

THE STATE OF NEW HAMPSHIRE SUPREME COURT

No. 2023-0097

Daniel Richard

v.

Christopher Sununu, et al.

**PLAINTIFF’S SURREPLY TO THE
DEFENDANTS BREIF**

This is a case of first impression. This involves new national standards of review under recent U.S. Supreme Court case rulings regarding Constitutional standards applied to state legislative statutes including the June 2023, *Moore v. Harper*, 600 U.S. ____ (decided June 27, 2023) [hereinafter, “*Moore*”] and *New York State Rifle & Pistol Assn., Inc., et al. v. Bruen* [hereinafter, “*Bruen*”] No. 20-843 (U.S. Supreme Court, June 23, 2022) These rulings are applicable precedent and call for the reversal in this case.

1. Now comes, Appellant Daniel Richard, pro se, submitting this Sur-reply in response to the state Appellees’ Answering Brief.
2. The Appellant claims that his right to remedy of certain voting right violations was summarily and improperly denied without hearing on the merits in this case where he seeks both remedy and redress for violations of his State and Federal voting rights, under the Constitution of New Hampshire [hereinafter “Const. N.H.”] and

the Constitution of the United States. Article 1. Section 2 and the 17th Amendment, [hereinafter U.S. Const. & 17th Am.”].

3. The Attorney General has intentionally mis-represented constitutionally relevant facts presented by Appellant and ignored case law in its response to illegitimately support flawed arguments in opposition. Further, it filed no response regarding the new national controlling case law on this topic. This gaslighting of the public and the Appellant has created a deceptive factually and procedurally faux-excuse to overlook and ignore state officials' illegitimate behaviors to enact material alteration of the constitutional voting process in a manner that is otherwise unable to be corrected. The harm is significant, irreparable, and ongoing.
4. For example, state absentee voting for the election years 2014, 2016, 2018, averaged 4%. But for the 2020 election, absentee voting under new election voting expansion practices--without oversight and improperly and inconsistently applied at a local level--improperly expanded non-constitutional absentee voting to 32%. 260,217 illegal absentee ballots (wrongly printed, distributed, and processed) were counted using ‘Vote Counting Devices’. This Expansion of an unconstitutional voting process *in violation of the State Constitution* represents a hidden political manipulation of process to avoid the safeguards of the State Constitution to wrongfully expand a create new unauthorized classes of unverified and ineligible voters not qualified by Constitutional standards.

5. **Un-Constitutional Ballot Counting Devices**

Appellant states in his amended complaint on pg. 16, Items 58 and 59 that the moderator (and/or asst. moderator) failed to perform their mandatory duty, required by the Const. N.H. Part II, art. 32. This violation is a substantive due process violation as the moderator is constitutionally mandated (“shall”) to “sort,”

verify signatures and affidavits, and count the absentee ballots – as well as other ballots now having been cast by a significant number of non-constitutional voters. Appellees sanctioned the unlawful *discretionary* use of Ballot Counting Devices and enhanced absentee balloting at the local level, perversely employing and distorting NH RSA 656:40, [which allows some towns, cities, or other political subdivisions of the State to use Ballot Counting Devices or not] in a political process/system which circumvents to violate the State Constitution, thereby depriving the Appellant of a fair, equal and uniform voting process throughout the State. These illegitimate state-actor practices are ongoing and officials flaunt their abuse of power, while distorting the facts and moving to dismiss any review, and public trial of the issue. The “manner” in which this complex and multi-tiered “statutory-scheme” of improper vote-generating activity was instigated and enacted by various state officials acting under color of law - is unconstitutional and unlawful for the reasons re-stated herein.

