THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0252

New Hampshire Democratic Party
v.
William M. Gardner, et al.

and

League of Women Voters of New Hampshire, et al.
v.
William M. Gardner, et al.

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

BRIEF OF THE DEFENDANTS

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NEW HAMPSHIRE
SECRETARY OF STATE

and

GORDON J. MACDONALD
NEW HAMPSHIRE
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Fifteen Minute Oral Argument Requested

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III. Whether SB3 violates Part I, Article 11 of the New Hampshire Constitution. DD54-104.

IV. Whether SB3 violates the New Hampshire Constitution's equal-protection provisions. DD99-104.

V. Whether SB3 grants the Secretary of State ("Secretary") authority to modify its registration and verifiable action of domicile forms beyond solely the forms' physical layout and, if so, whether the Secretary should have been permitted to modify those forms to reduce complexity, cure confusion, and add clarification before declaring SB3 facially unconstitutional. DD99-100.

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[1] Citations to the record are as follows:
"PI_" refers to the transcript of the August 27, 2018 preliminary injunction (PI) hearing.
"PII_" refers to the transcript of the August 29, 2018 PI hearing.
"PIII_" refers to the transcript of the August 30, 2018 PI hearing.
"PIV_" refers to the transcript of the September 4, 2018 PI hearing.
"PV_" refers to the transcript of the September 5, 2018 PI hearing.
"PVI_" refers to the transcript of the September 6, 2018 PI hearing.
"PVII_" refers to the transcript of the September 7, 2018 PI hearing.
"T__" refers to the transcript of the trial held on December 3-11, 2019.
"DD__" refers to the addendum to the Defendants' brief.
"DAI-DAV__" refers to the separate appendices to the Defendants' brief.

TEXT OF RELEVANT AUTHORITIES
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

New Hampshire Constitution

Part I, Article 11 [Elections and Elective Franchises.] All 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. Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile. No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States; but the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such offenses. The general court shall provide by law for voting by qualified voters who at the time of the biennial or state elections, or of the primary elections therefor, or of city elections, or of town elections by official ballot, 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, in the choice of any officer or officers to be elected or upon any question submitted at such election. Voting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote in the choice of any officer or officers to be elected or upon any question submitted at such election. The right to vote shall not be denied to any person because of the non payment of any tax. Every inhabitant of the state, having the proper qualifications, has equal right to be elected into office.

Senate Bill 3 (2017)

Due to the size of Senate Bill 3 (2017), its full text is included in the Defendants' Appendix at 458-77.

STATEMENT OF CASE AND FACTS

The New Hampshire Constitution requires registrants to prove their voting qualifications, including that they are domiciled in a particular community. N.H. Const. Pt. 1, Art. 11. Except for absentee registrations, voter registration occurs in person in the presence of an election official. PVI61-62. This election official is trained to answer questions about the registration process and help persons register to vote. T1457-62; PVII72-75, 79-84.

Pre-SB3, registrants affirmed on the voter registration forms that they were qualified to vote on pain of the civil and criminal penalties for voter fraud, which the face of the forms disclosed. RSA 654:7 (2016); *see* DAI5-8. Registrants had to produce documentation of their voting qualifications, including domicile. RSA 654:7, III (2016); PIII162; *id.* PVII83. In over 90% of registrations, new registrants presented a document satisfying this requirement. PVII90, 97; T1538. A registrant lacking domicile proof could complete a domicile affidavit attesting that he was "not currently in possession of necessary documents to prove my domicile." DAI5. If the registrant lacked proof of the other voter qualifications, the registrant could fill out a qualified voter affidavit attesting to those qualifications. DAI22.

Since 2012, the Secretary has been required to verify that each person who signed a domicile affidavit was, in fact, domiciled as represented on the voter registration form. PVI203; RSA 654:12, V(d). The Secretary sent a letter to each registrant who completed a domicile affidavit. If the letter was returned undeliverable, further investigation

would occur to confirm the voter's domicile. T1474, 1502-03; RSA 654:12, V(d-e). If the Secretary was unable to verify a registrant's domicile, the Secretary referred the matter to the Attorney General's Office ("AGO") for additional investigation. T1503.

In 2016, the legislature changed the registration form for election-day registrants for the November 2016 general election eliminating the qualified voter affidavit, DAI22, and the domicile affidavit, DAI5, and adding a second page to the new registration form, DAI7-8, on which a registrant could attest to any or all of the voter qualifications, including domicile. This form was used only during the 2016 general election on Election Day. PVII21; *see* RSA 654:7, III (2016).

During that election, 6,033 individuals registered using a domicile affidavit. PV225-26; DAI16. The Secretary could not verify 458 of those affidavits and referred them to the AGO. PV226-27; DAI17. After at least 582 hours of investigation by AGO personnel, and at least 155 hours of investigation by state police, the AGO verified 392 of the 458 domicile affidavits, DAI15-17; *see* PV225-28, leaving sixty-six domicile affidavits unverified. DAI17; PV228.

A. Incremental Changes to the Voter Registration Process Under SB3.

SB3 modified how local election officials check a registrant's domicile qualification. It created two voter registration forms: one used more than 30 days before an election ("Form A"), DAI9, and one used within 30 days of an election and on Election Day ("Form B"), DAI10-11. RSA 654:7, IV(b-c) (2017). Those registering to vote using Form A must

produce domicile proof. Form A is substantively identical to the first page of the pre-SB3 voter registration form. *Compare* DAI6 *with* DAI9; PVI65:4-14.

Form B contains a new domicile affidavit with two options. First, if a registrant possesses domicile proof but does not have it when registering, the registrant may attest to his domicile and commit to delivering that proof to local election officials within 10 days of the election.[2] DAI11 (first blank). The trial court identified this as "Option 1." DD56. An Option 1 registrant receives a "Verifiable Action of Domicile" ("VAD") form, DAI12, that provides a list of documents a registrant may use to establish a verifiable act of domicile. RSA 654:7, V; PVII80-81. Voters return the VAD form and their domicile document to the clerk in person or by mail or email. PVI53.

The second option, or "Option 2," applies if the registrant is unaware of possessing domicile proof at the time of registration. RSA 654:7, IV(c). The registrant may attest to that fact and acknowledge that officials may send mail to his address or take action to confirm the assertion of domicile post-election. *Id.* Like before SB3, the registrant signs the attestation under the penalties for wrongful voting. *Id.* The post-election domicile confirmation actions taken by officials are substantially the same as the procedures the Secretary and the AGO used before SB3. *Compare* PV225-29 *with* PVII85-86.

[2] This period is 30 days for residents of communities in which the clerk's office is open less than 20 hours a week. RSA 654:12, I(c)(2)(A).

B. The Litigation.

The plaintiffs filed this action alleging violations of the state and federal constitutions. The defendants removed the case to federal court. The plaintiffs amended to eliminate their federal claims, causing the cases to be remanded to the superior court and consolidated.

On September 12, 2017, the superior court preliminarily enjoined SB3's penalties and required the Secretary to inform potential registrants of the injunction. DAI73-75. In August and September 2018, the superior court held a preliminary injunction hearing. DAI242. The plaintiffs presented testimony from eighteen witnesses, including four expert witnesses, and introduced more than one hundred exhibits.

The plaintiffs predicted that SB3 would cause long lines, confusion, and disenfranchisement in the 2018 primary and general elections. Witnesses speculated that SB3 could affect certain groups of voters not before the court and hypothesized that SB3 would impact voter registration for college students and young people. *See, e.g.*, PI80, 83-84, 198-99, 132-33, 135, 141; PV113-14, 118, and 196-98; PIII11-13, PII93-95.

No witness testified that SB3 had prevented or discouraged him or her from registering to vote. No witness testified that he or she was aware of anyone who SB3 had been prevented or discouraged from voting by SB3. No witness testified that he or she would not register to vote because of the language of the SB3 forms. Rather, the plaintiffs relied entirely on predictions of how SB3 *may* affect some groups of prospective registrants who *may* be more likely to vote for Democrats.

Other than the penalty provisions, SB3 was in effect for the state primary election on September 11, 2018. On October 22, 2018, the trial court preliminarily enjoined SB3, crediting the plaintiffs' and their witnesses' hypotheses, predictions, and concerns. The trial court forecasted problems in the 2018 general election arising from SB3, noting that "confusion will only be compounded when combined with the stress of trying to understand the forms while standing at the head of a line of potentially hundreds of voters waiting their turn" and "potentially significant increases in waiting times at polling places throughout the state." DAI251, 255.

On October 31, 2018, this Court stayed the preliminary injunction until after the November 6, 2018 general election. DAI268-69. The SB3 registration process therefore governed the November 6, 2018 general election, and none of the superior court's forecasted problems manifested. The defendants moved for summary judgment on all counts in plaintiffs' amended complaints. The trial court granted summary judgment on the constitutional domicile qualification claim (Count II) and the void-for-vagueness claim (Count IV), to the extent SB3 prescribes competing mental states. DAII89, 93. The trial court otherwise denied the motion. The defendants' reconsideration motion was denied. DAII71-95.

C. December 2019 Merits Trial.

The parties agreed that the merits record would consist of the August and September 2018 preliminary injunction record and the December 2019 merits trial record. During the December 2019 merits trial, the plaintiffs

called sixteen witnesses. Not a single witness testified that SB3 prevented, dissuaded, or discouraged him or her from registering to vote.

Of the previously unregistered plaintiffs, Anderson and Mehta registered to vote in October 2018, while SB3 was in effect. Anderson registered at Dartmouth College during an on-campus registration drive, where the Office of Residential Life confirmed his domicile for local election officials. T485-87. Mehta registered to vote on Dartmouth campus too using documentation. DAI45-48. Mehta knew of no one who was afraid to register to vote, did not register to vote, was confused by the SB3 registration forms, or was discouraged about registering to vote, during the November 2018 general election. DAI51, 54. She testified that the voter registration process went smoothly for her, all of her questions during it were answered, and she left the process without being confused. DAI51-52.

Dragone registered to vote on November 7, 2019, one year after the superior court's preliminary injunction went into effect. T530; DAI269. When the superior court's preliminary injunction order went into effect on November 7, 2018, the Secretary reverted to the voter registration process, including the forms and affidavits, that pre-existed SB3. Dragone registered to vote under this pre-SB3 system and explained that the Goffstown clerk's office was confused about how to register him to vote. T533.

Elizabeth Tentarelli, President of the League of Women Voters of New Hampshire, remained in her office until 5:00 p.m. on the date of the 2018 general election, but received *no* calls or emails regarding problems at the polls and learned of *no one* being unable to register to vote that day. T1037-38, 1039, 1041. Lucas Meyer, President of the New Hampshire Young Democrats, was not aware of and could not identify *any* individual

who was confused by SB3 on election day or *any* voter who did not register to vote as a result of SB3 in the November 2018 general election. T928-30.

On April 8, 2020, the trial court ruled in plaintiffs' favor, facially invalidating and permanently enjoining SB3.

SUMMARY OF THE ARGUMENT

SB3 permits a same-day registrant lacking domicile documentation to return it within ten days following the election. The trial court erred by facially invalidating SB3 on its finding that the forms associated with this registration option, coupled with statutory penalties, imposed an unreasonable burden on a small minority of voters during certain elections at certain polling places. The trial court should have held instead that the plaintiffs failed to meet their heavy burden of showing that SB3 was unconstitutional in every set of circumstances.

Alternatively, this Court should overrule *Guare v. State* because: (1) it departs without explanation from the flexible *Anderson-Burdick*[3] balancing test this Court adopted in *Akins v. Secretary of State*, 154 N.H. 67 (2006), by instituting traditional intermediate scrutiny review; and (2) it is substantively incorrect. This Court should remand to the trial court for application of the correct standard.

