exhibit B

- Chairman: Any further comment? Yes, Representative Walls.
- Rep. Walls: I know I walked in a little bit late during this but I'm just trying to understand why this is outside the budget. Why are we doing this now?
- Chairman: Your guess is as good as mine.
- Rep. Walls: Can we ask the commissioner?
- Chairman: Sure. He knows everything.
- Commissioner: So, you're asking why didn't we just wait and put it in the budget coming up for...?
- Rep. Walls: Or why wasn't it the last...
- Commissioner: Well, so, while this has been a priority of mine, and it was one of the things I mentioned when I was confirmed, is that we needed to deal with invasive species. Frankly, with the last budget cycle, we were really told to hold off and so I had to be very creative in dealing – maintaining the department and there was really no ability to expand at that point.
- So, Senator Guida came after – this year with this request and we do feel that it's appropriate to get going as soon as possible. But I can't tell you 100% that I would have requested the funding in a previous budget because I never had that opportunity due to the constraints that were put on me at the time. But this is a department priority.
- Rep. Walls: Okay.
- Commissioner: All right.
- Rep. Walls: Good answer, thank you.
- Chairman: Any other comments? Motion's made and seconded. Ought to pass 267 as amended. I'm gonna call the roll.
- Clerk: Okay. And the chairman votes?
- Chairman: Yes.
-

Clerk: And the vice chairman?

Vice Chairman: Yes.

Clerk: And the clerk votes yes. Representative Mooney?

Rep. Mooney: Yes.

Clerk: Representative Shultz?

Rep. Shultz: Yes.

Clerk: Representative Mackie?

Rep. Mackie: Yes.

Clerk: Representative [audio cuts out] [00:01:57].

Clerk: [Inaudible] [00:01:59] chairman motion passed.

Rep. Walls: Mr. Chairman, I'd like to have a little sympathy for Representative Shultz. Can she vote last on the democrats instead of first? We're putting her – and she did ask for that – we're putting her in a very difficult position as a sub.

[Crosstalk]

So, I would just ask that we give her the chance to hear how others are voting before we put her on the spot. Thank you. Second.

[Crosstalk]

Chairman: Work session. Work session on 267 is closed. Okay. All right. Now, we have Senate Bill 418. I'll open the work session on 418. Any – I don't think this has an amendment.

Vice Chairman: No, it doesn't.

Chairman: It doesn't. Okay. So, it's 418. Any comments on 418? Yes. Certainly.

Patty: Patty Lovejoy. Senior Deputy Secretary of State. I just wanted to give you some information on this bill. The bill was changed quite a bit with its – with its amendment, I'm sorry. This bill is requiring – is now calling for provisional ballots for those who register to

vote for the first time in New Hampshire without an ID. It is not – the original bill was for all affidavit voters. There are three types of affidavit voters. There is an affidavit for domicile. There's one age and citizenship and then there's one for an ID. So, it is possible that someone could need all three forms, but this bill now is related to those who don't have an ID and were registering to vote for the first time in New Hampshire that day.

Just to give you some information the ID voters, or we call those challenged voter affidavits, that means you didn't have an ID. In the 2020 election, there were 733 people state-wide that voted without an ID. We do not keep information in our data as to how many of those were people who just came to vote and forgot their ID versus how many were registering to vote that day. Our gut belief is that the vast majority of that 733 are people who are already registered to vote. And they just forgot their ID. They – like, well you don't need to go home, you can just sign this challenge voter affidavit.

So, this bill is related only to those bills, but it still requires that for each of those people who are registering to vote today, and don't have an ID with them, they will be given a packet by their – by the moderator. And that packet will include a overnight envelope to send it to the Secretary of State's office. The postage for those is basically \$30 for each one of them. The moderator will have to write on the back of the ballot that this is Affidavit Voter No. 1, Affidavit Voter No. 2, et cetera.

Theoretically, in the bill, it says that those that are supposed to be put into the side pocket and hand counted at the end of the day. I think a lot of you who have been involved in elections before – if you are the person that is standing there in front of the ballot box – the machine – the machine will take a ballot going this way, this way, this way, all four ways. So, if a voter where they've written Affidavit Voter No. 5 on the back of it, flips that over and goes to put it in the machine, you are not gonna know that that was there. There are some things that will need to be changed eventually if this does go through.