6. These state practices are an infringement of Appellant’s Equal Protection Rights

(a). NH RSA 656:40 impermissibly infringes on the Appellant’s State equal protection rights (Const. N.H. Part I, art. 11.);

(b). NH RSA 656:40 also impermissibly infringes on the Appellant’s equal protection rights under the 14th Amendment of the U.S. Const [hereinafter 14th Am;]

(c). Meanwhile, NH RSA 656:40 impermissibly shifts the state burden of proof for review onto the Appellant to prove that he is harmed by the Appellees’ statutory scheme to “amend” the constitutional duties of the moderator, (i.e., the manner in which votes were not verified yet were counted, and by the initiation and use of Ballot Counting Devices);

(d). Appellees failed to show a historical analogue burdening the right of the Appellant to the equal application of the law in State and Federal elections;

(e). NH RSA 656:40 impermissibly infringes on the constitutional manner (Const. N.H. Part II, art. 32) where the moderator is required to “sort,” verify, and count the votes; this constitutional mandate was improperly and illegally altered by (removed) statute and practice. The inhabitants of this State are deprived of the exercise of their informed consent (Const. N.H. Part I, art. 1.) by the changes to amend the Const. N.H. secretly through legislative sophistry, in direct violation of the due process clause of the Const. N.H. Part II, art. 100. This thereby deprived the inhabitants of this State (which the Appellant is one of) of fundamental right to due process required by Const. N.H. Part II, art. 100 – which requires an open voter amendment process to alter any terms of the Const. N.H. This also violates the due process protection of the Const. N.H. Part I, art. 1, art. 15 and the due process clause of the 14th Am. to the U.S. Const. as recently decided in *Moore*. *The legislative scheme is ongoing harm against lawful voters.*

7. **The Un-constitutional Expansion of Absentee Voting by State Officials**

(a) NH RSA Chapter 657 impermissibly infringes on the Const. N.H. Part I, art. 11 (The Qualified Absentee Voter Clause), and The Voter Qualification Clause of the U.S. Const. Article 1, Section 2 and the 17th Am;

(b) Further, NH RSA Chapter 657 has impermissibly shifted the burden of proof onto Appellant to prove that he was harmed by Appellees statutory scheme (progressively implemented) to impermissibly alter the constitutional language in order to surreptitiously expand absentee voting “rights” (thereby increasing illegitimate ballots cast and counted) **without the consent of the voters** and

outside of the Constitutional safeguards and requirements provided in the Const. N.H.;

(c) NH RSA Chapter 657 violates the Const. N.H. (The Qualified Absentee Voter Clause), and The U.S. Voter Qualification Clause. The Const. N.H. Part I, art. 11, only authorizes those -

“...who are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person;”

(d) The Appellant was disenfranchised by this scheme and his vote diluted, as his State and federal voting rights, are violated by depriving the Appellant of the fair and equal election process established by each Constitution. The illegitimate government alteration of the constitutional election process by sophistry and sleight-of-hand alterations in various legislative (i.e., political) manipulations of the constitutional language – in order to artificially create more votes, without submitting their “scheme” to significantly alter the constitutional “manner” to create an exponential number of new-sub-par votes – is both an abrogation of the valid constitutional amendment process and overall integrity of the vote casting process reasonably expected by citizens, including Appellant. The unfair increase in constitutional voting by the additional tabulation of various non-constitutional absentee, legislative and political manipulations is largely hidden from common and public observation, and represents voter fraud of the worst kind, the dilution of proper votes cast using bogus unconstitutional votes new *politically* manufactured and processed as valid votes under color of law. It alters the entire landscape of bona fide voting process – by creating and allowing a calculated and artificial dilution of votes using expanded and unverified “absentee” *and other* processes that lacks constitutional validity.

(e) The inhabitants of this State are deprived informed consent (Const. N.H.) by what is an illegal expansion of “new” votes that avoid the mandatory process required to amend the Const. N.H. This scheme deprives will continue to deprive the inhabitants of this State of the fundamental due process required and essential for voting under Const. N.H. Part II, art. 100. It also violates the due process protection of the Const. N.H. Part I, art. 1, art. 15, and the due process clause of the 14th Amendment to the U.S. Const., Moore.

As established by *Moore*, state officials may not duck and or ignore its responsibility to review the state’s impermissible voter-interference practices (In Moore that state practice to substantively alter election outcomes was gerrymandering.) In this case, officials similarly claim that ballot counting devices and absentee ballot processing are non-justiciable issues for this Appellant in this case. Here, absentee balloting is the new gerrymandering.