Alternatively, the trial court erred in concluding that SB3 imposes an unconstitutional burden on the right to vote. At most, SB3 imposes a minimal burden, but even if the burden is greater and intermediate scrutiny applies, important state interests, which SB3 furthers, justify any burden SB3 imposes.

Finally, even if correct on the merits, the trial court erred by invalidating SB3. The trial court's concern focused on forms that it found

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[3] The *Anderson-Burdick* test is a sliding-scale balancing test developed in two U.S. Supreme Court cases: *Anderson v. Celebrezze,* 460 U.S. 780 (1983) and *Burdick v. Takushi,* 504 U.S. 428 (1992).

complex, confusing, and potentially misleading. SB3 requires forms "in substantially the following form," not identical to the statutory form, leaving the Secretary the authority to alter them if necessary to eliminate the very issues the trial court purported to identify. Rather than invalidate SB3, the trial court should have granted the opportunity to cure the alleged problematic language and then assessed the utility of any further remedy.

STANDARD OF REVIEW

This case presents mixed issues of law and fact. This Court accepts the trial court's findings of fact "unless they are not supported by the evidence or are erroneous as a matter of law," *Blagbrough Family Realty Trust v. A&T Forest Products, Inc.*, 155 N.H. 29, 36 (2007), but reviews the trial court's application of the law to the facts *de novo*. *Bovaird v. N.H. Dept. of Admin. Servs.*, 166 N.H. 755, 758 (2014). The Court also reviews *de novo* the trial court's determination that SB3 violates Part I, Article 11 and the equal-protection provisions of the New Hampshire Constitution. *Am. Fed. Of Teachers v. State*, 167 N.H. 294, 300 (2015).

"In reviewing a legislative act, [this Court also] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds." *Id.* This Court "will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." *Id.* "Thus, a statute will not be construed to be unconstitutional when it is susceptible to a construction rendering it constitutional." *Id.* "When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN FACIALLY INVALIDATING SB3.

A facial challenge is "a head-on attack of legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." *Eby v. State*, 166 N.H. 321, 327 (2014). A party bringing a facial challenge "must demonstrate that there is no set of circumstances under which [the act] might be valid." *State v. Lilley*, 171 N.H. 766, 772 (2019). The plaintiffs sought to invalidate SB3 in its entirety and permanently enjoin it. DAI 130-31, 217. They accordingly had to demonstrate that SB3 *in its entirety* was facially invalid. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) ("The important point is that plaintiffs' claims and the relief that would follow … reach beyond the circumstances of these plaintiffs. They must therefore satisfy our standards for facial challenges to the extent of that reach.").

A statute applicable to all voters survives a facial challenge even when it imposes an unjustified burden on some. This principle is reflected in *Crawford v. Marion County Election Bd.*, which held that that the "petitioners ha[d] not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute." 553 U.S. 181, 203 (2008) (*Stevens*, J.).[4] On a facial challenge to a voter identification law, the Seventh Circuit has similarly observed that "the burden some voters faced could not prevent the state from applying the

[4] Justice Scalia endorsed this analysis in his concurrence, which Justices Thomas and Alito joined. *See Crawford*, 553 U.S. at 204.

law generally." *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016). The Eighth Circuit held that a facial challenge to a North Dakota law requiring a voter to provide documentation of his residential street address was unlikely to succeed because, "even assuming that a plaintiff can show that an election statute imposes excessively burdensome requirements on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to all voters." *Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019) (internal citation and quotations omitted).

The trial court acknowledged that SB3 does not burden most, much less all, New Hampshire voters. DD84-85, 88-89. The trial court attempted to distinguish *Crawford*, *Walker*, and *Brakebill* on the basis that SB3 burdens the minority of voters to whom it applies. DD88-89. In doing so, the trial court overlooked SB3's scope, misapplied the facial-challenge standard, and ignored that the burdens it identified emanate from only several narrow portions of SB3 that apply to a small minority of voters: the domicile affidavit options within Form B, RSA 654:7, IV(c); the VAD form, RSA 654:7, V; and the new penalties, RSA 659:34, I(h, i).

Moreover, while SB3 may not apply to all *voters*, it does apply to all *registrants*, requiring that they produce documentation showing a verifiable act of domicile. The evidence at trial demonstrated both that the majority of registrants possess the requisite documentation and that, during the 2018 general election, only a small percentage of election-day registrants did not present such documentation at the time they registered and therefore encountered Form B's domicile options. DAII129-30-97. The percentage of registrants who encounter the VAD form is even smaller, as it is provided

only to those registrants who choose Option 1. Similarly, the plaintiffs' lines concern relates only to same-day registration at a small number of polling places, during large elections, at certain times on election day, where such lines existed pre-SB3. DD66-68, 84-85.

Thus, even under the trial court's view of the evidence, SB3 burdens only a small subset of same-day registrants. *Crawford*, *Walker*, and *Brakebill* establish that a purported burden on *some* voters is insufficient to facially invalidate a law of general applicability. The trial court's attempt to distinguish those cases rests on an incorrect view of SB3's scope. The plaintiffs failed to prove that SB3 *itself* is invalid in all or virtually all of its applications. *John Doe No. 1*, 561 U.S. at 194. The trial court accordingly erred in facially invalidating SB3.

II. *GUARE V. STATE*, 167 N.H. 658 (2015), SHOULD BE OVERRULED BECAUSE IT IS INCONSISTENT WITH *ANDERSON-BURDICK* AND IS SUBSTANTIVELY INCORRECT.

"The doctrine of *stare decisis* demands respect in a society governed by 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." *Jacobs v. Director, N.H. Div. of Motor Vehicles*, 149 N.H. 502, 504 (2003). But *stare decisis* is not "an inexorable command," and "the doctrine is at its weakest when [the court] interpret[s] the Constitution because a mistaken judicial interpretation of that supreme law is often practically impossible to correct through other means." *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct. 1390, 1405 (2020) (internal quotations omitted).

This Court considers various factors in a *stare decisis* analysis such as whether: (1) the rule has proven to be intolerable simply by defying practical workability; (2) the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. *State v. Quintero*, 162 N.H. 526, 532-33 (2011). The Court may also consider "the quality of the decision's reasoning"; the decision's "consistency with related decisions"; "legal developments since the decision"; and "reliance on the decision." *Ramos*, __ U.S. at __, 140 S. Ct. at 1405 (internal quotations omitted).

Guare should be overruled because it is inconsistent with the flexible *Anderson-Burdick* balancing test this Court adopted in *Akins v. Secretary of State*, 154 N.H. 67 (2006). In *Guare*, this Court imported the traditional tiers of scrutiny into the *Anderson-Burdick* analysis, adopting an intermediate scrutiny test applicable when a voting law imposes an "unreasonable" burden on the right to vote. The *Anderson-Burdick* jurisprudence rejects this approach. Specifically, in *Crawford*, 553 U.S. 181, "a majority of the [Supreme] Court's members appeared to disavow the application of specific and discrete levels of scrutiny to non-severe [voting] restrictions." *Libertarian Party of N.H. v. Gardner*, 126 F.Supp.3d 194, 206 (D.N.H. 2015) (hereinafter "*LPNH*"); *see Crawford*, 553 U.S. at 191 (*Stevens*, J.) ("However slight th[e] burden may appear … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.") (internal quotations omitted); *id.* at 210 (*Souter*, J., dissenting) (observing that the Court has "avoided preset levels of scrutiny in favor of a sliding-scale balancing test").

Instead, federal cases hold that when voting regulations impose a burden that is neither severe nor modest "the *Anderson-Burdick* framework departs from the traditional tiers of scrutiny and creates its own test." *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020); *see, e.g.*, *Libertarian Party of N.H. v. Sununu*, 2020 WL 4340308, at *11-12 (D.N.H. July 28, 2020) (rejecting *Guare* and refusing to apply a specific level of scrutiny in *Anderson-Burdick* challenge); *LPNH*, 126 F.Supp.3d at 206 (same); *Sarvis v. Judd*, 80 F.Supp.3d 692, 704 (E.D. Va. 2015) (rejecting application of traditional intermediate scrutiny in *Anderson-Burdick* challenge).

"For … intermediate cases, … [a court] must weigh the burden against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Mays*, 951 F.3d at 784 (quoting *Burdick*, 504 U.S. at 434). "Only where the State's interests outweigh the burden on the plaintiff's right to vote do voting restrictions not offend the Equal Protection Clause." *Id.*

Under *Anderson-Burdick*, the record a State may build to justify a voting restricting is not limited and permits reliance on *post hoc* justifications, unlike the rule adopted in *Guare*. *Id.* at 789; *LPNH*, 126 F.Supp.3d at 209. As the Sixth Circuit has explained, "voting cases in this Circuit differ from other Equal Protection claims regarding intermediate scrutiny; the *Anderson-Burdick* framework applies." *Mays*, 951 F.3d at 789. "No opinion from this court or the Supreme Court has ever limited the record that the State can build in order to justify a burden placed on the right to vote." *Id.*

Guare departs from this flexible jurisprudence it purports to follow, imposing a rigid intermediate scrutiny standard that artificially limits the record the State may build to justify a voting regulation. Worse, *Guare* suggests that this intermediate level of scrutiny is reached where individuals allege merely that they find a particular voting law confusing because it is susceptible to different interpretations. This Court should therefore set *Guare* aside and realign its voting jurisprudence with federal law.

Guare should also be overruled because it is substantively incorrect. *Guare* rests on the flawed premise that the statutory definition of domicile

in RSA 654:1, I (2015) was different from the statutory definition of "residence" and "resident" under RSA 21:6 (2015), RSA 21:6-a (2015), RSA 261:45 (2015), and RSA 263:35 (2015). The State incorrectly conceded that differences in the statutory language meant that "domicile," "resident," and "residence," as used in those statutes, were legally different. The Court did not decide whether that statutory construction was correct.

In *Casey v. Gardner*, this Court held that the statutory definition of domicile in RSA 654:1, I, is synonymous with the amended statutory definitions of "residence" and "resident" as used in RSA 21:6 and RSA 21:6-a. __ N.H. __, 2020 WL 2565302 (May 20, 2020). It also held that the indefinite intention to remain language that existed in RSA 21:6 and RSA 21:6-a when *Guare* was decided "was never intended to be applied … literally," but merely required an intent to remain in a particular place "for the time at least". *Casey*, __ N.H. __, 2020 WL 2565302, at *4 (May 20, 2020). This holding confirms that the legal assumption on which *Guare* rested was wrong. The indefinite intention to remain language contained in RSA 21:6 and RSA 21:6-a did not make the concepts of "resident" and "residence" different from the concept of "domicile" contained in RSA 654:1, I.

Accordingly, because *Guare* departed from the flexible *Anderson-Burdick* balancing adopted in *Akins* and is substantively incorrect, it should be overruled and this action should be remanded to the trial court for it to apply the correct standard.

III. SB3 DOES NOT UNCONSTITUTIONALLY BURDEN THE RIGHT TO VOTE.

Even if the plaintiffs could maintain a facial challenge to SB3 as a whole, the law nonetheless survives under the *Anderson-Burdick* balancing framework. *See Akins*, 154 N.H. at 72. A court applying this test "must weigh the character and magnitude of the asserted injury to the rights … the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent those interests make it necessary to burden the plaintiff's rights." *Id.* (quotation marks omitted). "[W]hen the election law at issue subjects the plaintiff's rights to 'severe' restrictions, the regulation must withstand strict scrutiny to be constitutional." *Id.* (same omissions). In contrast, when a law "imposes only reasonable, nondiscriminatory restrictions upon the plaintiff's rights, then the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (same omissions). The *Anderson-Burdick* framework therefore recognizes that every voting regulation "is going to exclude, either *de jure* or *de facto*, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).

