THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2020-0252

SUPREME COURT RULE 7 APPEAL FROM THE JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT-NORTH

BRIEF OF APPELLEES-PLAINTIFFS

Attorneys for Plaintiffs League of Women Voters of New Hampshire, Douglas Marino, Garrett Muscatel, Adriana Lopera, Phillip Dragone, Spencer Anderson, and Seysha Mehta
and
Attorneys for Plaintiff New Hampshire Democratic Party

Steven J. Dutton, NH Bar No. 17101
McLANE MIDDLETON, P.A.
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326

Paul Twomey, NH Bar No. 2589
TWOMEY LAW OFFICE
P.O. Box 623
Epsom, NH 03234

William E. Christie, NH Bar No.11255
S. Amy Spencer, NH Bar No. 266617
SHAHEEN & GORDON, P.A.
107 Storrs Street, P.O. Box 2703
Concord, NH 03302-2703

Marc E. Elias, *pro hac vice*
John M. Devaney, *pro hac vice*
Bruce V. Spiva, *pro hac vice*
Amanda R. Callais, *pro hac vice*
Alexander Tischenko, *pro hac vice*
PERKINS COIE LLP
700 Thirteenth Street, NW, Suite 800
Washington, D.C. 20005-3960

Stephanie R. Holstein, *pro hac vice*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101

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STATEMENT OF THE CASE AND FACTS

At issue here is the constitutionality of Senate Bill 3 ("SB 3"), which three separate New Hampshire judges have found to be unconstitutional. Enacted in 2017, SB 3 made sweeping changes to the state's longstanding system for proving domicile for voter registration. DAII190-209.[1] These changes were not only unnecessary, they were also burdensome and confusing, replacing New Hampshire's straightforward registration process with one that applies different standards to voters, depending on when they register to vote. Shortly after SB 3's passage, Appellees the League of Women Voters of New Hampshire, six individuals, and the New Hampshire Democratic Party (collectively, "Plaintiffs") sued Secretary of State William Gardner (the "Secretary") and Attorney General Gordon MacDonald (collectively, the "State") challenging the law.

I. Voter Registration Background

New Hampshire is unique among states because it only provides two primary means of voter registration: voters may (1) register in person at their clerk's office before an election, or (2) at the polls on election day

[1] Plaintiffs use the citations set out in the State's Brief ("Br.**") for the record materials mentioned in Br.8 n.1. For record materials not mentioned in Br.8 n.1, Plaintiffs use "PVIII**" to refer to the August 28, 2018 PI hearing transcript and "PIX**" to refer to the August 31, 2018 PI hearing transcript. Citations to "PAI-PAIV**" refer to volumes I through IV of Plaintiffs' appendix.

("SDR").[2] RSA 654:8; RSA 654:11; RSA 654:27; RSA 654:7-a. Historically, most have registered using SDR. T1388.

Before SB 3, all registrants were subject to the same requirements and forms, no matter when they registered to vote. They provided "reasonable documentation" of age, identity, citizenship, and domicile. RSA 654:7; RSA 654:12. If a registrant lacked domicile documentation, they could still register by completing a "domicile affidavit" or, as of 2016, a "sworn statement" on the registration form. DAI5; DAI8. After attesting to domicile, no further action was required.

This system resulted in robust civic engagement, consistently high voter turnout, and confidence in New Hampshire's elections. PIV133, 149-150; T273-75. Elections were also secure, with voter fraud virtually non-existent. DD43; PAI135-39; DAI261; PIV133, 149-50. Even *claims* of voter fraud were rare, PIX56-58, until 2016 when Donald J. Trump lost the New Hampshire presidential election and claimed that thousands of out-of-staters voted unlawfully in the state, PVI118, 126.

There was no evidence to support these claims. *Id*. Nevertheless, shortly thereafter, SB 3 was enacted largely along party lines. DAII190; DAIII17-34; DAV113-32, 149-50, 163-64. Voter fraud was its *only* stated justification. DD41-43; PAI130-34; DAI259-61; DAIII17-18, 27-28, 199. In enacting it, the General Court and the Governor ignored overwhelming opposition from New Hampshire citizens and election officials. *See* PAIII64-66 (summarizing legislative testimony).

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[2] New Hampshire also allows absentee registration in narrow circumstances. RSA 654:16; RSA 654:17; RSA 654:20.

II. Voter Registration under SB 3

SB 3 was not the modest change the State represents it to be. SB 3 drastically altered three main aspects of New Hampshire's domicile law, making it far more confusing and difficult to register.

First, it created two classes of registrants based upon the time of registration. Voters registering more than 30 days before an election cannot use a domicile affidavit and must instead present domicile documentation or be turned away. DAII202-05; PVI66-67. Voters registering within 30 days of an election or on election day must also present domicile documentation; if they lack documentation, they must complete "Form B," SB 3's new second page of the Voter Registration Form. DAII203-05.

Second, SB 3 replaced the domicile affidavit with six dense, confusing paragraphs on Form B, where a voter without domicile documentation must select one of two options. DAI10-11; T813-16. Under the first, "Option 1," registrants must agree to submit domicile documentation to the clerk's office within 10 or 30 days after registering, depending on the hours of their local clerk's office. DAI11; DAII203-04. These registrants receive the Verifiable Action of Domicile form ("VAD"), another confusing document listing categories of documents that satisfy SB 3. They must sign and return the VAD, along with their domicile documentation, before the deadline. DAI12; DAII198-200.

Under the second option ("Option 2"), registrants swear they are not "aware" of any domicile documentation and consent to officials taking "other actions" to verify their domicile. DAI11; DAII203-05. These actions

may include home visits from government officials to verify domicile. DAII204.

After selecting Option 1 or 2, a registrant must sign an acknowledgement that they "have read and understand the above qualifications" under penalties of voter fraud. DAI11. In contrast to the requirements for proving domicile, Form B allows registrants to prove age, citizenship, and identity as they did before SB 3—by signing an affidavit. *Id.*

Third, SB 3 codified a new type of "voter fraud" that has no relation to fraudulent voting. A person now commits "wrongful voting" if they select Option 1 "and purposely and knowingly fail[] to provide a copy of the document by mail or present the document in person to the town or city clerk by the deadline." DAII208. The penalties include a fine up to $5,000 and a class A criminal misdemeanor. RSA 659:34. If this provision is permitted to stand, New Hampshire would be the only state in the country to penalize voters criminally for not submitting paperwork. PIX91-92.

III. Litigation History

Three Superior Court judges reviewed SB 3—two during separate preliminary injunction hearings and the court below in a seven-day trial. Each found that SB 3 severely or unreasonably burdens the right to vote. All three decisions relied on robust evidence and application of this Court's long-standing framework for evaluating the constitutionality of voting laws under *Guare v. State*, 167 N.H. 658 (2015).

First, after full briefing and a hearing, Judge Temple (Hillsborough County Superior Court South) temporarily enjoined SB 3's penalties on

September 12, 2017. The court found that SB 3's penalties are "'severe' restrictions on the right to vote," are not "'narrowly drawn' by any stretch of the imagination," and "act as a very serious deterrent on the right to vote." DAI73. It also expressed "serious concerns regarding other parts of SB 3." DAI74. However, given the then-impending election (scheduled for the day after the hearing) the court found it could not fairly rule on temporary injunctive relief as to the entire bill. DAI71-74.