8. **Legislature improperly passed an unconstitutional statute permitting so-called Resident Aliens the Right to Vote without a Constitutional Amendment**

(a) “N.H. Const. pt. I, art. 11. By the article’s plain language, an individual must be an inhabitant of this State,” Fisher. (a). NH RSA 21:6, RSA 21:6 (a) impermissibly infringes on the Const. N.H. Part I, art. 11 (Voter Qualification Clause) and The Voter Qualification Clause of the U.S. Const. Article 1. Section 2. and the 17th Am;

(b) NH RSA 21:6 impermissibly shifts the burden of proof onto this Appellant for him to prove that he is harmed by this statutory scheme *to amend* the Constitutional definition of a qualified voter without following Constitutional Amendment requirements, which specifically require the consent of “*the inhabitants*” of N.H;

(c). NH RSA 21:6 is a state statute that allows *resident aliens* the right to vote in N.H. in direct violation of both State and Federal Constitutional requirements.

(d). Under state and federal Constitutions, the Appellant was disenfranchised, and his vote diluted by this non-constitutional statutory scheme practiced by state election officials. The deprivation and harm to a constitutionally fair and equal election process will continue.

(e). The inhabitants of this State have been deprived informed consent (Const. N.H.) about the illegitimate statutory process that alters constitutional voting using a series of legislative changes that expand voting to include ‘new’ unqualified votes and voters. This expansion of new voter classes is not allowed by definition in the State Constitution. These back-door alterations of the State Constitution occurred by the implementation of new ‘laws’ promoted by government officials over a period of time – each which circumvents the definition of those permitted to vote defined in the Constitution, thereby depriving the inhabitants of this State the due process required before amendment. Const. N.H. Part I, art. 1, art. 15 and Part II, art. 100 and Federal due process, 14th Am. *Moore*.

9. *Bruen (2022)* - A recent U.S. Supreme Court decision, *Bruen* further articulated a two-step analysis for determining whether a law or regulation of constitutionally protected conduct is unconstitutional (as is claimed in this case). First, courts must determine whether any enumerated right (*plain text*) covers an individual’s conduct. *Bruen*.

10. If so, then the “*Constitution presumptively protects that conduct*,” and the Government must justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition regulating the right in question. Only then

may a court conclude that the individual's conduct falls outside the enumerated right's unqualified command.

11. In the instant case, the *plain text* of the State Constitution uses the specific word "inhabitant" 25 times, which underlies the Appellant's claims because he is **an inhabitant** of N.H. Therefore, the burden falls on the Appellees to justify the law showing that it is consistent with State and Federal constitutions and election laws written pursuant thereof. Here, the plain text word "inhabitant" has been dropped, and new words substituted to expand the classes of who-is-eligible-to vote. By altering *the plain text* meaning to now include whole new groups and classes of voters not included in the original language, the legislature improperly impinged on the Constitutional authority. New groups of voters include out-of-state students, and out-of-state residents, and a plethora of others who, under expanded and redefined words, do not qualify to vote under the plain text language meaning of the State Constitution.

12. Appellees cited no relevant authority to amend the Const. N.H. *without the consent* of her inhabitants as mandated by the state constitution (Part I, art. 1). Appellees needed to and failed to show some historical analogue relating to: (a). Discretionary Ballot Counting Devices; (b). Statutory expansion of absentee voting; (c). Legislative or other legitimate authority for sua sponte, granting resident aliens voting rights, notwithstanding the Constitution; (d). and must point to some "*historical precedent from before, during, and even after the founding [that] evince a comparable tradition of regulation.*" *Bruen*.

13. **The Lynch Pin is the deprivation of due process by state actors who altered the State Constitution** by using new legislative terms and "voting processes" to improperly expand the number of new voters (and ballots counted) without first properly submitting the proposed changes to the inhabitants for approval or

disapproval, as required under state and federal law. Legislative fiat was used to promote and enact the constitutional requirements necessary for these and other voter-enhancement changes to occur.

14. All of the new specific statutory voting schemes (including widespread absentee balloting manipulations and the extensive use of Ballot Counting Devices) complained of in this case are novel issues to the court, but each is a type of bureaucratic manipulation to improperly and illegitimately expand the votes counted.

15. Appellees rely on *their materially flawed argument* of the *1976 Amendment, Question 8 (b)*. This political tactic was declared by this Court to be unconstitutional in *Fischer v Governor 145 N.H. 28, 37 (2002)*. Resurrecting a political variation of the void argument and trying to apply it flawed reasoning represents legal misconduct.