A. SB3 Does Not Impose An Unreasonable Burden On The Right To Vote.

The trial court ruled that SB3 does not impose a severe burden on the right to vote, and the plaintiffs have not challenged that ruling. The trial court nonetheless found that SB3 imposes an unreasonable burden on the

right to vote because three discrete parts of SB3, taken together, unconstitutionally burden the right to vote: (1) the new domicile affidavit in Form B, RSA 654:7, IV(c); (2) the VAD form, RSA 654:7, V; and (3) the penalties associated with registering to vote on election day by agreeing to return proof of domicile to the clerk and subsequently failing to do so, RSA 659:34, I(h), (i). These aspects of SB3 do not impose an unreasonable or discriminatory burden on the right to vote. In concluding otherwise, the trial court erred.

1. Form B And The VAD Form Are Not Confusing or Misleading.

The trial court concluded that Form B fails to clarify when Option 1 or Option 2 should be selected. A review of Form B suggests otherwise. A registrant selects Option 1 if she fails to bring domicile proof with her to register to vote and otherwise knows or believes that she has access to it (*e.g.*, at home or in her car). A registrant selects Option 2 if she is "aware of no" documentary proof that shows she is domiciled at her claimed address. A local election official is available to help guide persons in making an appropriate choice. *See, e.g.*, T1415-17.

The testimony of Assistant Secretary of State Orville Fitch and Deputy Secretary of State David Scanlan do not conflict the form language nor are their statements inconsistent as the trial court asserts. DD80, 82. Deputy Scanlan was asked whether a person should select Option 1 if they did not possess domicile proof, but knew they could obtain it from someone else. Deputy Scanlan explained that it is the registrant's choice; if the registrant believes they can get the document and return it, they may choose

Option 1; if the person does not know if they can get it, they may choose Option 2. T1393-94, 1407, 1415-17. Assistant Secretary Fitch was asked different questions related to how he helped resolve an issue in Hanover on election day. In remedying that issue, he informed local election officials that they should help registrants understand the types of documents they might have and, if the registrant has such a document, he should choose Option 1 and return it; if the registrant does not know whether he possesses such a document, he should check Option 2. T1490-93. This testimony is consistent and the trial court's characterization of it is incorrect.

Form B's language also belies the trial court's conclusion that the form is "outright misleading" because it "improperly suggests that failing to return documentation will *only* result in official mail being sent to the registrant's address." Order at 27. Form B specifies at the bottom that, "[i]n accordance with RSA 659:34," if a person provides false information on Form B, that person may be subject to civil and/or criminal penalties. RSA 654:7, IV(c). The penalty associated with registering to vote on election day by selecting Option 1 and then" purposefully and knowingly" refusing to return domicile documentation post-election is contained in RSA 659:34. Form B also states that failing to return domicile proof after registering to vote by agreeing to do so "will prompt official mail to be sent to your domicile address by the secretary of state to verify the validity of your claim to a voting domicile at this address." RSA 654:7, IV(c). Form B does not state or imply that the sending of official mail is the *only* thing that may happen.

The trial court also concluded that the VAD form "contains confusing and potentially misleading language suggesting that its list of

documents is more exhaustive than the State believes it to be." DD80. RSA 654:7, V identifies the VAD form as a "notice" and "guide." Option 2 on Form B indicates that persons who do not possess documentary proof of domicile may register to vote without providing proof of domicile and never receive the VAD form. Only those persons who select Option 1 to register to vote by selecting Option 1 will receive the VAD form.

Presumably, a person who selects Option 1 knows that she possesses or has ready access to one or more domicile documents. The trial court ignored this practical reality. Instead, it found the VAD form "confusing" because it states that "[o]nly one item on the list is required to demonstrate a verifiable act." DD81. The trial court speculated that "[t]his may lead an individual who does not have documentation that exactly matches the provided list to believe that he or she cannot comply with it." *Id.* But this ignores the option on the VAD form itself that permits persons to "describe what other verifiable action or actions you have taken to make the address listed on your voter registration form your one voting domicile: _____." RSA 654:7, V.

And while some of the individual plaintiffs testified at the preliminary injunction hearing that they did not believe they had any documentation listed on the VAD form, such testimony establishes at most that they could select Option 2, register to vote, and never receive the VAD form.[5] The trial court's concerns about the VAD form ultimately amount to speculation about what hypothetical persons may think when they interact

[5] In the end, no individual plaintiff in this case who registered to vote while this lawsuit was pending encountered the domicile affidavit in Form B or the VAD form.

with that form, which is not evidence sufficient to declare a law unconstitutional. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("In determining whether a law is facially invalid," a court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."). In sum, the trial court's concerns about Form B and the VAD form are unsupported by the forms' text or by any non-speculative evidence in the record.

2. The Trial Court's Reliance On Anecdotes, Hearsay Statements, And Private Third Party Actions To Support Its Burdens Analysis Was Error.

The trial court concluded that SB3 caused voter confusion during the 2018 general election based on anecdotes and non-specific hearsay statements insufficient to support that conclusion. DD80-81. Some students in Hanover initialed both Option 1 and 2 even though their domicile had already been confirmed by the Office of Residential Life so they did not need to engage the domicile affidavit. T405-06. An individual in Goffstown selected Option 1 and Option 2. DAV168-74. The record does not reveal why. *Id.*

While a supervisor of the checklist in Concord observed a woman complete the registration forms and then leave, the woman allegedly indicated when asked that she did not think she could cast a ballot that day. T111-12. The record does not reveal how that behavior is linked to SB3. T112-13. Another registrant attempted to locate a ham radio license through his phone, became frustrated, and left without registering, despite

being told he could register to vote without providing documentation. *Id.* T113-14. The record does not reveal how this person's conduct is linked to SB3. *Id.* These incidents do not demonstrate that SB3 caused confusion during the 2018 general election.

The trial court drew a similarly unsupported conclusion from an AGO checklist for the town of Lyndeborough indicating that three voter registrations were on hold "waiting for voters to return w/ domicile proof." T1136-37; DAI29. Contrary to the trial court's finding, Chief Investigator Richard Tracy did not testify "that local election officials in Lyndeborough improperly sent voters away from the polls with instructions to bring back documentation." DD81. He instead was asked the following while looking at the checklist:

> Q And to the right there, in handwriting, it says three on hold, waiting for voters to return with domicile, I believe that's proofs. And would you understand this report to be that the supervisors had sent somebody home to get documentation to bring back?
>
> A That's what that appears to say.

T1137. Rather than call the author of these notes, John F. Brown, the plaintiffs showed them to Investigator Tracy, who had no personal knowledge of, nor any part in creating, them. Investigator Tracy did nothing more than acknowledge the words on the paper, yet the trial court characterized his testimony as confirming the truth of what plaintiffs' counsel said the notes reflected.

The trial court relied on an email that the Portsmouth supervisor of the checklist sent to the defendants claiming the new forms were confusing

persons. DD81. However, the email does not reveal any specific examples of confusion. DAI59-61. Instead, it details an instance where election officials guided a person to correctly check Option 1 and describes how that person went home to get his domicile proof and return with it the same day. DAI60.

The trial court asserted there was confusion among local election officials because individual municipalities posted information on their websites that was inconsistent with the registration options available under SB3. DD83. No testimony or other evidence in the record supports this conclusion. And the trial court never explains how the actions or inactions of third parties allegedly misinterpreting or failing to update their websites renders a state statute facially unconstitutional. The trial court's reliance on this information was therefore error.

Finally, the trial placed emphasis on the fact that the President of the University of New Hampshire sent students incomplete information regarding how to register to vote. DD83. Again, the trial court cites no authority for proposition that the private actions of individual third parties can render a state law unconstitutional on its face, and no evidence exists in the record linking these actions to SB3. Consequently, the trial court's reliance on this information was error too.

In sum, the evidence the trial court relied on to demonstrate voter confusion does not reveal an unreasonable burden on the right to vote. It reflects instead a new and different registration system that requires domicile proof to be presented in more instances. Presenting such evidence in order to register to vote places, at most, a minimal burden on the right to

vote. The trial court erred in concluding otherwise and its decision in this regard should be reversed.

3. RSA 659:34, I(h) Imposes At Most A Minimal Burden On The Right To Vote.

The trial court also concluded that, because of the alleged confusion created by SB3, "a significant majority of residents will find themselves subject to the substantial penalties imposed by SB3." DD83. In support of this conclusion, the trial court placed evidentiary weight on the number of persons who registered to vote choosing Option 1 between January and June 2018 and July and December 2018. This was error.

The trial court had preliminarily enjoined SB3's penalty for failing to return documents before the law went into effect and required that the Secretary inform prospective registrants of the injunction. DAI73-75. Thus, persons registering to vote under SB3 very likely knew that if they registered under Option 1, they would not face penalties for failing to return documentation. There was therefore no reasonable basis for the trial court to conclude that any, much less all, of the individuals who registered using Option 1 in 2018 would find themselves subject to SB3's penalties. Nor was there any basis to infer that these individuals would not have returned documents had the penalties been in effect.

The trial court also incorrectly interpreted the penalties associated with SB3. The penalty for failing to return documents when utilizing Option 1 is narrow. RSA 659:34, I(h). It applies solely to persons registering to vote "on election day" and requires them to "purposefully *and* knowingly" fail to return the documentary proof of domicile. *Id.* The

trial court interpreted RSA 659:34, II to impose a lower *mens rea* requirement for criminal penalties associated with RSA 659:34, I(h) and RSA 659:34, I(i). DD105; DAII89-93. That analysis is incorrect.

RSA 659:34, II provides: "A person is guilty of a class B felony if, at any election, such person purposely or knowingly commits an act specified in subparagraph I(b) or I(e). A person is guilty of a class A misdemeanor if, at any election, such person purposely or knowingly commits any of the other acts listed in paragraph I, … ." The act of failing to return documents in RSA 659:34, I(h) is tethered to the specific, heightened *mens rea* requirement of "purposefully *and* knowingly." That heightened *mens rea* in the more specific provision controls over the lesser *mens rea* requirement referenced in the more general provision of RSA 639:34, II. Because the trial court's interpretation to the contrary played a material role in its burdens analysis, that interpretation should be reversed. [6]

The trial court went on to speculate that the mere existence of penalties for wrongful or fraudulent registration, including the fact that such conduct may be investigated, could cause persons not to register to vote. The trial court did not provide any support for the dubious proposition that a State may not penalize wrongful or fraudulent registration or voting conduct. RSA 659:34, I(h) holds accountable only those persons who intentionally refuse to provide documentary proof of their domicile after promising to do so in order to register and cast a ballot. The legislature may

[6] While the trial court indicated that two other SB3 penalties may also burden the right to vote, DD106-107, it found RSA 659:34, I(h) to be the most problematic. The same analysis that applies to RSA 659:34, I(h) applies to the other penalties too.

legitimately penalize such wrongful conduct in order to ensure the integrity of and public confidence in the election system.

4. The Trial Court's Same-Day Registration Lines Analysis Does Not Elevate The Burden Beyond Minimal.

The trial court concluded that the "complicated and confusing nature of the forms will increase average registration times and result in longer lines at the polls." DD84-85. This conclusion was misplaced for at least two reasons. First, as discussed above, the trial court's conclusions with respect to Form B and the VAD form are not persuasive. Second, as discussed below, the trial court incorrectly concluded that the Secretary could not revise or clarify those forms to reduce whatever textual burdens they allegedly impose.