Next Judge Brown (Hillsborough County Superior Court North), to whom the case was reassigned in 2018, found SB 3 unconstitutional. He conducted a nine-day preliminary injunction hearing, considering 79 exhibits and testimony from 18 fact and four expert witnesses.

Judge Brown preliminarily enjoined SB 3 in full on October 22, 2018, finding that "SB 3's forms are drafted in a manner that makes them confusing, hard to navigate and comply with, and difficult to complete in a timely manner." DAI248. Moreover, "[g]iven the extraordinarily low rate of documented voter fraud in this state, it is far more likely that more legitimate voters will be dissuaded from voting [by SB 3] than illegitimate voters will be prevented." DAI261-63.

This Court stayed the injunction on October 26, due to the proximity of the approaching election. The criminal penalties remained enjoined. DAI268-69. While SB 3 was in effect for the 2018 general election, the preliminary injunction resumed the next day. DAI268-70. SB 3 has not been in effect since 2018.

The case proceeded to trial in December 2019, now before Judge Anderson (Hillsborough County Superior Court North). Pursuant to a joint stipulation, the trial addressed the events surrounding the 2018 general

election, with the court using the evidentiary record from the 2018 preliminary injunction hearing for events before then. PAI175-76. At trial, the parties presented 88 additional exhibits and testimony from 14 fact witnesses and three experts.

Multiple fact witnesses testified to voters leaving polling places before registering, receiving incorrect guidance from election officials on how to register due to SB 3's complex forms, and being forced to leave polling places to obtain domicile documentation even though SB 3 purportedly allows registering without them. *See* PAI58-60, 69-71, 73-76 (collecting testimony). Other witnesses, including local election officials and top officials from the Secretary's Office, revealed their own confusion about when registrants may use Option 1 or 2. *See* PAI73-76, 95-102 (collecting testimony). Tellingly, the Deputy and Assistant Secretaries—the officials responsible for implementing SB 3—contradicted each other about this very question on the stand. PAI103-06; T1317-21, 1410-12, 1416-17, 1493, 1534-35, 1540; PVII81-82, 137-38.

Plaintiffs' expert evidence was also compelling. Dr. Deborah Bosley, a nationally known expert in plain language and readability, analyzed SB 3's forms. Her analysis revealed they were written at a graduate reading level, far above the average New Hampshire voter's ability. DD10-12; PVIII22-23, 25, 27, 77-78. The participants in her usability study—unregistered, eligible New Hampshire citizens ages 18-29 years—could not understand the meaning of multiple words and phrases on the forms. PVIII64-66, 68-69, 79; PAIV3-189. She concluded the forms "are overly complex" and "the average adult will find [them] too difficult to understand on their own." PVIII84-86.

Dr. Muer Yang, a queuing theory expert, found SB 3's complexity would result in long lines at polling places. DD13-19; PAI83-92; T690-92, 700-10; PIX173, 179. His models were built on actual information from election officials about waiting times in pre-SB 3 elections and the 2018 general election in which SB3 was in effect. PIX163-71. His conclusions were supported by testimony and data establishing that waiting times at multiple polling locations in the 2018 general election exceeded the 15-minute standard the State had used for nearly two decades. DD17-18; PAI82 n.256; *see id.* 82-88 (collecting testimony).

Dr. Michael Herron, a Dartmouth professor and expert in statistical analysis of election administration, applied political science's long-recognized "calculus of voting" framework to evaluate the costs imposed on voters by SB 3. DD20; PAI40-41; T280, 285-92. His analysis revealed that SB 3 would deter eligible voters from registering and voting. T280-83, 288-89; PIV154-55, 166-67. He further concluded these burdens would disproportionately affect college students, voters with higher residential mobility, lower income voters, and Democratic-leaning voters because they are more likely to use SDR. DD19-22, 36; PAI81-82, 106-14; T307-10, 314-15, 320-21; PIV186, 190, 194-95, 199-201, 203-04, 206-11. Dr. Herron also performed a statistical analysis of voter fraud in New Hampshire and found the rate was consistently extremely low. PIV134-35 (e.g., .00093% in 2016 and .00052% in 2018).

Finally, Dr. Lorraine Minnite, a leading expert on voter fraud, concluded voter fraud concerns in New Hampshire were unsupported. PAI137-38; PIX27-28. She analyzed reports of fraud in New Hampshire over 20 years, reviewing newspapers and official government reports, and

found there was virtually no evidence of voter fraud—and even less domicile fraud (the only fraud SB 3 could possibly address). DD43; PIX56-59. Most reported instances of suspected voter fraud were merely mistakes by eligible voters and, ultimately, voter fraud could not justify SB 3. PIX27-28, 61-67.

The State did not rebut this evidence. Instead, it attempted to make the case that SB 3's burdens could be minimized by third parties assisting with the registration process and through prosecutorial discretion as to the enforcement of SB 3's penalties. DD38-40. The court rejected this, finding that SB 3 "imposes an unreasonable and discriminatory burden on the rights of voters," and the State's "reliance on the beneficence of third parties [is] fraught with risk." DD40. It further found that, "the State's overarching argument that Plaintiffs failed to identify any individual that was prevented from voting due to the implementation of SB 3 largely misses the point… SB 3 does not stop someone at the polls from casting a ballot; it discourages them from showing up in the first place." DD37.

The State also *conceded* that "voter fraud is virtually non-existent in" New Hampshire and provided no evidence that using the domicile affidavit had resulted in improper registrations. DD43; PAI149-52. Instead, it relied upon *post-hoc* rationalizations, contending that SB 3 promoted voter confidence and reduced administrative burdens. The court rejected these arguments. DD44-46.

The court found Plaintiffs' fact and expert witnesses credible, while expressly discrediting the State's expert. DD22-26. It permanently enjoined SB 3 on April 9, 2020. This appeal followed.

SUMMARY OF ARGUMENT

Based on the extensive record before it, the court correctly found SB 3 violates the New Hampshire Constitution. The State's contrary arguments are meritless.

The court applied the correct standard to Plaintiffs' facial challenge to SB 3. The court should not conjure hypotheticals and declare SB 3 constitutional if any hypothetical constitutional circumstance can be found. Plaintiffs asserted that SB 3 violates New Hampshire citizens' constitutionally guaranteed right to vote under Part I, Article 11 of the New Hampshire Constitution. This challenge is evaluated under the "flexible standard" set forth in *Akins v. Secretary of State*, 154 N.H. 67 (2006), and reaffirmed in *Guare*, which requires the court to balance the burdens imposed by the law against the State's proffered justifications. *Guare*, 167 N.H. at 663. The court correctly did so here.

The State's argument that *Guare* should be overruled is baseless. *Guare* is not an outlier decision. It is entirely consistent with this Court's decision in *Akins* and the long-applied federal *Anderson-Burdick* test. There is no reason to overrule *Guare*.