We have – there's an RSA about no extraneous marks on ballots. Obviously, this is your – we're telling the moderator to make an extraneous vote. Another change that was made in this bill was that it originally was gonna be effective for the primaries coming up and the effective date has been put off to next year – to 2023. So,

the first time that this would be in place is for the first in the nation primary. We are still gonna have a first in the nation primary. So, there will be – if there's a court challenge, there will be time to do that. The Secretary of State has taken the position on this bill that he was in support of it, but he would prefer that it would be laid on the table and brought to the Supreme Court to deal with the constitutional issues.

But obviously, that's up to the legislature to decide how you want to – how you want to handle any bill. So, the votes will be counted if you have one of these affidavit ballots. Your vote is going to be counted that day. You have seven days to get your envelope where you were providing your ID information to the Secretary of State. If the Secretary of State does not receive that in seven days and each of the town moderators will have to send to the Secretary of State's office a listing of each of the – each of the individuals who voted on this provisional type of ballot.

After the end of the seventh day, the Secretary of State's office will notify the moderator that you need to retrieve ballot No. 2, six and nine, and check for each office that they voted for – remove that from your totals. So, that's the way that this bill works. I just wanted you to – to be sure that you understood what the bill is. I'll take any questions if you have any.

- Chairman: Questions? Go ahead.
- Rep. Griffin: Yeah. Thank you, Mr. Chairman. You mentioned at the beginning of your testimony, a fee of \$30?
- Patty: Yes.
- Rep. Griffin: Paid by whom?
- Patty: The Secretary of State's office. So, that's – as part of the amended fiscal note that you have, it includes that. Since I had no way of knowing of those 733 ones that we had last time, how many of them were registering to vote that day versus how many of them just forgot their ID. I assume that they were all people that were first time voters. So, the fiscal note that you have is on the high side, assuming that all 733 of them – and also, we only have to pay them postage for somebody who actually mails it back. But the Secretary of State's office will need to provide these packets for every – every voting location. We do have 308 I think it is, voting

Exhibit C

Chair, Clerk, Rep. Umberger, Rep. Emmerick, Rep. Lynn, Rep. Walz, Rep. Mooney, Rep. Schultz, Rep. Weyler, Rep. Theberge, Rep. Erf, Rep. Griffin, Rep. Edwards, Rep. Bean, Rep. Turcotte, Rep. Wallner, Rep. Nordgren, Rep. Buco, Rep. Long, Rep. Hatch, Rep. Heath, Rep. Murray

- Clerk: [00:27:00] Representative Umberger.
- Rep. Umberger: Yes.
- Clerk: Madam Chair, there are 12 yays and nine nos on the ought-to-pass on SB 366.
- Chair: Okay. Can someone tell me who's doing the minority report?
Thank you.
- Clerk: Okay.
- Chair: Okay. We now turn to SB 418. Relative to verification of voter affidavits. Representative Emmerick.
- Rep. Emmerick: Madam Chair, I'd like to recognize Representative Lynn for an amendment. I think he's got it for you.
- Rep. Lynn: You know, Madam Chair, is this the appropriate time for the amendment? Or should we deal with the ITL motion first?
Whatever you prefer.
- Chair: Yeah. I think we need to—It's currently in interim study.
- Rep. Walz: Madam Chairman, I'd be happy to make a motion for interim study. Because that's what I was planning on doing.
- Chair: Yeah. That's correct.
- Clerk: Okay.
- Rep. Walz: So, are you accepting my motion for interim study?
- Chair: Yes. I am. Do I have—?
- Rep. Walz: And I think Representative [Inaudible] [00:28:29]—I think that probably needs to be seconded.
- Chair: Yes. It does.

Chair, Clerk, Rep. Umberger, Rep. Emmerick, Rep. Lynn, Rep. Walz, Rep. Mooney, Rep. Schultz, Rep. Weyler, Rep. Theberge, Rep. Erf, Rep. Griffin, Rep. Edwards, Rep. Bean, Rep. Turcotte, Rep. Wallner, Rep. Nordgren, Rep. Buco, Rep. Long, Rep. Hatch, Rep. Heath, Rep. Murray

registration. And if we're in violation of that, it's going to really complicate all kinds of future registrations in this state. And we would all of a sudden have to set up a whole new voter registration system inconsistent with what we currently have. That would be expensive, to say the least.

Finally, we all have gotten a lot of emails on this because what it does is it violates voter anonymity. In other words, the secret ballot would no longer exist for certain people. And, so, it would set up what's called provisional ballots, where ballots would be marked. And they would be able to trace back to the actual voter. So, for those reasons, I want to say that we oppose it. And I just want to say too. I think every veteran, every member of the military, should be voting against this. Because you're really disenfranchising our military members, who are outside the country. And I think it's wrong to disenfranchise our overseas voters, but in particular, our military members. And anybody who's a vet in this room, I think they understand it. I'm sure many of you have voted from overseas. I know I have.