But even setting this aside, the trial court erred in concluding that SB3 unreasonably burdens the right to vote by causing longer lines. The trial court acknowledged "that the data suggests that the number of individuals lacking proof of domicile is, overall, a small minority of new registrants." DD83. The trial court nonetheless concluded that "the models strongly indicate that the increased average registration time under SB3 will have some negative impact on lines in the upcoming 2020 general election." DD31-32. This evidence is again insufficient to invalidate SB3 on its face.

"The burden of long lines, which results in people having to wait longer to register to vote, is not a severe burden." *See Promote the Vote v. Secretary of State*, __ N.W.2d __, 2020 WL 4198031, at 18 (Mich. Ct. App.

July 20, 2020) "Long lines are certainly an inconvenience, but a burden must go beyond mere inconvenience to be severe." *Id.*

Moreover, the trial court's concerns about lines was confined to election-day registrations. In conducting an *Anderson-Burdick* analysis, courts must "look[] at the whole electoral system" and, in doing so, take into account other features of it that lessen any alleged burdens. *Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020). Persons do not have a "right to vote [or register to vote] in any manner" they choose. *Burdick*, 504 U.S. at 433. Persons can avoid same-day registration lines by registering to vote in the lead up to an election.

Accordingly, the trial court's concerns about Form B, the VAD form, RSA 659:34, I(h), and long same-day registration lines, even when credited, do not demonstrate that SB3 unreasonably burdens the right to vote.

B. The State's Important Interests Justify Any Unreasonable or Minimal Burden SB3 Imposes.

New Hampshire has a constitutional obligation to ensure that only those qualified to vote under Part I, Article 11 register and actually vote in New Hampshire elections. N.H. Const. Part I, Art. 11 ("The general court shall provide by law for voting by qualified voters … ."); *see Crawford*, 553 U.S. at 196 (there is "no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters …").

This obligation promotes three additional state interests: safeguarding voter confidence, protecting public confidence in the integrity of the State's elections, and helping to prevent and protect against voter

fraud. *See, e.g., Crawford*, 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."); *Burdick*, 504 U.S. at 441 ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.").

"[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197. "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or confirm the identity of voters." *Id.* These interests, in turn, ensure that the votes of unqualified individuals do not cancel out the votes of qualified voters. "Any corruption in voter registration affects the state's paramount obligation to ensure the integrity of the voting process and threatens the public's right to democratic government." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013).

Courts do not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Rather, legislatures are "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

SB3 reduces the number of individuals who may register to vote without providing documentary proof of domicile. In doing so, SB3 helps ensure that only qualified individuals register and vote in New Hampshire elections, safeguards voter confidence, protects public confidence in the

integrity of the State's elections, and prevents and protects against voter fraud. These well-established state interests justify any minimal burden SB3 imposes

Even if intermediate scrutiny applied, however, SB3 would survive review. "[I]ntermediate level of scrutiny requires that a challenged law be substantially related to an important governmental objective." *Guare*, 167 N.H. at 665. Under this standard, the State must articulate a specific interest and explain why a particular restriction is actually necessary, meaning it actually addresses, that interest. *Id.* at 667-68. This Court's intermediate scrutiny precedents demonstrate, however, that the State's explanation need not be evidence based. *See, e.g.*, *Lennartz v. Oak Point Associates, P.A.*, 167 N.H. 459, 462 (2015) (identifying important government interest from legislative history); *Alonzi v. Northeast Generation Servs., Co.*, 156 N.H. 656, 665 (2008) ("The government's interest in creating the workers' compensation system is well-documented in our case law. We have no doubt that this is an important government interest.").

The State's important interests in ensuring that only qualified individuals vote in New Hampshire's elections, safeguarding voter confidence, protecting public confidence in election integrity, and preventing and protecting against voter fraud emanate from Part I, Article 11 itself and are recognized in the above-cited decisions. SB3 addresses these interests by requiring individuals who register to vote within 30 days of an election and on election day to provide some documentary evidence confirming their domicile, if they are aware of possessing such documentation. This is evident from SB3's language. Prior to SB3, many law-abiding persons would complete domicile affidavits simply because

they lacked documentation with them at the time of registration. This made the post-election verification process of these affidavits costly and time consuming. SB3 seeks a better assessment of the domicile qualification, makes it more difficult for persons to engage in wrongful voting, and seeks to reduce sworn registration affidavits to a manageable level so they can be efficiently and timely investigated. Being able to verify post-election the legitimacy of domicile affidavits executed during an election has significant value in ensuring the citizens of this State that their votes have been not negated by ineligible votes.

SB3's legislative history also confirms these important State justifications. The majority House Committee Report stated that SB3 "is designed to strengthen the public confidence in the integrity of our elections … ." DAIII199. The House Committee further found that the use of a domicile affidavit "creates opportunities for voter fraud because election officials must take the applicant at his or her word." *Id.* It is also found in Representative Barbara Griffin's House Floor Debate statements on SB3:

> Currently, the state does send out letters or cards as provided in law, but using that information to make any factual conclusion as to the validity of a domicile assertion is a nearly impossible task and over the years the volume and lack of follow up with thousands of voters would make that task a difficult ongoing and very costly use of state resources. SB3 is intended to and does shift from the state to the voter the responsibility of proving where they are domiciled by requiring a production of a piece of paper or documentary evidence in support of the assertions that the person lives where he or she says she does. … There is no limitation on the type of paper or documentary evidence that you need to

> provide. There is a suggested list in the bill but it is not exclusive.

DAV150.

Evidence presented at trial showed that the number of domicile affidavits as a percentage of election date registrations fell from 2016 to 2018. T790-91. At the same time, voter turnout during the 2018 general election increased more than 6% from the previous midterm election in 2014. *Id.* 785. This evidence reflects that SB3 was accomplishing its stated purpose of reducing the State's burden to investigate and confirm domicile affidavits.

As the statutory language and the legislative record reflect, the governmental interests underlying SB3 are compelling and SB3 actually addresses them. Thus, even if intermediate scrutiny applies, SB3 still survives review.

IV. NO SEPARATE EQUAL PROTECTION ANALYSIS APPLIES TO SB3; THE BALANCING TEST UNDER PART I, ARTICLE 11 ALONE CONTROLS THE ANALYSIS

The trial court also erred in concluding that SB3 violates equal protection because it disparately impacts certain groups of voters. A plaintiff cannot maintain an equal-protection claim based on disparate impact, absent proof of some impermissible motive. *See, e.g.*, *Barclay Square Condo. Owners' Ass'n v. Grenier*, 153 N.H. 514, 518–19 (2006) (explaining disparate impact on defendant is not sufficient to maintain a discrimination claim); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."). "[D]isparate impact alone is almost always insufficient to prove discriminatory purpose." *Alston v. City of Madison*, 853 F.3d 901, 907 (7th Cir. 2017). "Without more, a court's acceptance of a disparate-impact argument 'would render suspect each difference in treatment among the grant classes, however lacking in [impermissible] motivation and however otherwise rational the treatment might be.'" *Id.* (quoting *Washington*, 426 U.S. at 241). Thus, "[o]nly in rare cases are statistics alone enough to prove discriminatory purpose." *Id.*

The plaintiffs offered no direct evidence that SB3 was passed with some impermissible motivation. At most, they suggested, primarily through Dr. Michael Herron, that SB3 affects different people differently. This is an unremarkable, and entirely constitutional, proposition. *See Burdick*, 504 U.S. at 433 ("Election laws will invariably impose some burden upon

individual voters."). And while the plaintiffs repeatedly contended, and the trial court appeared to accept, that SB3 was passed with partisan motives, this is likewise insufficient to demonstrate impermissible discriminatory intent. *See Democratic Party of Wisc. v. Vos*, 966 F.3d 581, 586 (7th Cir. 2020) ("The Supreme Court has stated that, standing alone, the partisan intentions of legislators are not constitutionally suspect and that pursuing partisan ends does not violate the rights of people who disagree."). Stray comments by individual legislators do not alter this fact. *See Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013) (declining to ascribe an individual legislator's statements to the entire legislature); *see also Greater Birmingham Ministries v. Sec'y of State for Alabama*, 966 F.3d 1202, 1226 (11th Cir. 2020) (declining to find discriminatory intent based on "modern statements made by several Alabama legislators").

Absent any evidence of a discriminatory purpose, the plaintiffs' disparate impact equal-protection claim is no different than their claim under Part I, Article 11 and is therefore also subject to *Anderson-Burdick* balancing.[7] *See, e.g.*, *Libertarian Party N.H.*, 154 N.H. 376, 384 (2006) ("Part I, Article 11 … contains an explicitly enumerated guarantee of equality in … voting. Thus, the equal protection claims here are not just related to, but based upon, the [voting and] associational rights found in Part I, Article 11 and to which we have applied the *Akins* test."); *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (the

[7] The defendants identified in their post-trial brief that the plaintiffs' equal-protection challenge was analyzed under the *Anderson-Burdick* framework. DAII137.

Anderson/*Burdick* "test applies to *all* First and Fourteenth Amendment challenges to state election laws"); *Pisano v. Strach*, 743 F.3d 927, 934 (4th Cir. 2014) (same); *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (same). The trial court accordingly erred in conducting a separate equal-protection analysis. And because the plaintiffs could not prevail on their Part I, Article 11 claim for the reasons stated above, they likewise could not prevail on their equal-protection claim.

V. EVEN IF THE TRIAL COURT'S CONCERNS ABOUT FORM B OR THE VAD FORM WERE JUSTIFIED, IT ERRED BY NOT ALLOWING THE SECRETARY TO REVISE THE FORMS TO REDUCE COMPLEXITY, CURE CONFUSION, AND ADD CLARIFICATION.

With respect to Form B, RSA 654:7, IV(c) states that the Secretary shall "prescribe the form of the voter registration form to be used … in substantially the following form." RSA 654:7, V uses the same language for the VAD form. The trial court construed this language narrowly to prohibit the Secretary from editing the forms to reduce complexity, cure confusion, and add clarification. According to the trial court, these statutes permit the Secretary to modify the physical layout of the form only. That conclusion is incorrect.

In interpreting RSA 654:7, IV(c) and RSA 654:7, V, this Court "look[s] first to the statutory language and, if possible, construe[s] that language according to its plain and ordinary meaning, in the context of the entire statutory scheme." *State v. Eldridge*, 173 N.H. 61, 67 (2020). The phrase "in substantially the following form" does not mean that the Secretary is confined to altering the form's physical layout only. Rather, the word "substantial" means "being largely but not wholly that which is specified." https://www.merriam-webster.com/dictionary/substantial. Thus, the Secretary may revise the form to reduce sentence complexity, cure confusion, and add clarity to Form B and the VAD form.

The trial court's contrary construction reads the word "substantially" out of the statutes. *See Eldridge*, 173 N.H. at 67 (when interpreting s statute, a court must not "ignore the statute's language"). It is also inconsistent with decisions from other courts interpreting similar statutory

language. In *People ex rel. Davis v. Chicago, B. & Q. R. Co.*, 268 N.E.2d 411 (Ill. 1971), the Illinois Supreme Court construed statutory language requiring that a ballot "be substantially in the following form" as follows:

> The word 'substantial,' as ordinarily used, means essential, material, or fundamental. A substantial copy of the form of the ballot designated in the statute must evidently be one that contains the essence of the form in the statute—one giving the correct idea, but *not necessarily the exact expressions in the statutory form*. The words of the statute, 'The ballots at said election shall be substantially in the following form,' necessarily convey the idea that the ballot to be used or voted by the voters *is not required to be an accurate or exact copy*, but one which embodies or contains the substance or main features of the ballot found in the statute. The Legislature evidently did not intend that every word of the statutory form should be found in the form furnished the voter, and if enough of the words found in the statutory form, *coupled with other apt words*, are printed on the ballot furnished to the voter that will mean the same thing to all of the voters as the words used in the statutory form, the statute will be substantially complied with.