The court also correctly concluded that, based on the record, SB 3 unreasonably burdens voting rights with penalties that deter lawful voters from registering, confusing and misleading language on registration forms, and long lines caused by its unclear forms and procedures. No State interest justifies these burdens—including justifications based on non-existent voter fraud and *post-hoc* rationalizations.

The court also correctly concluded SB 3 independently violates New Hampshire's equal protection provisions. SB 3 regulates a fundamental right and arbitrarily—and unconstitutionally—divides the state's population and treats these groups differently.

The court properly declined the State's invitation to rewrite the statute to clarify the forms SB 3 requires. SB 3 expressly lays out what those forms must include. Consequently, the court lacked the power to revise them; only the General Court has that authority. Remand is inappropriate.

LEGAL STANDARD

A court's determination of a law's constitutionality involves both factual findings and the application of law to those facts. The severity of a law's burden on the right to vote is a factual determination. *Opinion of the Justices*, 171 N.H. 128, 134 (2018); *see also LeClair v. LeClair*, 137 N.H. 213, 222 (1993) (superseded by statute on other grounds). Analyzing whether the law is substantially related to an important government objective is also "fact-specific." *Opinion of the Justices*, 167 N.H. 539, 542 (2015) (citation omitted).

While it is true this Court reviews *de novo* the trial court's application of law to facts, *Emerson v. Gonzales*, No. 2016-0449, 2017 WL 3468618, at *1 (N.H. July 31, 2017), the court's factual findings bind this Court unless they are clearly erroneous. *Blagbrough Family Realty Tr. v. A & T Forest Prod., Inc.*, 155 N.H. 29, 36, 38 (2007). "Conflicts in testimony, questions about the credibility of witnesses, and the weight to be given to testimony are matters for the trial court to resolve." *Emerson*, 2017 WL

3468618, at *1; *see also Blagbrough*, 155 N.H. at 38 (trial court need not explain away all inconsistencies in evidence). "If the findings can reasonably be made on all the evidence, they must stand." *Id.* (quoting *Rancourt v. Town of Barnstead*, 129 N.H. 45, 50 (1986)).

ARGUMENT

The State offers four arguments to persuade this Court that three different judges erred in concluding SB 3 is unconstitutional. It first asserts that the trial court applied an incorrect legal standard in finding SB 3 facially invalid and, for the first time, argues that this Court incorrectly decided *Guare* and should ignore *stare decisis* and overrule that longstanding precedent. Next, it argues in vain that SB 3 imposes reasonable burdens that important state interests justify—all factual assertions without record support. Finally, the State argues the court was wrong to find a separate equal protection violation and, alternatively, that this Court should remand so the State can edit SB 3's forms. The robust record supports the court's decision. This Court should affirm.

I. The court correctly found SB 3 facially invalid.

The State' argument that the court applied the incorrect legal test for facial validity is unavailing. Br.21. Plaintiffs challenged SB 3 as a violation of Part I, Article 11 of the New Hampshire Constitution, which protects the fundamental right to vote. Each of the three trial judges to consider this applied the test this Court articulated in *Akins*, and reaffirmed in *Guare*. Those cases adopt the federal *Anderson-Burdick* framework for evaluating undue burdens on voting and use a "flexible standard" that balances the burdens on voters against the State's specific interests in the restriction. *See*

Guare, 167 N.H. at 663. The State attempts to bypass that test, asserting that a facial challenge to a voting law requires demonstrating there is *no* circumstance under which the restriction could theoretically be constitutionally applied. Br.20.

But New Hampshire courts have consistently understood that a "facial challenge is best understood as a challenge to the terms of the statute, not hypothetical applications, and is resolved simply by applying the relevant constitutional test to the challenged statute." *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214 (D.N.H. 2018) (quotation and citation omitted). *This* is the governing test for facial challenges. The "no set of circumstances" approach the State advances "obscure[s] the relevant inquiry, as [it] could be taken to suggest that a court's task is to 'conjure up' hypothetical situations in which application of the statute might be valid." *Id*. at 213 (citations omitted). Thus, New Hampshire courts—including this Court, *infra* at 18-20—adjudicate facial challenges "by applying the relevant constitutional test to the challenged statute," without trying to imagine a situation in which the statute might be validly applied. *Id*. (citations omitted); *see also Doe v. City of Albuquerque*, 667 F.3d 1111, 1124 (10th Cir. 2012).

While some courts acknowledge the "no set of circumstances" language, the court correctly observed that this is merely a "descriptor of the outcome of a constitutional test, rather than a test in and of itself." DAII83. This Court has *never* used the "no set of circumstances" test to evaluate claims of facial invalidity of voting laws. It has consistently decided these challenges by applying the *Akins*-*Guare* framework to a statute's plain terms.

For example, in *Guare*, this Court addressed a facial challenge to a statute that added language to New Hampshire's voter registration forms. Although the language affected few registrants and there were circumstances under which the law *could* be constitutional, this Court found the law unconstitutional. *Guare*, 167 N.H. at 669. While acknowledging the "no set of circumstances" approach, the Court did *not* consider hypotheticals under which the statute could be constitutional. *Id*. at 662. Instead, it evaluated the effects of the challenged language and the justifications for it. Nothing in *Guare* suggests the correct approach is to invent hypotheticals and uphold a statute if just one hypothetical would result in a constitutional application. *Guare* did precisely what the court did here: it "appl[ied] the relevant constitutional test to the challenged statute." *Saucedo*, 335 F. Supp. 3d at 214.

The *Akins*-*Guare* balancing test derives from the federal *Anderson*-*Burdick* standard; the court's approach was also consistent with that of countless federal courts that have considered similar challenges. Indeed, the requirement that the State justify burdens on voters through a compelling state interest is essential to the courts' role as the guardian of the right to vote. That role would be compromised if courts were required to uphold burdensome statutes if there were *some* hypothetical in which the burdens were acceptable.

The State's argument that SB 3 survives constitutional challenge if it violates the voting rights of only *some* voters should also be rejected. Br.20. Under this theory, a restrictive voting law can survive a facial challenge "when it imposes an unjustified burden on some" voters, Br.20, even if the law restricts the rights of thousands. This is untenable, and would

immunize virtually all voting restrictions so long as they "do[] not burden most, much less all, [] voters." Br.21. Moreover, it would conflict with New Hampshire's promise that "[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election." N.H. Const. pt. I, art. 11.

Even courts considering challenges under the U.S. Constitution, which lacks such an explicit guarantee, have uniformly rejected this approach. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (controlling op.); *see also, e.g.*, *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016); *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016). The question is not how much a law burdens voters *generally*, but rather how it burdens *those impacted by it*. *Id*.

The State's citations to *Crawford*, *Frank*, and *Brakehill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019), do not advance its argument. Br.21. As the court recognized, those cases involved requirements that applied to *all* voters. SB 3, however, applies to residents who are not yet registered but want to be. DD35. These people alone—"already a minority of the voting population in New Hampshire"—face SB 3's burdens. DD36-37. It is the burdens on them that courts must evaluate.