And, so, I would say we should not be disenfranchising our overseas voters. We don't want to risk being in violation of federal law. And in particular, we don't want to take away the secret ballot. We have a long history of secret ballot in this country. And why would we want to go there? For all those things, I think it makes more sense to go to interim study and to look at how we can meet the needs of people's concerns about voter registration without violating federal law and without violating individual rights and without violating constitutional rights, as this bill does.

Chair: Thank you very much. Representative Emmerick.

Rep. Emmerick: Thank you, Madam Chair. One of the things that's very interesting about this argument is that we're violating privacy. We don't know who the individual is because they have no ID. So, I don't really think we're violating anybody's privacy because they haven't identified themselves yet. As far as the foreign ballots, the timing issue will have to be addressed. And the concept of having an ID to vote is supported by this bill. Thank you, Madam Chair.

Chair: Are there any other comments? Representative Mooney?

Rep. Mooney: Thank you, Madam Chair. I am gonna oppose the motion of interim study. And I would encourage my colleagues to also oppose it so that a motion of auto ought-to-pass can be made. Now this bill came to Finance after a vote in the full House of 180 to 154 in favor of ought-to-pass with amendment. Now, the House amendment allows the bill to only apply to those registering for the first time on Election Day without proof of his or her identity. The intention of the bill is to strengthen election integrity and improve the verification of voter identification and residency. Interestingly enough, it came to light that 733 individuals, statewide, in the general election of 2020, voted without showing an ID. So, they then had to fill out an affidavit. Now it's unknown how many of those 733 were registering for the first time to vote, same day voter registration. But we were assured yesterday by a representative from the Secretary of State's office would be a lot less than 733. Perhaps it could be just a couple hundred.

So, that's what we're talking in terms of numbers. I would believe that the spending, an estimated of 48,000 in fiscal year 2023 and then 72,000 in fiscal year 2025, would be certainly reasonable in terms of verifying voter identity for same day voter registrants. That being said, with regards to veterans, I've seen the ads. I've seen the—there was a handout yesterday given to us in Division I. But I don't see a direct correlation the way the House amended the bill to narrow it to same day voter registrants. Also with regard to a secret ballot, it was mentioned and I think worth repeating, that a secret ballot, in this instance, has just as much secrecy as an absentee ballot would have. So, not a whole lot has changed other than an improved way to verify a person is who they say they are. So, for that reason, I will oppose a motion of interim study. Thank you, Madam Chair.

Chair: Are there any other—? Representative Walz. Walz.

Rep. Walz: Thank you. To respond to a few of these articles, first of all, there's a huge distinction between marked ballots and an absentee ballot.

Our law specifically says you cannot put a mark on a ballot. This is gonna require putting a specific mark on a ballot that ties the ballot to a specific voter. Unlike an absentee ballot that is removed from the envelope in an anonymous fashion and then cast separately, this is gonna be consistently put separately so you can always tie the ballot back to a voter. It is not like an absentee. There is no longer an anonymous ballot for these people when their ballots have been marked. That's one.

Two. The Chair of our lovely Division I said that this will have to be dealt with. The fact that we cannot certify on time. But the reality is if you pass this bill, there's nothing to be dealt with. The fact of the matter is if you pass this bill, if you have challenged ballots, and we may have them in many voting places, if you have any challenged ballots, you cannot possibly certify in time to get the ballots out 45 days ahead of time. It is physically impossible. So, to say it has to be dealt with, to me, is meaningless. How are you gonna deal with it? When you have just set up a time frame where it's absolutely impossible to meet the requirements and mail them within 45 days.

Finally, I think there's nothing here. The amendment that was passed by the House is—the amendment here does nothing to solve the problem with the military. The problem with the fact that we can't get military ballots out within 45 days, as required by federal law, continues to exist in the bill as it exists, which is why, again, I think interim study is a better approach. We have huge problems with this. Why are we going forward with such a flawed bill? Let's study it, come back and figure out a better way to ensure that the ID is out there. And frankly, I might add, while we had talk of this, we have not had, to my knowledge, one prosecution in this state for false ID or failure to provide ID. This seems to me to be a solution looking for a problem that we don't even have evidence exists. So, why are we creating more problems for ourselves, violating federal law, potentially violating the constitution, for a problem that has not even been prosecuted in this state, to my knowledge? And we know we're gonna violate the rights of our soldiers. And I think that's wrong. Thank you.