Id. at 416 (emphases added); *see Cohen v. Ketchum*, 344 A.2d 387, 398 (Me. 1975) ("We reject out of hand the claim that any deviation from the statutory form, regardless of its substantive impact, renders the warrant fatally deficient."); *Bank of Chatham v. Arendall*, 16 S.E.2d 352, 354-56 (Va. 1941) (concluding that a form of confession was "substantially" in the statutory form though it deviated from the statutory language in several respects).

This Court should likewise conclude that the legislature's use of the phrase "substantially in the following form" in RSA 654:7, IV(b-c) & V grants the Secretary the authority to alter the language of Form B and the

VAD form to reduce complexity, cure confusion, and add clarification and reverse the trial court's contrary conclusion.

Thus, even if this Court shares the trial court's concerns with respect to either form, it should still reverse the remedy the trial court ordered to provide the Secretary with the opportunity to cure any deficiencies in the forms by reforming them in accordance with his authority under RSA 654:7, IV(c) and RSA 654:7, V. *See Wash. State Grange*, 552 U.S. at 546 ("[I]n fairness to the voters of the State of Washington who enacted [the challenged law] and in deference to the executive and judicial officials who are charged with implementing it, [a court must] ask whether the [challenged] ballot could conceivably be printed in such a way as to eliminate the possibility of widespread voter confusion and with it the perceived threat to the First Amendment.").

CONCLUSION

This Court should hold that the plaintiffs failed to meet their burden of showing that SB3 is facially unconstitutional. Alternatively, this Court should overrule *Guare v. State* and remand the case to the trial court for application of the correct standard. Alternatively, this Court should hold that SB3 does not unconstitutionally burden the right to vote and does not violate equal protection. In the event this Court believes that SB3's forms contribute to an unconstitutional burden on the right to vote, this Court should reverse the trial court's permanent injunction and permit the Secretary a reasonable opportunity to alter the relevant form language to eliminate any unconstitutional textual burden.

The State certifies that the appealed decision is in writing and is appended to this brief.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

WILLIAM M. GARDNER,
NEW HAMPSHIRE SECRETARY OF STATE

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November 13, 2020

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CERTIFICATE OF COMPLIANCE

I, Anthony J. Galdieri, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,499 words, which is less than the number of words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

November 13, 2020 /s/ *Anthony J. Galdieri*
Anthony J. Galdieri

CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that a copy of the State's brief shall be served to the following parties of record through the New Hampshire Supreme Court's electronic filing system:

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November 13, 2020 /s/ *Anthony J. Galdieri*
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ADDENDUM TABLE OF CONTENTS

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April 09, 2020

FILE COPY

Case Name: **League of Women Voters of New Hampshire, et al v William M Gardner, et al**
Case Number: **226-2017-CV-00433** ***226-2017-CV-00432***

You are hereby notified that on April 8, 2020 the following order was entered:

RE: FINAL ORDER:

See Copy of order attach - Anderson, J.

W. Michael Scanlon
Clerk of Court

(539)

C: Steven J. Dutton, ESQ; Paul Joseph Twomey, ESQ; Bruce V Spiva, ESQ; John M Devaney, ESQ; Marc E Elias, ESQ; Anne M. Edwards, ESQ; Amanda R Callais, ESQ; Anthony J. Galdieri, ESQ; William E. Christie, ESQ; Suzanne Amy Spencer, ESQ; Richard J. Lehmann, ESQ; James S. Cianci, ESQ; Bryan K. Gould, ESQ; Cooley Ann Arroyo, ESQ; Callan Elizabeth Maynard, ESQ; Uzoma Nkwonta, ESQ; Elisabeth Frost, ESQ; Samuel R. V. Garland, ESQ; Tammy Jackson

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

League of Women Voters of New Hampshire, et al.

v.

William M. Gardner, et al.

Docket No. 226-2017-CV-00433

ORDER

Plaintiffs have brought this action seeking to overturn legislation commonly known as Senate Bill 3 ("SB 3"), which amended New Hampshire's voter registration process. Specifically, Plaintiffs allege that SB 3 violates the State Constitution by burdening the right to vote (Count I), contradicting the domicile qualification in the State Constitution (Count II), violating equal protection (Count III), and being void for vagueness (Count IV). On November 4, 2019, the Court partially granted the State's motion for summary judgment, dismissing Count II in its entirety and Count IV in part.

The Court held a bench trial on the remaining claims from December 2 through December 10, 2019.[1] The parties thereafter submitted post-trial briefs. For the reasons that follow, the Court finds in Plaintiffs' favor on Counts I and III, and in the State's favor on the remainder of Count IV.

[1] The Court also held a preliminary injunction hearing from August 27 through September 7, 2018. The testimony received at that hearing was incorporated into the record at the bench trial.

Factual Background

Pursuant to Part I, Article 11 of the New Hampshire Constitution, all citizens over the age of eighteen that are domiciled in New Hampshire possess an equal right to vote. Prior to an election, New Hampshire residents can register to vote in person at their local town or city clerk's office. On election days, new voters are also able to utilize same-day registration at the polls. Prior to 2017, an individual could register to vote without presenting any proof of his or her domicile; the voter only needed to fill out a form listing his or her domicile address and sign an affidavit swearing that the information was true and accurate. That affidavit, in its entirety, read as follows:

> If this form is used in place of proof of identity, age, citizenship, or domicile, I hereby swear that such information is true and accurate to the best of my knowledge.
>
> This form was executed for purposes of proving (applicant shall circle yes or no and initial each item):
>
> Identity Yes/No _____ (initials)
> Citizenship Yes/No _____ (initials)
> Age Yes/No _____ (initials)
> Domicile Yes/No _____ (initials)

(Joint Exhibit ("JE") 9.)

In 2017, thirteen Republican state senators sponsored SB 3, a bill intended to amend the law to include stricter requirements for proving one's domicile when registering to vote. SB 3 altered the voter registration process in two significant ways. First, it created a distinction between registrations occurring more than thirty days before an election and those occurring within thirty days of and on election day. New voters who seek to register more than thirty days before an election must present documentation proving they are domiciled in the appropriate town or ward or they will be

turned away. Those who seek to register within thirty days of an election or on election day are not required to have documentation with them in order to vote, but they must fill out the second page of the Voter Registration Form ("Form B").[2]

Form B is the second major change to the registration process. In order to prove domicile, a new voter without documentation is required to select one of two options. The first option ("Option 1") reads as follows:

> I understand that to make the address I have entered above my **domicile** for voting I must have an intent to make this the one place from which I participate in democratic self-government and must have acted to carry out that intent. I understand that if I have documentary evidence of my intent to be domiciled at this address when registering to vote, I must either present it at the time of registration or I must place my initials next to the following paragraph and mail a copy or present the document at the town or city clerk's office within 10 days following the election (30 days in towns where the clerk's office is open fewer than 20 hours weekly).
>
> ___ By placing my initials next to this paragraph, I am acknowledging that I have not presented evidence of actions carrying out my intent to be domiciled at this address, that I understand that I must mail or personally present to the clerk's office evidence of actions carrying out my intent within 10 days following the election (or 30 days in towns where the clerk's office is open fewer than 20 hours weekly), and that I have received the document produced by the secretary of state that describes the items that may be used as evidence of a verifiable action that establishes domicile.
>
> Failing to report and provide evidence of a verifiable action will prompt official mail to be sent to your domicile address by the secretary of state to verify the validity of your claim to a voting domicile at this address.

(JE 11.) The second option ("Option 2") states:

> ___ By placing my initials next to this paragraph, I am acknowledging that I am aware of no documentary evidence of actions carrying out my intent to be domiciled at this address, that I will not be mailing or delivering evidence to the clerk's office, and that I understand that

[2] For ease of reference, any mention of Form B in this order refers to the second page of the form, as the first page is largely unchanged from prior years.

> officials will be sending mail to the address on this form or taking other actions to verify my domicile at this address.

(*Id.*) The form also retains the balance of the affidavit used the previous year, containing the following in the lower left corner:

> This form was executed for purposes of proving (*applicant shall circle yes or no and initial each item*):
>
> Identity Yes/No _____ (initials)
> Citizenship Yes/No _____ (initials)
> Age Yes/No _____ (initials)

(*Id.*)

Voters who select Option 1 on Form B are provided a separate form titled Verifiable Action of Domicile ("VAD"). This form states that "[t]he following checklist shall be used as a guide for what you may use as evidence and shall be submitted to the town or city clerk along with documentation that you are required to provide." (JE 12.) It then presents a list of examples of documents that would serve as documentation proving one's domicile, only one of which is necessary to return to the clerk's office.[3] The form must be returned with the chosen documentation "by mail or in person" within ten or thirty days as specified above.

In addition to the foregoing, SB 3 also extended the existing penalties for wrongful voting set forth in RSA 659:34 to three new categories of conduct specific to SB 3: (1) presenting falsified proof of domicile or verifiable action of domicile; (2) providing false information in a written statement to prove that another is domiciled at a particular address; and (3) failing to provide follow-up documentation if choosing

[3] The following are examples of acceptable evidence for proving domicile: (1) establishing residency at an institution of learning; (2) renting or leasing an abode for a period of more than thirty days prior to an election day; (3) obtaining a New Hampshire motor vehicle registration, driver's license, or identification card; and (4) enrolling a dependent minor child in a publicly funded elementary or secondary school serving the town or ward where the applicant is claiming to be domiciled. (JE 12.)

Option 1. The potential penalties imposed include a civil fine of up to $5,000 and criminal liability for a class A misdemeanor. RSA 659:34.

Governor Sununu signed SB 3 into law on July 10, 2017, and it became effective September 8, 2017. Prior to the statute becoming effective, Plaintiffs initiated the present lawsuit, arguing the law was unconstitutional as it would effectively suppress voter turnout. On September 12, 2017, the court (Temple, J.) preliminarily enjoined enforcement of the criminal and civil penalties associated with SB 3. On October 22, 2018, the court (Brown, J.), granted a preliminary injunction enjoining the entirety of SB 3 from going into effect. After an emergency appeal, the New Hampshire Supreme Court stayed the preliminary injunction until after November 6, 2018, allowing SB 3 to remain in effect for the 2018 Midterm elections, but thereafter leaving the preliminary injunction in place.

Analysis

A plaintiff "may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both." *State v. Hollenbeck*, 164 N.H. 154, 158 (2012). Here, Plaintiffs assert a facial challenge to the statute. "A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." *State v. Lilley*, 171 N.H. 766, 772 (2019). "To prevail on a facial challenge, the challenger must establish that no set of circumstances exists under which the challenged statute . . . would be valid." *Id.* "On the other hand, an as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." *Id.* In its order on the State's motion for

summary judgment, this Court (Anderson, J.) determined that the proper approach on facial challenges is to conduct an ordinary constitutional analysis after first determining the appropriate level of scrutiny to apply.