II. *Guare* should not be overruled.

The Court should also reject the State's extraordinary argument that *Guare* should now be overruled. This argument rests primarily on the incorrect assertion that the *Guare* framework and its application of "intermediate scrutiny" to voting laws is an impermissible departure from the *Anderson-Burdick* test that federal courts use to decide the lawfulness of voting restrictions under the U.S. Constitution. Br.24. The threshold

problem with this argument is that voting claims brought under the state constitution, like Plaintiffs' claims here, are governed by state law; decisions from federal courts provide "guidance only." *Akins*, 154 N.H. at 71. There is no requirement that this Court's jurisprudence relating to voting laws exactly mirror federal law.

In any event, in deciding *Guare*, this Court expressly relied on the *Anderson-Burdick* line of cases, and the framework it adopted is consistent with them. The *Guare* Court used *Burdick v. Takushi*, 504 U.S. 428 (1992), as the foundation for the standard it adopted; it quoted directly from *Burdick* stating, "[w]e apply a balancing test to determine the level of scrutiny we must apply" under which we "weigh the character and magnitude of the asserted injury to the [voting] rights" sought to be vindicated "against the precise interests put forward by the State as the justifications for the burden." *Guare*, 167 N.H. at 663 (quotation marks ommitted).

This Court's use of intermediate scrutiny in *Guare* is not meaningfully different from the balancing test that federal courts apply. Under *Anderson-Burdick*, courts balance a law's burdens against the State's actual (not *post-hoc*) justifications. *Id.* Courts apply strict scrutiny when voting rights are severely burdened, requiring the State to demonstrate a law was "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. Laws that impose "reasonable, nondiscriminatory restrictions" need to be supported only by "important regulatory interests." *Id.* But even when a law imposes slight burdens, a state must still demonstrate a nexus between the law's actual justifications and the burdens. *Tucson*, 836 F.3d at 1024. In other words, standard

rational basis review does not apply even then, given the importance of voting rights. *Id*. at 1025.

"Most cases fall in between the[] two extremes." *Obama for Am. v. Husted (OFA)*, 697 F.3d 423, 429 (6th Cir. 2012). In *OFA*, for example, the court found the burdens from Ohio's elimination of a three-day early voting period were neither "severe" nor "slight." *Id.* at 429. The court required the State to prove a state interest that is between "compelling importance" and "an important regulatory interest"—referred to as one that is "sufficiently weighty." *Id.* at 433-34 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Applying that standard, the court held that the burdens outweighed Ohio's minimal interest in eliminating the voting period. *Id.* at 436. Other courts have similarly required states to show that laws advance interests that are between "compelling" and "important." *See, e.g.*, *Esshaki v. Whitmer*, 813 F. App'x 170, 171 (6th Cir. 2020).

Guare is fully consistent with *OFA* and this line of cases. Indeed, after concluding that language on New Hampshire's voter registration form imposed an "unreasonable burden" on voting because it incorrectly advised people domiciled in the state they were subject to all state laws that applied to residents, the *Guare* Court required the State to demonstrate an interest somewhere between "compelling" and "important," 167 N.H. at 667-68, *i.e.*, after finding the burden was neither slight nor severe, it required that the State meet "intermediate scrutiny" to justify it. In so doing, the Court relied on *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 545 (6th Cir. 2014), *stay granted* 135 S. Ct. 42, which applied *Anderson-Burdick* and required the state to "articulate specific rather than abstract state interests, and explain why the particular restriction imposed is actually

necessary, meaning it actually addresses the interest set forth." *Guare*, 167 N.H. at 667 (quotations omitted). The *Guare* Court emphasized that this standard was within the "flexible standard" adopted in *Akins* that was itself based on *Anderson-Burdick*. *Id*.

The State also wrongly asserts that the *Guare* Court erred by prohibiting reliance on *post-hoc* rationalizations to justify a voting law's burdens. Br.25. It makes this argument out of necessity because it concedes that voting fraud—the only state interest identified in SB 3's legislative history—is virtually non-existent. DD43. *Post-hoc* justifications are therefore all the State can use to justify SB 3. But courts applying *Anderson-Burdick* have repeatedly recognized that courts must weigh actual justifications for the law, not hypothetical justifications proposed after litigation has begun. *See, e.g.*, *Libertarian Party of N.H. v. Gardner*, 126 F. Supp. 3d 194, 207 (D.N.H. 2015) (declining to "validate [voting] restriction based on hypothetical interests that the State does not invoke"). Moreover, it has long been the law in New Hampshire that in responding to constitutional challenges, the State "may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations." *Cmty. Res. For Just. v. City of Manchester*, 154 N.H. 748, 762 (2007). This Court's rejection of *post-hoc* justifications in *Guare* was sound and consistent with long-standing precedent.[3]

[3] There is nothing unusual about this rule; courts regularly prohibit *post-hoc* justifications in litigation challenging the constitutionality of laws. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("[J]ustification must be genuine, not hypothesized or invented *post hoc* in response to

Finally, the State argues *Guare* should be overruled because it is premised on an incorrect legal finding: that the statutory definition of "domicile" is different from the definitions of "residence" and "resident." Br.25-26. According to the State, the Court never analyzed the definitions of these terms because the State conceded they were legally different. But a plain reading of *Guare* shows that the Court carefully evaluated these statutory definitions and concluded there is a "basic difference" between a resident and a person with a New Hampshire domicile: "a 'resident' has manifested an intent to remain in New Hampshire for the indefinite future, while a person who merely has a New Hampshire 'domicile' has not manifested that same intent." *Guare*, 167 N.H. at 662. The Court thus concluded correctly that the language at issue was confusing because it conflated these definitions. This is consistent with the then-operative statutory definitions of these terms; the State's assertion that the Court erred is baseless.[4]

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litigation."); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 110 (2nd Cir. 2008) (rejecting as "contrived" rationale for restrictive voting practice). This protects against the risk that states will use pretextual justifications to infringe on constitutional rights.

[4] The State's invocation of *Casey v. Gardner*, 173 N.H. 266 (2020), does not salvage its argument. *Casey* interpreted amended definitions adopted in 2018—not the statutory definitions at issue in *Guare*. The General Court changed the definition of residence after *Guare* and, consequently, *Casey*'s analysis of "residence" and "domicile" has nothing to do with the law as it existed in *Guare*. Moreover, *Casey* was a certified question brought to this Court under a rule that limits its scope to "the cause *then pending* in the certifying court." N.H. Sup. Ct. R. 34 (emphasis added). Finally, the State claims the *Casey* Court stated that "residence" and "domicile" are

Accordingly, *stare decisis* requires rejecting the State's request to overturn *Guare*. The Court has emphasized that *stare decisis* "is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results." *Brannigan v. Usitalo*, 134 N.H. 50, 53 (1991) (quotations omitted); *see also State v. Quintero*, 162 N.H. 526, 539 (2011) ("*Stare decisis* is the essence of judicial self-restraint."). The Court thus rarely reconsiders its prior decisions: "[W]hen asked to reconsider a holding, the question is not whether we would decide the issue differently *de novo*, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." *Jacobs v. Dir., N.H. Div. of Motor Vehicles*, 149 N.H. 502, 504-05 (2003) (quotations omitted).This Court correctly decided *Guare*; the State's request must be rejected.