16. Earlier decisive precedent/rulings at law, such as *Fisher*, were ignored by Appellees and the Court when dismissing the Appellant's claims under *Moore*. *The 1976 Question 8 amendments* how the state has violated the Appellants substantive and procedural due process rights under both State and Federal Constitutions.

17. The lower Court and Appellees further evaded the historical facts and controlling 2000 state Court precedent of Fisher, which previously declared the *1976 Amendment Question 8 (b) - The Domicile Question* - to be unconstitutional:

"It is clear, however, that the removal of the "proper qualifications" language from the voting provision did not conform to the scope of the amendment intended by the constitutional convention. Specifically, it did not relate to the four intended substantive changes regarding age, domicile, duties of the secretary of state, and absentee voting, and far exceeded the

convention's remaining intent to "simplify" the wording of Article 11. Indeed, as noted by the State, the ballot questionnaire submitted to the citizens for ratification of the 1974 amendment failed to alert the voters to any substantive change to the legislature's authority to generally determine voter qualifications." (Emphasis added) *id.*

18. This issue was pled as precedent in the Appellant's lower court claim, which Judge Ruoff avoided, so is raised again for appeal.
19. Appellees' "statements of facts and law" regarding discussion of Question 8 (re: the 1974 amendment) lack legitimacy, as *Gerber v. King 107 N.H. 495, 225 A.2d 620 (1967)* [hereinafter "*Gerber*"] forbids the comingling of five separate and distinct yes or no questions for one yes or no answer, as was done in the instant case on absentee ballots. The issue was resolved more than two decades ago by this court.
20. It is disingenuous now for Appellees (who represent the state's highest elected political and legal officers) to claim in 2023, that the reason the 1976 Question 8 (a) was presented to voters was to reduce the voting age from 21 to 18. This and other "question-8-arguments" have already been briefed, but Appellee's present response is intentionally obfuscation and misleading because the age-18-ballot question was moot long before the time it showed up on the ballot in question in 1976.
21. The voting age reduction/vote had already been completed and enrolled as law in 1974 - two years before it was placed on the 1976 ballot. The issue was void, although referenced by Appellees' counsel as important "precedent" to dismiss this case. The earlier 1974 age-vote stemmed from a CACR proposed by the legislature to voters, who on November 5, 1974, voted 147,484 to 57,756 to

reduce voter age. (See Exhibit E, *New Hampshire Manual*, cited at page 17, Appellant’s Brief).

22. It is disingenuous now for Appellees to aver that 1976 Question 8 (e) ballot somehow represents binding precedent allowing the use (in 2020, 2022, and thereafter) expanded multi-part legislative scheme to unconstitutionally expand voting to new classes, but without a constitutional amendment, since this court previously disallowed such tactics as void as far back as 1967 in *Gerber*.

23. The responses in opposition are stubbornly disingenuous, applying misstatements of fact and law, while omitting contemporary precedent, including *Moore and Bruen*. *Gerber* for example, upholds the common law, and prohibits comingling of multiple unrelated questions to voters with one yes or no choice; *Gerber* pointedly disallowed the voter to vote yes to part of one specific question and no to another part of the same question. The plain text of the last sentence of the 1784 Const. N.H. Part II, Art. 99, in 1792 states:

“Provided that no alteration shall be made in this constitution before the same shall be laid before the towns and unincorporated places, and approved by two thirds of the qualified voters present, and voting upon the “question.”” (Emphasis added) *“[N]o alteration”, and “question” are singular terms, not plural.*

24. In addition to other causes of action and complaints in the Appellant’s Brief, these and other fundamental voter-integrity issues, require review and reversal in 2023, under *Moore and Bruen*.

25. The Court is requested to schedule a review hearing with oral arguments on this matter at the earliest opportunity, as the issues raised are a matter of re-

occurring public harm through the improper dilution of each citizen's vote in the 2020, 2022 and upcoming elections.

26. Following the hearing, this Honorable Court is requested to grant remedial, prospective, and other relief as appropriate.

August 29, 2023

Respectfully submitted,

/s/ Daniel Richard

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Certificate of service

I hereby certify that a copy of the foregoing was served through the Court's e-filing system to all parties of record.

August 29, 2023

/s/ Daniel Richard

Daniel Richard