I. Count I – Part I, Article 11

"Although the right to vote is fundamental, [the Court] do[es] not necessarily subject *any* impingement upon that right to strict scrutiny." *Guare v. State*, 167 N.H. 658, 663 (2015). "Instead, [the Court] applies a balancing test to determine the level of scrutiny that [it] must apply." *Id.* "Under that test, [the Court] weigh[s] 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 justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* "Under this standard, the rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens the fundamental right to vote." *Id.* When voting rights are subject to severe restrictions, strict scrutiny applies and "the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id.* Where restrictions are reasonable and nondiscriminatory, however, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* "Most cases fall between these two extremes." *Id.*

"Courts in other jurisdictions have recognized that a test similar to intermediate scrutiny applies to a voting restriction that falls between the two extremes." *Id.* at 666. "Our intermediate level of scrutiny requires that a challenged law be substantially related to an important government objective." *Id.* at 665. The State bears the burden

under this level of review, and "may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations." *Id.* Where a law imposes unreasonable restrictions on the right to vote, "the State must 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." *Id.*

In Count I of their Complaint, Plaintiffs allege that SB 3 violates Part I, Article 11 of the New Hampshire Constitution by burdening the fundamental right to vote. Plaintiffs argue that SB 3 imposes severe or, in the alternative, unreasonable burdens upon voters, subjecting the law to strict or intermediate constitutional scrutiny. They articulate a number of burdens that fall within the following broad categories: (1) the criminal and civil penalties imposed; (2) the confusing language and procedures on the forms; and (3) the creation or exacerbation of long lines at polling places. Plaintiffs argue these burdens will result in voters being dissuaded from voting, relying upon a theory known as the calculus of voting. The Court will summarize these topics below and then address SB 3's impact on voters.

A. Burdens Imposed by SB 3

1. Penalties

As noted above, SB 3 imposed new penalties on registrants who failed to comply with the registration process. The first page of the modified registration form includes the following passage:

> In accordance with RSA 659:34, the penalty for knowingly or purposely providing false information when registering to vote or voting is a class A misdemeanor with a maximum sentence of imprisonment not to exceed one year and a fine not to exceed $2,000. Fraudulently

> registering to vote or voting is subject to a civil penalty not to exceed $5,000.

(JE 11.) Form B also contains this same language but adds the following sentence: "In accordance with RSA 659:34-a voting in more than one state in the same election is a class B felony with a maximum sentence of imprisonment not to exceed 7 years and a fine not to exceed $4,000." (Id.)

SB 3 also amended RSA 659:34, I, to add the following (additions in bold):

> A person is subject to a civil penalty not to exceed $5,000 if such person:
> . . . .
> (g) Presents falsified proof of identity, **domicile, or verifiable action of domicile** at any election;
>
> **(h) Registers to vote on election day using an affidavit to satisfy proof of being qualified, represents on the affidavit that the person possesses proof that he or she does not have in his or her possession at the polling place, and purposely and knowingly fails to provide a copy of the document by mail or present the document in person to the town or city clerk by the deadline established in RSA 654:12; or**
>
> **(i) Purposely and knowingly provides false information in a written and signed statement or other documentation that another person is domiciled at an address that is owned, leased, rented, or managed by the individual providing the statement for the purposes of voter registration and that statement is used for voter registration purposes.**

RSA 659:34, I(g)–(h). The statute also states that "[a] person is guilty of a class A misdemeanor if, at any election, such person purposely or knowingly commits" the above-noted acts. RSA 659:34, II.

Finally, SB 3 amended RSA 654:12, I(c)(2)(A) to include the following language: "An applicant whose voter registration is approved based on an acknowledgment of a domicile evidence obligation who knowingly or purposely fails to provide a document to

the city or town clerk as required by this paragraph shall be subject to the penalties of wrongful voting as established in RSA 659:34." In its order on the State's motion for summary judgment, the Court interpreted the statute as requiring a "knowing *and* purposeful" mental state for civil penalties, and a "knowing *or* purposeful" mental state for the criminal penalties. While the Court found this does not render the statute unconstitutionally vague, it did note that it has the unusual effect of holding criminal conduct to a lower standard than related civil misconduct.

2. Confusing Language

Plaintiffs argue that any burden imposed by the new penalties is augmented by the complexity of SB 3, specifically Form B and the Verifiable Action of Domicile form. At the preliminary injunction hearing, the Court heard testimony from Dr. Deborah Bosley, an expert in plain language and readability. As Dr. Bosley did not offer additional testimony or supplemental reports at the subsequent bench trial, the following summary of her testimony is largely taken from the court's (Brown, J.) preliminary injunction order.

Dr. Bosley conducted an analysis of Form B and the VAD, utilizing four methodologies: (1) a readability test, which is an algorithm-based analysis of the grade level necessary to understand the text and ease of understanding; (2) a comparison of the existing language with best practices in plain language; (3) usability testing, which consisted of one-on-one interviews with intended users; and (4) an expert review.

Dr. Bosley's readability test scored readability on a scale of 0–100, with 100 being equivalent to a comic book, 60–70 equivalent to a local newspaper, and 0–30 equivalent to the Harvard Law Review. The results are based upon the average

number of words, the number of syllables per word, the average number of words per sentence, and the number of sentences.

In performing her analysis, Dr. Bosley separately tested both Option 1 on Form B and the entirety of Form B. The tested paragraph of Option 1 consists of a single sentence containing just over 100 words. Dr. Bosley testified that the ideal sentence should contain only 12–25 words. Option 1's readability score was below 0. Form B as a whole has an average sentence length of 72 words and its reading score was also below 0. Dr. Bosley testified that the readability scores alone indicated that the forms would be very difficult for the average adult to read and understand.

Dr. Bosley performed the same analysis on the VAD. For the entire form, the average sentence length is 31 words, the grade level of the text was 17 (equivalent to that of a first-year graduate student), and the readability score approached 30. Dr. Bosley also tested the second to last paragraph of the form, which instructs the reader what to do if they do not have any of the listed documents. The paragraph is 97 words long, had a grade level of 23 (equivalent to that of a doctoral candidate), and its readability score was 16.32. Ultimately, as with Form B, the analysis demonstrated that the VAD would be very difficult for the average adult to read and understand, as the average adult in the United States reads at an eighth-grade level. Consistent with the foregoing, Dr. Bosley testified that both forms fail to meet many of the best practices in the field of plain language.

As to this readability analysis, the State argues that Dr. Bosley's conclusions are implausible on their face, claiming that "Dr. Bosley stated that the SB 3 registration forms are incomprehensible to every person in the state and would require 32 years of

formal education to understand." (State's Post-Trial Mem. at 34.) This, however, is an inaccurate characterization of Dr. Bosley's testimony. While the algorithm Dr. Bosley employed did indicate a grade level of 32 for the combination of Options 1 and 2, Dr. Bosley testified that she interpreted these results to simply indicate the complexity of the document being analyzed. (Preliminary Injunction ("PI") Tr. (8/29) at 22.) Instead of stating that the forms would be incomprehensible to everyone in the state, Dr. Bosley testified that "nobody would be able to ready this easily. Easily." (*Id.* at 23.)

Dr. Bosley also conducted usability testing with 12 participants[4] consisting of 7 college students, several part-time workers, and some full-time workers, all aged between 18–29 years old. The participants found some of the forms' words or phrases confusing, such as "domicile," "verifiable action," and "democratic self-government." (See JE 43B at 198, 264, 316, 348.) The participants also found the forms difficult to navigate. (See id. at 193, 262–65, 316–19.) Following the PI hearing, the State argued that Dr. Bosley prompted some of the participants with leading questions. However, the court (Brown, J.) found this does not invalidate the entirety of the testing, as there are many instances of confusion recorded without any such leading questions. As a result of the complexity of the forms, Dr. Bosley testified that the readers were skimming its contents, rather than reading the materials provided. (PI Tr. (8/28) at 62-64; *see also* JE 43B at 183 (tester indicating that if she was in a hurry she would probably initial the form without reading it because it was so tedious).)

[4] Dr. Bosley testified that research by others in the field has indicated that 12 test subjects should result in the discovery of approximately 96% of the issues in a given document.

3. Long Lines

Another central argument made by Plaintiffs is that the confusion caused by the forms, in addition to dissuading some from voting, will cause those who do register and vote to take more time at the registration table, resulting in longer lines. At both the preliminary injunction hearing and the bench trial, the Court heard testimony from Dr. Muer Yang regarding the increase in wait times that would result under SB3. Dr. Yang is a queuing expert that applied Queueing Theory to this case. Queueing Theory is a mathematical model that looks at three factors (arrival rate, service rate, and number of servers) to describe the behavior of queueing systems. With respect to elections, the inquiry is how to effectively use election resources to minimize voter wait time. Dr. Yang identified the strengths of Queuing Theory as its simplicity, transparency, and ease of use, as it does not require many data points to generate predictive models. Its primary weakness is that it makes strong assumptions. Specifically, it assumes that the arrival process is constant, which is not reflected in reality, as there are peaks and valleys to the rate that voters arrive at polls. Notably, Dr. Yang testified that because of the irregular arrival rate of voters, queueing theory has a tendency to underestimate wait times.

Following the preliminary injunction hearing, Dr. Yang issued a supplemental report updating his numbers with data from the 2016 general election that he did not have access to before, as well as from the 2018 midterm election, during which SB 3 was partially in effect. Dr. Yang also interviewed moderators, supervisors, and city/town clerks from the same towns as his original report, minus one. Finally, he interviewed two election observers.

Dr. Yang's high-level conclusions are simple: due to its increased complexity, SB 3 will increase registration time for voters, resulting in longer lines. This reduces the margin of error for election officials when they plan for future elections. Overall, Dr. Yang concluded that SB 3 will have a negative impact on lines for same-day registrants. These negative effects will naturally be greater at larger polling locations.

Dr. Yang looked at the registration forms used both before and after SB 3, including the VAD, and the training materials provided by the State. He also looked at the number of ballots cast and the election files in past elections, the number of same-day registrants at each polling location in prior elections, the number of same-day registrants submitting domicile affidavits, and the opening and closing times of the polls. Dr. Yang also based his calculations in part on data gathered by local election officials and observers at various polling locations. For example, Louise Spencer, an observer at Durham in 2018, recorded transaction time information on voters. (JE 88-1.) She did so by randomly selecting an individual and observing their progress through the line, noting the time they entered the line, sat at the registration table, and left the registration table. Her data indicated an average registration time of 7.8 minutes. (*Id.*)

Dr. Yang also reviewed data provided by the State demonstrating average registration times for several cities and towns in both 2016 and 2018. (JE 88-5.) While some polling places, such as Bedford and Londonderry, actually saw a reduction in the average registration time, more saw an increase. (*Id.*) For example, Plymouth's average registration time of 3-5 minutes in 2016 increased to 5-15 minutes in 2018; Manchester Ward 11 increased from 5-10 minutes in 2016 to 7-12 minutes in 2018; and Milford increased from 4-6 minutes in 2016 to 5-10 minutes in 2018. (*Id.*)

Using the foregoing data, Dr. Yang conducted two types of analyses. The first is the utilization of an M/M/c queuing formula to generate tables analyzing several variables, including numbers of registrants, number of servers, and average transaction time. (*See, e.g.*, JE 88-2.) This formula generates expected wait times for polling locations of different sizes, using variables for average registration time with and without proof of domicile, as well as different percentages of individuals without proof of domicile. For example, one of Dr. Yang's M/M/c queueing charts assumed an average registration time of 5 minutes for an individual with proof of domicile, and further assumed that someone without proof of domicile would require an additional 2.5 minutes to fill out Form B. (*Id.* at 2.) At small polling locations of 100 same-day registrants, SB 3 will have only minor impacts on expected wait times, increasing from a baseline of an 18% probability of waiting an expected 0.7 minutes to a 19% probability of waiting the same time if 5% of registrants lack proof of domicile. (*Id.*) Even under the worst case scenario of 40% of registrants having no proof of domicile, there is only a 25% probability of waiting an expected 1.3 minutes. (*Id.*)

As the number of registrants increases, however, the wait times become more pronounced in a nonlinear fashion. At a polling place with 1000 same-day registrants, the baseline wait time is expected to be 2.9 minutes with a 62% probability. (*Id.*) If 5% of same-day registrants lack proof of domicile, the expected wait time increases a full minute to 3.9 minutes with a 67% probability. (*Id.*) If 25% of same-day registrants lack proof of domicile, the wait time jumps to 27.8 minutes with a 93% probability. (*Id.*) At 40% lacking proof of domicile, the queue becomes overloaded, meaning it will continue to increase faster than registrations can be processed until the polls close. (*Id.*)

Not surprisingly, the effects are worst at the most populous polling places, such as Durham. At a polling place with 3,000 same-day registrants, the baseline wait time is 3.1 minutes with a 73% probability. (*Id.*) With only 5% lacking proof of domicile, the wait time more than doubles to 6.7 minutes with an 84% probability. (*Id.*) At 10% lacking proof of domicile, the expected wait time jumps to 40.7 minutes with a 97% probability. (*Id.*) At 15% and above lacking proof of domicile, the queue becomes overloaded. (*Id.*) Therefore, Dr. Yang's models indicate that the largest polling places are greatly impacted by even incremental effects of SB 3. It goes without saying that all of the foregoing issues become increasingly pronounced as the average registration time under SB 3 increases. It is also important to recall Dr. Yang's caveat about the fact the Queueing Theory tends to underestimate lines as it assumes a consistent rate of new arrivals.