III. The court's finding that SB 3 unconstitutionally burdens the right to vote is not clearly erroneous.

The State's alternative contention that the court should have upheld SB 3 under *Guare* rests on its disagreement with the court's factual findings as to SB 3's burdens and the lack of state interests. But the court's findings are well supported by the record and must be upheld under the well-settled clear error standard of review. *Blagbrough*, 155 N.H. at 36, 38. The State fails to make that showing.

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synonymous, Br.26, but fails to note that the Court was only comparing one statutory definition of residence while in fact there are multiple such definitions, including the motor vehicle definition of RSA 259:88, mentioned in *Casey*, which is not synonymous with domicile. *Id*. at 272-74.

A. SB 3's penalties unreasonably burden voters.

The court did not clearly err in concluding SB 3's penalties impose unreasonable burdens. DD32-35, 39; DAI262-63; DAI74. The State's contentions that the court (1) gave the number of people who failed to return paperwork after the 2018 general election too much weight, (2) incorrectly interpreted the sweep of SB 3's penalties, and (3) found that no penalties for voter fraud would be constitutional, are insufficient to establish clear error.

The court's determination that SB 3's penalties unreasonably burden the right to vote was based on extensive record evidence, not simply the number of individuals who failed to return documentation of domicile in 2018, as the State suggests. Br.34. That evidence included: credited expert testimony establishing that the threat of criminal penalties deters potential voters because it increases the cost of voting, DD33; PIV166-67; testimony from the Deputy Secretary conceding that local officials are not advised to instruct registrants about penalties because of "the appearance of intimidation," DD34; PVI172; PV197-98; PAI43-44; and testimony from voters affirming that the threat of penalties would deter them from registering, DD34-35; T227-29; PIII53-54; PAI43 & n.78. True, the court also found it compelling that *not one* of the 66 new registrants who selected Option 1 between January and June 2018 timely submitted proof of domicile, and that, of the 1,104 new registrants who selected Option 1 between July and December 2018, 815 (74%) did not return proof of domicile. DD31; PAIV190-93; T1129-30. But it had good reason to give that evidence weight. State officials testified that per SB 3's plain language,

if SB 3's penalties had been in effect, *all of those individuals would have been investigated and subject to potential prosecution*. DD46-47; T989-91; T1110, 1130-32; T838-39; PAI46-47.

In contrast, the State's assertion that these voters would have returned paperwork if the penalties had been in effect is speculative. The State cites nothing in support. Moreover, it ignores that although the penalties were stayed, Form B—which all of these voters signed—still expressly required registrants choosing Option 1 to return domicile documentation. DD47; DAI10-12. That hundreds of voters did not comply with this express command shows that the same result could be expected *even if* the penalties were in effect. At bottom, the evidence demonstrates that the court's findings on this point can "reasonably be made" and "must stand." *Blagbrough*, 155 N.H. at 38.

The State's characterization of the penalties as "narrow" because they only impact election-day voters who "purposely and knowingly" fail to return documents is similarly unavailing. Br.34-35. No case requires that a threshold number of voters be impacted for a law to unreasonably burden voting. Rather, *Guare* and *Anderson-Burdick* both contemplate that laws that unreasonably burden only subsets of voters can be unconstitutional. *Supra* at 16-17.

More to the point, this argument misreads the statute. SB 3's penalties are not limited to election-day voters; they apply to any voter who registers with Form B within 30 days of election day or on election day. DD4; DAI10-12; PAI156. All voters registering during that time who select Option 1—not just election-day voters—are subject to SB 3's penalties for nothing more than purposely and knowingly failing to return paperwork.

Further, even if SB 3's penalties only impacted election-day voters, they would still be unreasonable, as the bulk of New Hampshire voters register *on election day*. T1401-02; PAI19. SB 3 would therefore place hundreds, and potentially thousands, of voters at risk. *Supra* at 4.

Likewise, the "purposely and knowingly" language does not cabin the statute's reach. DD35. The simple act of signing Form B provides prosecutors with evidence of purposeful *and* knowing conduct on the part of any voter who fails to timely return paperwork. DAI11; PAI45 (affirming "**that I have read and understand the above qualifications** for voting"). Indeed, the State has used similar acknowledgements as basis to prosecute voters in the past. PVI39-41; PAI46.

Finally, the State's contention that the court found the State "may not penalize wrongful or fraudulent registration or voting" is a gross mischaracterization. Br.35. The court did not contest the State's ability to penalize voters who act fraudulently. Rather, its concern was the opposite: under SB 3 "an individual *need not cast a fraudulent vote* in order to be subject to the penalties." DD33 (emphasis added). Indeed, a voter can be entirely truthful about her domicile and fully qualified to vote—like the 815 voters mentioned above, DD46 (citing PAIV192-93)—and yet still be criminally and civilly penalized. DD33.

Consequently, the court's factual finding is not clearly erroneous.

B. SB 3's confusing and misleading forms unreasonably burden voters.

The court also correctly found Form B and the VAD contribute to SB 3's unreasonable burden on voting. The State's arguments to the

contrary—based again on its own interpretations of SB 3 that are wholly divorced from the record—only bolster this conclusion.

The State first argues the court erred in finding Form B and the VAD confusing and misleading. Br.28. But the question on appeal is not whether the court *could* have interpreted the evidence differently; it is whether there is sufficient evidentiary support for the interpretations and findings the trial court reached. *Emerson*, 2017 WL 3468618, at *1; *see also Blagbrough*, 155 N.H. at 36, 38. The answer to that question is a resounding "yes."

The record is replete with evidence supporting the findings that Form B and the VAD are confusing and misleading. For example, uncontradicted expert evidence established the forms were written at a reading comprehension level far above the average voter, and actual users were deeply confused by them. *Supra* at 9. Multiple fact witnesses confirmed this. Election officials who witnessed voters attempting to complete the forms testified that voters misunderstood the forms, often initialing both Options 1 and 2. DD28; *see, e.g.*, T405; DAV174; PAI58-60.

And high-ranking state officials verified this confusion by interpreting the language on Form B differently *on the stand*. *Compare* DD30; T1534-45, 1540 (Assistant Secretary) (testifying voter should only select Option 1 if they know they have, at that moment in time, proof of domicile), *with* DD30; T1411-12 (Deputy Secretary) (testifying voters should select Option 1 even if they did not have, at that moment in time, proof of domicile as long as "they believed they *could* obtain said proof"); PAI103-04. Though the State argues this testimony is not "inconsistent," Br.29, a plain reading reflects otherwise. At a minimum, the court's factual

finding on this point is reasonable and, consequently, "must stand." *Blagbrough*, 155 N.H. at 38.

The documents themselves (particularly the VAD), also demonstrated the forms' misleading nature. As the court recognized, the VAD contains "confusing and potentially misleading language suggesting that its list of documents is more exhaustive than the State believes it to be." DD28. "[A]lthough the State repeatedly described the VAD as a general, non-exhaustive guideline, the form itself states that that '[o]nly one item *on the list* is required to demonstrate a verifiable act.'" DD29; DAI12; PAI61. Thus, an "individual who does not have documentation that exactly matches the provided list [would] believe that he or she cannot" establish domicile. DD29. Though the State argues this is false, Br.29, the record does not support that assertion.

At least three Plaintiffs testified they did not believe they had documents matching any of those listed on the VAD and therefore believed they could not prove domicile.[5] DD29; T487, 524-25; PII205-06; PAI109 n.387; *see generally* PIII47-50, 54-55, 95-96; PIV20-22. Several election officials provided similar testimony.[6] DD29-31; T561-62; DAI59-61; PVII53; T409-12; PAI71; *see generally* PAI77-78.

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[5] The State's attempt to undercut this testimony by asserting these voters could have selected Option 2 misses the point. None of these voters understood the forms enough to know what options, if any, were available.

[6] The testimony provided by local election officials also undermines the State's assertion that "[a] local election official is available to help guide persons in making an appropriate choice." Br.28. Most officials were just as confused as voters by SB 3's forms. *Supra* at 27-28.

Witnesses who observed voters attempting to navigate the forms during elections also confirmed such confusion. DD29-31; T418, 550-51; DAI59-61 ("We noticed a considerable amount of confusion on the part of voters due to the new forms."); T197-98 (voters left registration table without voting; at least one left because she thought she needed documents to register); T113-14 (voter who registered using Form B attempted to leave before voting because she thought she could not vote that day; voter grew frustrated and left after trying unsuccessfully to find proof of domicile); T1136-37; DD29 (officials improperly sent registrants away with instructions to bring back documentation); T233-34 (officials incorrectly informed registrant he could not register without proof of domicile); PAIV200 (registrant left believing he could not vote because he recently moved and official said he needed proof of domicile); PAI58-60, 121 n.447. The record soundly supports the court's factual findings about the forms' confusing and misleading language.[7]

Next, the State attempts to undercut the record by cherry-picking a handful of instances the court discussed and characterizing them as "anecdotes," hearsay statements, and irrelevant third-party actions. But this should be rejected for several reasons.

[7] The State's reliance on *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), is misplaced. Br.31. In *Grange*, Washington had not yet implemented the challenged law. *Id.* at 450. New Hampshire *did* implement SB 3 with problematic results.

The court reviewed the evidence *as a whole* to find SB 3 burdens the right to vote. DD32.[8] The evidence overwhelmingly supports its factual determinations, easily satisfying the "at least some evidence" standard required to uphold the factual findings. *Emerson*, 2017 WL 3468618, at *1; *Blagbrough*, 155 N.H. at 38. Moreover, "anecdotes" are still competent evidence. *See, e.g.*, *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 926 (11th Cir. 1997).

The State's remaining quibbles with specific court findings are otherwise baseless. The State did not object to any of the evidence it now characterizes as hearsay on hearsay grounds. Br.31-34. Accordingly, the court properly admitted that evidence. DD29; T1083-85, 1135; T1331. The State takes other evidence out of context. For example, it argues that the court's reliance on evidence of actions by the President of the University of New Hampshire is error because third-party actions are irrelevant. Br.33. But this ignores that the State's defense relied on actions by third-parties, like universities, and their purported ability to reduce SB 3's burdens. *See, e.g.*, DD40-41; DAII140; PAI35. The State also ignores that the University President's confusion about the law speaks directly to the confusion experienced by citizens throughout New Hampshire and, as such, is plainly relevant. DD31-32; PAIV201-02; PAI78. Similarly, where election officials

[8] The State's other criticisms also fall flat. That the President of the League did not receive calls about problems on election day, Br.15, ignores that the League received questions *before* election day, T1030-31, as well as the significant education efforts the League and others undertook to help voters overcome SB 3's burdens. T1020-26; PAI165-68.

are so confused about SB 3's requirements that they post conflicting information online, Br.33, it is relevant to evaluating the statute's burdens.

Thus, the evidence more than reflects "a new and different registration system that requires domicile proof to be presented in more instances." Br.33. It strongly supports the court's factual findings that SB 3 unreasonably burdens the right to vote.

C. SB 3 causes long lines that unreasonably burden voters.

The court correctly found SB 3 would increase line length, further burdening voters. The State's contrary assertions are misplaced.

Relying on *Promote the Vote v. Secretary of State*, No. 353977, 2020 WL 4198031, at *18 (Mich. Ct. App. July 20, 2020), the State insinuates that the court erred because long lines can never constitute a severe voting burden. But there is no authority for that proposition. In fact, several cases have found just the opposite. *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008) (long wait times may establish a violation of the fundamental right to vote); *N.A.A.C.P. State Conf. of Pa. v. Cortes*, 591 F. Supp. 2d 757, 765 (E.D. Pa. 2008) (same); *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969) (same). This is particularly true when long lines are combined with other issues like widespread confusion. *Common Cause/N.Y. v. Brehm*, No. l7-CV-6770, 2020 WL 122589, at *22-23 (S.D.N.Y. Jan. 10, 2020) (poll-worker errors, confusion implementing statutes, and resulting voting wait times substantially burdened right to vote). Even *Promote the Vote* held only that long lines *alone* do not impose a severe burden. 2020 WL 4198031, at *18.

Here, the threat of long lines constituted just one part of the overall burden the court found SB 3 imposes.

Moreover, the court's conclusion that SB 3 causes long lines that contribute to its unreasonable burden was a finding of fact, and the State has failed to show it was clearly erroneous. To the contrary, this finding was based on credible testimony from two experts, DD13-17, 22, 32; T672-73; T280-81; PAI87-89, election officials' and observers' testimony, D32; T447-49; PAI87-88, and even the State, which agrees that long lines deter voters, D32; PAIV213-14, 227; T875-76; PAI81-83 & n.256. In fact, since 2004, the State had considered a wait exceeding 15 minutes a "long line." PAIV213-14.[9]

The State next attempts to minimize these findings by asserting that few new registrants lack proof of domicile. Br.36. But the court itself acknowledged that fact and, based on unrebutted evidence, still concluded "the increased average registration time under SB 3 will have some negative impact on lines." DD32-33.

Finally, the State's argument that this Court must examine the electoral system as a whole to evaluate the burden, Br.37, firmly works against it. New Hampshire has few alternatives to registering in person. DD3. SB 3 further reduced the options for those without documentation

[9] That standard remains for voter check-in lines, but the State inexplicably revised its threshold to 30 minutes for registration lines while this litigation was pending. T1569-70; PAI82 n.256.

because now those voters cannot register until 30 days before an election.[10] Examining the whole election system only confirms the court's reasonable findings.

D. The State's interests do not justify SB 3's unreasonable burdens.

The court also correctly concluded the State's justifications do not overcome SB 3's burdens. The State takes two approaches in attacking the court's findings. *First*, it implies that the standard of review is rational basis and, therefore, that its blanket justifications of voter fraud, confidence, and administrative burden are sufficient without any "empirical verification." Br.38. *Second*, it attempts to relitigate its arguments below, effectively asking this Court to overturn the court's factual findings because the State disagrees with them. Both are unavailing.