The second analysis Dr. Yang performed was a computer simulation model. Dr. Yang testified that he used three data inputs for his simulation: (1) the actual number of same-day registrants as recorded by the State; (2) the transaction time information recorded by Louise Spencer; and (3) the number of registrars working the polls. The model was cross-validated using video footage from the Durham polls in 2018, which showed 120-130 individuals waiting in line at 5:40 p.m. (PX 107.) Dr. Yang's simulation estimated that there would be 126 individuals in line at that time. (JE 88-8.) The model predicted an average maximum wait time of 35 minutes, which exactly matched the longest wait time in Louise Spencer's data. (Id.; JE 88-1.) Finally, the model predicted an average overtime wait—meaning the time a voter spends at the polls after they close—of 19 minutes, compared to 20 minutes reflected in the State's own data.

Therefore, many of the data points generated by the simulation accurately reflected the situation in reality.

Dr. Yang created simulations that showed what registration wait times might look like in Manchester Ward 4 in 2020 in order to demonstrate how SB 3 could reduce the margin of error for local election officials. He first used real-world data from the 2016 general election for the same ward to generate a table showing the number of same-day registrants, average registration time, average wait time, maximum wait time, average queue length, and average overage time. (JE 42 T22.) The chart then simulates results for 5%, 10%, and 15% increases in same-day registrants. (Id.) Based on that data, Dr. Yang ran a simulation for a 2020 general election using SB 3's registration forms, assuming that registering with Form B would take an average of 7.5 minutes (compared with 5 minutes for those who possessed proof of domicile), and assuming that 5% of registrants would need to use Form B. (JE 42 T23.) Separately assuming a 5% increase in the number of same-day registrants, the average wait time under SB 3 increased 9 minutes, to 47 minutes total, over the 2016 simulation data. (Id.)

Since 2004, the State had taken the consistent position that anything exceeding 15 minutes is a "long line," and has encouraged local officials to do everything they can to keep voter wait times below that threshold. (*See* JE 33 at 6; PX 41 at 10; PX 42 at 5; PX 43.) That remains the standard today for voter check-in lines. However, according to testimony from Assistant Attorney General Matthew Broadhead, the State has recently changed its position on voter registration lines, establishing a new threshold of 30 minutes until a line is deemed "long." (Trial Tr. (12/11) at 1270.) Specifically,

question 8(c) of the Attorney General's Polling Place Checklist for the 2018 General Election reads: "Are eligible voters who choose to register on election day able to start the voter registration process in less than 30 minutes?" (JE 71 at 2.)

In its cross-examination of Dr. Yang, the State challenged his reliance on Ms. Spencer's data for his average registration time of 7.8 minutes, noting that Dr. Yang also interviewed Ann Shump, Chairman of the Supervisors of the Checklist in Durham, who indicated that she was able to register voters under SB 3 in 5 minutes on average. Dr. Yang explained that he reconciled the difference first by noting that Ms. Shump's 5 minutes was within the range of Ms. Spencer's data, which was 4-16 minutes. He also noted that Ms. Shump is a very experienced registrar, so she would be able to register a voter faster than someone else, while Ms. Spencer recorded registration times across numerous registrars. Given that there are over a dozen registrars at Durham alone during general elections, it would be inappropriate to use a single person's registration time to estimate SB 3's effect across multiple registrars and polling locations. Moreover, Ms. Shump herself testified that it took her a couple minutes more to register voters without proof of domicile, and Barbara Ward stated in her email to the Secretary of State that in some cases it took several minutes simply to explain Options 1 and 2 to registrants. (Trial Tr. (12/5) at 579, 581-82; PX 147 at 2.)

The State also questioned the accuracy of Dr. Yang's predictive models, arguing he lacked sufficient data. Dr. Yang explained that the average registration time was an input into his calculations, and that the length of resulting lines are the output. If the input changes, so too will the output. He further noted that the output is based on the simple physics of the system, and if the output is known, such as by observing video

footage of the lines recording during the 2018 election, that information can be used to validate the input, i.e., the average time it took to register voters during that election. As noted above, Dr. Yang did have this footage, which he used to validate his model.

Finally, the State took issue with the larger numbers Dr. Yang included in his charts, specifically identifying a significant drop in estimated registrants lacking proof of domicile in Dr. Yang's predictive models from the actual numbers recorded during the 2018 midterm elections. For example, Dr. Yang's earlier models included situations where up to 50% of voters in Durham lacked proof of domicile, but only 2.4% actually lacked domicile in the 2018 general election. (*See* JE 93.) In response, Dr. Yang first noted that the high numbers were based on 2016 presidential election data, that his simulation model was predicting the 2020 presidential election, and that the 2018 midterm was not comparable to either. This is consistent with the testimony of Dr. Herron set forth below.

Second, Dr. Yang said his table results were not intended to predict any particular precinct and characterized it like a dictionary. In other words, any given election official can look at the tables and, using their own judgment, pick a row that appears closest to what they expect to take place and prepare accordingly.

Overall, the Court finds Dr. Yang persuasively addressed the State's criticisms of his methodology and conclusions, and further notes that the State offered no rebuttal expert on the issue of lines.

4. Calculus of Voting

To support their claim that SB 3 imposes a burden on voters, Plaintiffs retained the services of Michael Herron, Ph.D, a professor at Dartmouth College and an expert

in statistical analysis of election administration. Dr. Herron discussed the "calculus of voting," which he described as an old and prominent theory in political science that looks at the costs and benefits of voting, and how this influences a voter's decision to vote. Within this theory, "costs" refer to a broad range of expenditures incurred as a result of voting, such as time spent waiting in line, gathering documentation, traveling to the town or city clerk's office or the polls, etc. "Benefits" fall into two classes: the benefit that one might receive by casting a deciding vote, and benefits that voters accrue through the act of voting, such as performing one's civic duty and expressing his or her opinions. In essence, the calculus of voting is simple: the probability of an individual voting increases as costs are reduced and decreases as costs are increased.

In evaluating the impact of SB 3 upon the population of New Hampshire, Dr. Herron performed bivariate, multivariate, and individual-level analyses, updated with data from the 2018 midterm election. For his bivariate plot analysis, Dr. Herron examined how one's age, mobility, and median income impacted the rate at which voters utilized same-day registration. (JE 89-1, 89-2, 89-3.) These analyses showed that young voters between the ages of 18-24, mobile voters, and individuals with lower median incomes all used same-day registration at higher rates. (Id.)

Dr. Herron testified that he conducted a multivariate regression analysis because bivariate plots are limited in that one might wonder if, for example, young people use same-day registration independently of being mobile or not. The multivariate analysis contained variables for youth, mobility, income, and partisanship. The multivariate analysis confirmed that young, mobile, and lower-income individuals used same-day

registration at a higher rate, and also indicated that undeclared voters and Democrats also utilized same-day registration at a higher rate than Republicans. (JE 89-5.)

Finally, Dr. Herron conducted an individual-level analysis of New Hampshire voters in which he looked at college students in dormitories, new movers, and new registrants because these groups would be disproportionately impacted by SB 3. His data demonstrated that the vast majority of college students in dormitories are registered Democrats or undeclared. (JE 89-8.) The same holds true for new registrants and movers. (JE 89-9, 89-10.)

In his supplemental report, Dr. Herron also performed an analysis of turnout in the 2018 election. He testified that he did so because SB 3 was partially in effect for that election and wanted to understand what if anything he could learn about the implementation of SB 3 based on the 2018 midterms. Based upon the voter turnout for both presidential and midterm elections since 2008, and particularly noting that the turnout for the 2018 midterms was significantly higher than the turnout for the midterm elections in 2010 and 2014, Dr. Herron opined that one could expect an additional 130,000 to 175,000 more voters in the 2020 election. (See JE 89-11.) This would tend to magnify all of the aforementioned issues caused by SB 3, in particular the length of lines predicted by Dr. Yang.

Further compounding the foregoing issues is the existence of significant variability in the data at local levels. Dr. Herron compiled a list of towns with the highest rates of registrants failing to bring proof of domicile to the polls, which ranged from 7.27% to 32.26%. (JE 92-5.) There was also a wide variety in the rates at which registrants selected Option 1 versus Option 2 during the 2018 general election. (JE 92-

3.) Dr. Herron offered two possible explanations: (1) voters in different towns simply brought documentation at different rates; or (2) variability in the discretion of local election officials resulted in different implementations of SB 3. In fact, based on testimony from Assistant Secretary of State Bud Fitch, the 32% rate, which was from Rochester Ward 5, was improperly skewed as a result of human error; at some point during the day, one of the supervisors of the checklist was requiring everyone to fill out Form B, regardless of whether they had proof of domicile or not. (Trial Tr. (12/11) at 1488-89.) In addition, Dover reported that of its greater than 2,000 new registrants, not a single one utilized Form B. (JE 92-2.) This also appears to indicate some error in the recording of data. Setting aside these outliers, this data suggests that whatever burdens SB 3 imposes will not be felt uniformly across the state.

The most prominent costs associated with SB 3 are the confusion arising from the language of the forms; increased wait times likely to result from the complexity of the forms; and incurring post-election obligations and being exposed to potential penalties if selecting Option 1. These costs will disproportionately impact certain members of the electorate, such as college students, mobile voters, and the homeless. Ultimately, considering the foregoing, Dr. Herron concluded that all things being equal, over time and across multiple elections, fewer people would participate in New Hampshire elections as a result of SB 3. Dr. Herron testified that his conclusion remained the same after the 2018 midterms.

To counter Dr. Herron's testimony, the State retained M.V. Hood, III, Ph.D, a professor of political science at the University of Georgia. Dr. Hood's methodology consistent of asking two basic questions: (1) What did SB 3 change?; and (2) What

were the effects of SB 3? In answering the first question, Dr. Hood examined the law prior to SB 3 and read the text of SB 3. He also interviewed a number of state and local election officials. In doing so, he concluded that SB 3 does not change the registration process in any significant manner in that new registrants must still present documentary proof of domicile or sign an affidavit, and can still register and vote on election day.

In answering the second question, Dr. Hood reviewed data for voter turnout in the 2018 midterms and compared it to turnout in prior elections. In 2018, voter turnout in New Hampshire was 54%, an increase over both the 2014 (47.6%) and 2010 (45.7%) midterm elections. (JE 90-F1.) Dr. Hood also reviewed turnout among young voters for the same elections and observed a similar trend. As a percentage of total turnout, 6.3% of voters aged 18–24 voted in the 2018 midterms, compared to 4.4% in both 2014 and 2010. (JE 90-F2.)