The federal authority—*Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997), and *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)—the State points to for the proposition that its justifications do not require evidentiary support is inapposite. Br.37-38. The Court did not find an unreasonable burden in either instance. *Timmons*, 520 U.S. at 364 (burden not severe and State's asserted interests were "sufficiently weighty" to justify it); *Munro*, 479 U.S. at 199 ("effect on constitutional rights is slight").

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[10] That Plaintiffs were able to register after months of litigation, consulting with counsel, and after SB 3 was enjoined does not undermine the court's conclusion. DD37. Plaintiffs were deterred from registering for years due to SB 3. DD37; T484-85 (did not register until one year after litigation began); T7-16 (same); T524, 530 (did not register to vote until two years after litigation began and after SB 3 was enjoined); PAI169-70 & n.625.

Moreover, neither case is controlling. Rather, *Guare* establishes the standard here, and it required the State to demonstrate that SB 3 is "substantially related to an important government interest," 167 N.H. at 665, by "articulat[ing] specific, rather than abstract state interests, and explain[ing] why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest set forth." *Id.* at 667. While voter fraud and confidence may be important government interests, SB 3 was not "actually necessary" to address them. *Id.* at 667.[11]

The only actual justification for SB 3 in the legislative record was voter fraud, DD41-43; PAI32-34, but the State conceded, "voter fraud is virtually non-existent in this state," DD43. Even if voter fraud were a genuine problem, the State also failed to show SB 3 effectively targets it. Under SB 3, new voters may still register without proof of domicile and cast a ballot that will be counted; the State "presented no evidence that [SB 3's penalties] would be a deterrent to a fraudulent voter." DD44. Further, while SB 3 is purportedly intended to address *registration* fraud relating to using a domicile affidavit, *none* of the few instances of voter fraud prosecuted before SB 3 involved that scenario. *See* PAI139-42 (summarizing lack of domicile affidavit fraud).

There also was no discussion in SB 3's legislative history about safeguarding voter confidence. DD44 (explaining that discussions of voter

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[11] Similarly, the State's reference to *Lennartz v. Oak Point Assocs., P.A.*, 167 N.H. 459, 463 (2015), and *Alonzi v. Ne. Generation Servs. Co.*, 156 N.H. 656, 667 (2008), falls flat. Br.39. Those cases apply the same standard as *Guare*, but there, unlike here, the government demonstrated that restrictions were actually necessary to serve a specific state interest.

confidence were fraud prevention in disguise); PAI132; DAIII18, 28, 199. Thus, the State's reference to "voter confidence" cannot save SB 3. *Guare*, 167 N.H. at 668. Moreover, the court correctly found the State failed to show that New Hampshire—with one of the highest voter turnout rates in the country—has a problem with voter confidence. DD44; PAI143-44; PIV149-50. On the contrary, extensive evidence of voter confusion and other impediments to registering established that SB 3 undermines public confidence in the electoral system. *See* PAI145-46 (collecting evidence). Thus, SB 3 is not "actually necessary" to boost electoral confidence. DD44; PAI145; PIV151-52.

Finally, offering yet another *post-hoc* justification, the State argues the court should have found SB 3 is supported by an interest in reducing administrative burdens associated with investigating and verifying domicile affidavits. Br.40. But the court found correctly that this late justification cannot save SB 3 under *Guare*. DD45; PAI133-34. Not only did the State fail to present evidence establishing that SB 3 would reduce the time state officials spend investigating domicile affidavits, the evidence actually demonstrated that the State's pre-SB 3 investigations were efficient and effective. *See* DD46; PAI147-51 (summarizing evidence). And SB 3 increased demands on the State's resources by requiring officials to investigate not only those without documentation, but also those who chose Option 1 and failed to return documentation. DD47; PAI151-53; T1504-05, 838-39, 989-91, 1110, 1130-32.

The court's factual finding that there is no justification must be affirmed.

IV. The court correctly analyzed Plaintiffs' equal protection claims.

The court correctly decided that SB 3 violates the New Hampshire Constitution's equal protection guarantees. N.H. Const. pt. 1, arts. 1, 2, 10, 12, 14. These protections "are designed to ensure that State law treats groups of similarly situated citizens in the same manner." *McGraw v. Exeter Region Co-op. Sch. Dist.*, 145 N.H. 709, 711 (2001). When a law's classification involves a fundamental right, an exacting level of scrutiny applies. *State v. Lilley*, 171 N.H. 766, 772 (2019); *Baxter Int'l, Inc. v. State*, 140 N.H. 214, 217 (1995). Voting is unquestionably a fundamental right. *Guare*, 167 N.H. at 663; *Akins*, 154 N.H. at 71. The court rightly applied a level of scrutiny more exacting than rational basis. DD48-49. After considering the voluminous record before it, it found the State failed to justify SB 3's disparate treatment of various classes of voters, and therefore the law violated New Hampshire's equal protection guarantees. *Id*. at 51.

Relying almost exclusively on out-of-state federal authority on the role of disparate impact in equal protection analyses, the State misstates the equal protection standard and insists on a specific finding of intentional discrimination. But this Court need not find intentional discrimination because classifications "affecting a fundamental right"—like the right to vote—are nonetheless "subject to the most exacting scrutiny." *In re Sandra H.*, 150 N.H. 634, 637 (2004) (citations omitted). The State's proposed test ignores this Court's command that "[t]he first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." *LeClair*, 137 N.H. at 222 (quotation and

citation omitted).[12] This Court has not required finding intentional discrimination when laws treat similarly situated people differently and a fundamental right is implicated. *Id*. at 222-23; *see also Sandra H.*, 150 N.H. at 637-38 (summarizing equal protection jurisprudence). As the court found, SB 3 treats similarly situated persons differently.

SB 3 divides registrants into two arbitrary categories. Those registering more than 30 days before an election whose voting rights are denied if they fail to provide proof of domicile and must take additional steps to register. DAII194-98, DAII202-04. Those registering within 30 days of an election who do not need to provide proof of domicile, but who face stiff penalties for failing to timely return paperwork, and who must navigate SB 3's complex procedures and forms, and face long lines, *id*.; PAI156-57. These groups are similarly situated New Hampshire domiciliaries seeking to participate in the democratic process. SB 3, however, arbitrarily divides them into differently-treated groups.

Additionally, SB 3 imposes disparate treatment on specific groups of voters, such as registrants who rely on SDR, college students, low-income and homeless voters, and Democratic-leaning voters. DD51-52. As the court found, these populations disparately experience SB 3' burdens because they rely more heavily on SDR than other voters. *Id.* For instance,

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[12] The State's only citation to this Court's opinions is to an inapposite case in which a condominium association's owner argued the association's recently enacted limitation on overnight parking disproportionately impacted him. *Barclay Square Condo. Owners' Ass'n v. Grenier*, 153 N.H. 514, 518-19 (2006). The ability to park a vehicle overnight in a specified spot hardly compares to burdening voting rights and does not implicate a protected constitutional right.

young voters are more likely than older voters to be transitory, must commonly register using new addresses, and often lack the necessary documentation—like leases, current drivers' licenses, or vehicle registrations—needed to prove their domicile. T307-09; PAI107. The court accurately summarized how these voters "are similarly situated with all other voters in New Hampshire" because they are both "domiciled here and, pursuant to the State Constitution, have an equal right to vote." DD50. Yet "[b]ecause specific, identifiable groups" use SDR "at demonstrably higher rates than others, SB 3 disproportionately burdens those individuals." *Id*. at 50-51.

The court found SB 3 slices and dices the registrant population and inflicts burdens on some groups but not others—all without sufficient justification. This is separate and distinct from the court's *Guare* balancing test. The court did not err in its equal protection analysis.

V. There is no basis for remand.

The State's final, fallback argument also fails. The State's assertion that the court should have permitted the Secretary to "revise" and "alter" the content of Form B and the VAD is flawed for several reasons. Br.45-46.

The language in Form B and the VAD is statutorily prescribed; the Secretary has no power to modify it. The Secretary can only "prescribe the form of the voter registration form," RSA 654:7, IV(c), which refers only to the physical layout of Form B or similar forms. Likewise, the Secretary is only authorized to "prepare and distribute" the VAD "in substantially the following form." RSA 654:7, V. Nothing in these statutes permits the Secretary to change the forms' substantive language.

The Deputy Secretary himself recognized this: "[t]he statute puts the language of the form in place … So we don't change wording on the form, but we'll -- we'll play around with the layout to make sure that it fits on the page that we're dealing with." T1420. He confirmed this again for Form B. T1421 ("We printed it, yes, and did the layout. The language is courtesy of the legislature.").

The State argues that language in RSA 654:7, IV directing the Secretary to "prescribe the form of the voter registration form" authorizes him to change the forms' substantive wording, but that language relates only to the forms' physical format. In the immediately preceding sentence, the statute instructs, "the registration forms shall be no larger than 8 1/2 by 11 inches," leaving no question that the section is addressing physical format. SB 3 then details—in more than 2,000 words—the language that must be included in the forms. Read in this context, it is clear that "substantially" means the layout of the form and nothing more. The Secretary's discretion to tweak the physical layout does not give him authority to change the statutorily prescribed language in the forms.

This conclusion is also supported by the plain meaning of "form," which Merriam-Webster defines as "the shape and structure of something *as distinguished from its material*." https://www.merriam-webster.com/dictionary/form (emphasis added) (last accessed Jan. 5, 2021); *see also Batchelder v. Town of Plymouth Zoning Bd. of Adjustment*, 160 N.H. 253, 257 (2010) (relying on dictionary definitions to assist in construing plain and ordinary meaning). Had the General Court intended for the Secretary to edit the content of the forms, it would have said so.

Boyle v. City of Portsmouth, 154 N.H. 390, 390 (2006) (declining to guess what drafters "might have intended").

Any changes to SB 3's forms would be extensive, as the court's finding that they are "needlessly complex, both in length and diction" shows. DD27-28; *supra* at 9. The scope and complexity of the necessary changes would have required specific drafting instructions from the court, but as the court aptly recognized, courts do not "guess what the drafters . . . might have intended" or "add words that they did not see fit to include," *Boyle*, 154 N.H. at 390. Accordingly, the court correctly ruled that only the General Court can "repair" the forms. DD48. Remand is inappropriate.

CONCLUSION

This Court should affirm the court's decision below that SB 3 is unconstitutional.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument not to exceed 15 minutes.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

The League of Women Voters of New Hampshire Plaintiffs and the New Hampshire Democratic Party certify that this brief complies with Supreme Court Rule 16(11). This brief contains 9,414 words.

Respectfully submitted,

ATTORNEYS FOR PLAINTIFFS
LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE, DOUGLAS MARINO, GARRETT MUSCATEL, ADRIANA LOPERA, PHILLIP DRAGONE, SPENCER ANDERSON, AND SEYSHA MEHTA
AND
ATTORNEYS FOR PLAINTIFF NEW HAMPSHIRE DEMOCRATIC PARTY

By Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: January 19, 2021

By: /s/ Steven J. Dutton_____

Steven J. Dutton
NH Bar No. 17101
steven.dutton@mclane.com
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326
Telephone (603) 625-6464

Paul Twomey, NH Bar No. 2589
paultwomey@comcast.net
P.O. Box 623
Epsom, NH 03234
Telephone (603) 568-3254

Marc E. Elias, *pro hac vice*
melias@perkinscoie.com
John M. Devaney, *pro hac vice*
jdevaney@perkinscoie.com
Bruce V. Spiva, *pro hac vice*
bspiva@perkinscoie.com

Amanda R. Callais, *pro hac vice*
acallais@perkinscoie.com
Alexander G. Tischenko, *pro hac vice*
PERKINS COIE LLP
700 Thirteenth Street, NW, Suite 800
Washington, DC 20005-3960
Telephone (202) 654-6200

Stephanie R. Holstein, *pro hac vice*
sholstein@perknscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101
Telephone (206) 359-8000

AND

NEW HAMPSHIRE DEMOCRATIC PARTY

By Its Attorneys:
SHAHEEN & GORDON, P.A.

By: /s/ William E. Christie
William E. Christie, NH Bar No. 11255
S. Amy Spencer, NH Bar No. 266617
107 Storrs Street, P.O. Box 2703
Concord, NH 03302-2703
Telephone (603) 225-7262
wchristie@shaheengordon.com
saspencer@shaheengordon.com

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2021, I served the foregoing BRIEF OF APPELLEES-PLAINTIFFS by electronic mail, to the following counsel of record:

Anne M. Edwards
New Hampshire Dept. of Justice
33 Capitol Street
Concord, NH 03301
anne.edwards@doj.nh.gov

Anthony J. Galdieri
New Hampshire Dept. of Justice
33 Capitol Street
Concord, NH 03301
anthony.galdieri@doj.nh.gov

Samuel R.V. Garland
New Hampshire Dept. of Justice
33 Capitol Street
Concord, NH 03301
samuel.garland@doj.nh.gov

Daniel E. Will
New Hampshire Dept. of Justice
33 Capitol Street
Concord, NH 03301
daniel.will@doj.nh.gov

Bryan K. Gould
Cleveland, Waters and Bass, P.A.
2 Capital Plaza, P. O. Box 1137
Concord, NH 03302-1137
gouldb@cwbpa.com

Cooley A. Arroyo
Cleveland, Waters and Bass, P.A.
2 Capitol Plaza, P. O. Box 1137
Concord, NH 03302-1137
arroyoc@cwbpa.com

Callan E. Sullivan
Cleveland, Waters and Bass, P.A.
2 Capitol Plaza, P. O. Box 1137
Concord, NH 03302-1137
sullivanc@cwbpa.com

Richard J. Lehmann
Lehmann Law Office, PLLC
835 Hanover Streeet, Suite 301
Manchester, NH 03104
rick@nhlawyer.com

James S. Cianci
Legislative Office Bldg, Room 405
Concord, NH 03301
james.cianci@leg.state.nh.us

/s/ Steven J. Dutton
Steven J. Dutton