Dr. Hood also reviewed election-day registration statistics based on data from the New Hampshire Secretary of State's office. From September to November 2018, including the midterm election, a total of 1,266 domicile affidavits were submitted by new registrants, comprising 2.6% of election-day registrations. (JE 90-T1.) This represented a significant decrease from the presidential election in 2016, when 6,033 domicile affidavits were submitted, comprising 7.3% of election-day registrations. (JE 90-T2.) Dr. Hood testified that if Plaintiffs' hypothesis about the harmful effects of SB 3 was true, one would expect a spike in the number of affidavits being used, because it indicates that people were unable to comply with the law. To the contrary, Dr. Hood concluded that not only do voters overwhelmingly come to the polls with proof of

domicile, but the fact that use of domicile affidavits appears to be falling indicates that New Hampshire voters are aware of the law and are capable of complying with it.

Dr. Hood also examined post-election verification efforts by the State both before and after SB 3 by considering the 2016 presidential election and the 2018 midterm election. In 2016, of the 6,033 domicile affidavits completed, all but 66 were able to be verified by the Secretary of State. (Defs.' Ex. ("DX") 5A-T4.) By contrast, between July and December 2018, of the 1,380 domicile affidavits were completed, all but 7 were able to be verified by the Secretary of State. (JE 90-T4.) As a result, Dr. Hood concluded that in addition to reducing overall affidavit use, SB 3 resulted in a significant reduction in the cost of post-election investigations. Dr. Herron noted that this conclusion was unsupported by any data about the manpower or financial cost incurred by the State in its post-election investigation efforts.

Dr. Hood ultimately concluded that he could not find any detrimental effects associated with SB 3. However, there are significant shortcomings in Dr. Hood's analysis. With respect to voter turnout, Dr. Hood acknowledged that turnout can be affected by numerous factors, such as how competitive the race is, who the candidates are, the saliency of the issues at play, how much is spent on advertising, efforts by candidates to mobilize voters, and the existence of aggressive get-out-the-vote efforts. Dr. Hood further acknowledged that one would ordinarily control for these factors, but admitted he did not do so when looking at the numbers from the 2018 midterm. He specifically conceded that he did not look at any candidate effects, specific issues, or the competitiveness of any of the races in 2018; he did not look at any voter education campaigns specific to SB 3; and he could not say to what extent any of the

aforementioned factors contributed to turnout. He also agreed that there was a national trend of increased turnout in 2018 over 2014 and 2010, but did not perform any comparison between the rate of increase in New Hampshire and other states. With respect to the youth turnout data, Dr. Hood admitted he could not offer an opinion as to why it was higher in 2018 due to lack of sufficient information. Dr. Hood also did not look at national data for youth turnout in the 2018 election, and performed no analysis to determine what percentage of the youth were college students.

Dr. Hood's comparison between the 2018 midterm election and the 2016 presidential election is also flawed. As indicated by Dr. Hood's own data, the turnout in presidential elections is always significantly higher than midterm elections; in 2008, 2012, and 2016, turnout was approximately 70%, compared to 45-54% for the past three midterm elections. (JE 90-F1.) In addition, Dr. Herron testified that the demographics of those who participate in midterm elections differ from presidential elections. According to Dr. Herron, voters in midterm elections tend to be better informed and have attained higher levels of education, and midterm elections see fewer first-time voters than presidential elections. (*See* JE 89-12.) Therefore, one would always expect to see lower overall numbers in a midterm election, particularly those using same-day registration, regardless of any changes in election law. Due to the lower turnout and more experienced voter base, one would naturally expect to see fewer domicile affidavits being filed in midterm elections. As a result, a comparison between the 2018 and 2016 elections offers little insight into the overall impact of SB 3 going forward.

Other courts evaluating Dr. Hood's expert opinions have identified the same or similar flaws. In *Florida v. United States*, the United States District Court for the District of Columbia stated that it:

> reject[ed] other calculations in Professor Hood's expert report because [it] agree[d] with the intervenors' expert that in several instances Professor Hood inappropriately pools together groups of dissimilar data, which is not methodologically appropriate. For example, Professor Hood attempts to draw conclusions based on data pooled from different kinds of elections, without offering a reason to believe that early voting patterns are in fact common across the different types of elections.

885 F. Supp. 2d 299, 367 (D.D.C. 2012). This Court agrees that Dr. Hood's conclusions are based upon methodologically inappropriate analyses. Accordingly, for the reasons set forth above, the Court finds Dr. Hood's expert opinion not credible.

B. Impact on Voters

"Courts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). "[D]iscriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *Id.* "[O]nce the election occurs, there can be no do-over and no redress." *Id.* "While states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). "That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Id.* at 437. "The public interest therefore favors permitting as many qualified voters to vote as possible." *Id.*

The State argues, and the Court agrees, that the burdens imposed by SB 3 are not severe. As noted by the State, burdens are generally deemed severe where they outright exclude voters from the process. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (requirement that voter reside in state for one year and county for three months to register); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1996) (poll tax); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd* 336 U.S. 933 (1949) (literacy test). Where long lines have contributed to other courts' finding of a severe burden, the lines in those cases extended multiple hours, far longer than anything recorded in even the busiest of New Hampshire elections. *See, e.g., League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008) (voters forced to wait two to twelve hours); *Ury v. Santee*, 303 F. Supp. 119, 124, 126 (N.D. Ill. 1969) (voters waited two to four hours). Those lines are also often accompanied by multiple additional egregious violations. In *Brunner*, for example, voting machines were not allocated proportionally to the voting population, poll workers misdirected voters to the wrong polling places, provisional ballots were improperly utilized, disabled voters in need of assistance were turned away, and one witness testified that the touchscreen voting machine changed the candidate she voted for. *Id.* at 478. Here, in contrast, as repeatedly argued by the State, an individual lacking proper documentary proof of domicile who goes to the polls will be able to cast a ballot after filling out Form B's affidavit; they will not be turned away outright.

That being said, the burdens imposed by the law are neither reasonable nor nondiscriminatory. The language contained on the forms is needlessly complex, both in length and diction. As set forth in more detail below, the forms are also confusing or

outright misleading in several respects. First, the language on Form B does not readily clarify when Option 1 or Option 2 should be selected, as indicated by the fact that two State witnesses, both of whom occupy high levels in the government, offered competing testimony on this matter. Second, the VAD also contains confusing and potentially misleading language suggesting that its list of documents is more exhaustive than the State believes it to be. Finally, Form B is outright misleading with respect to the penalties associated with failing to return documentation under Option 1; not only does it avoid mentioning specific penalties, but it improperly suggests that failing to return documentation will only result in official mail being sent to the registrant's address.

Confusion manifested among voters in different ways during the elections in which SB 3 was partially in effect. For example, Elizabeth McClain, the Hanover Town Clerk, observed some students had initialed both Options 1 and 2 on Form B when registering. (Trial Tr. (12/4) at 405.) An inspector with the Attorney General's Office reported that a registrant in Goffstown Ward 5 did the same. (JE 70 at 43.) Elizabeth Correll, Concord's Supervisor of the Checklist, testified to two instances of voter confusion during the 2018 midterm election. First, she observed a woman complete the registration forms and then head toward the exit without voting. When stopped and asked why, the woman stated that she did not think she was able to cast a ballot that day. (Trial Tr. (12/3) at 111-12.) Second, a registrant did not have any proof of domicile on him but remembered that he did have a ham radio license that would have listed his address. After unsuccessfully attempting to find the license online with his phone, the man became frustrated and left without registering, despite being informed that he could register without providing any documentation that day. (Id. at 113-14.)

Voters in other locations left the polls to retrieve documents proving domicile because they thought they had to, and Chief Investigator Richard Tracy testified that local election officials in Lyndeborough improperly sent voters away from the polls with instructions to bring back documentation. (Trial Tr. (12/10) at 1136-37.) In an email to the Secretary of State and the Attorney General, among others, Barbara Ward, Supervisor of the Checklist for Portsmouth, stated that "[w]e noticed a considerable amount of confusion on the part of voters due to the new forms. Many individuals—including at least one former chair of the NH Republican Party and former candidate for State Senate—were confused by the forms." (Pls.' Ex. ("PX") 147 at 2.)

As noted in prior orders of the Court, the VAD also contains confusing language and directions. For example, although the State repeatedly described the VAD as a general, non-exhaustive guideline, the form states: "To establish that you have engaged in a verifiable act establishing domicile, provide evidence that you have done at least one of the following." (JE 12.) It also states that "[o]nly one item *on the list* is required to demonstrate a verifiable act." (*Id.* (emphasis added).) This may lead an individual who does not have documentation that exactly matches the provided list to believe that he or she cannot comply with it. Indeed, a number of college students testified at the preliminary injunction hearing that they did not believe they had anything that met the descriptions of any item on the list. Further, multiple witnesses testified that the ultimate decision of what constitutes acceptable proof is up to the discretion of the town clerk and/or the poll worker at the polling location.

The State repeatedly argued that no witness testified to a voter being actively turned away and prevented from casting a ballot after SB 3 went into effect. However,

as just noted, Investigator Tracy did testify that some voters were, in fact, turned away in order to acquire documentation; whether they returned and voted is unknown. (*See* Trial Tr. (12/10) at 1136-37.) Moreover, there were several near misses where individuals only voted because someone took the time to stop, ask questions, and explain. One witness testified that if things were busier, she would not have had the time to do this. Moreover, several witnesses testified to people leaving the polls after expressing frustration with the forms. Although the stories of voters leaving the polls are not extensive and are anecdotal, they are supported by the persuasive and credible expert testimony offered by Plaintiffs, for which the State had no effective rebuttal (see *infra*). Based on the expert testimony, the Court finds there exists strong evidence that SB 3, if fully implemented, will suppress voter turnout.

The complicated nature of the forms is reflected not only in voter confusion, but also confusion among local election officials. Assistant Secretary of State Bud Fitch testified that one of the supervisors in Rochester Ward 5 was instructing everybody who registered on election day to fill out an affidavit regardless of whether they needed to or not. Assistant Secretary Fitch also testified that with respect to choosing between Option 1 and Option 2, a voter should only select Option 1 if he or she knows that they have, at that moment in time, documentary proof of domicile. However, Deputy Secretary Scanlan testified earlier that same day that voters should select Option 1 if they believed they *could* obtain said proof, and should select Option 2 only if they did not believe they could obtain it. The latter position would push a greater number of individuals to Option 1, exposing those registrants to potential penalties.

Various towns also displayed inconsistent information on their websites. Londonderry's voter registration page contained the following: "What are the requirements to register to vote? Proof of Londonderry, NH Residency (Driver's License or Passport with current Londonderry address)." (PX 164.) Goffstown's website said that without a driver's license, "a second proof of residency will be required (i.e. – utility bill, lease agreement)." (PX 165.) Brentwood's website states that in order to register, "[y]ou need to have a Driver's License with your Brentwood address or a bill with your name and address." (PX 174.) Finally, Hopkinton stated that "[a]cceptable proof [of domicile] is a vehicle registration, lease, utility or tax bill, or payroll stub with your Hopkinton/Contoocook address." (PX 175.)

In practical terms, due to all of the foregoing, a significant majority of registrants will find themselves subject to the substantial penalties imposed by SB 3. Of the 66 new registrants who selected Option 1 between January and June 2018, not one actually complied with the law and submitted proof of domicile within the time period required. (JE 58.) Of the 1,104 new registrants who selected Option 1 between July and December 2018, only 289 individuals returned proof of domicile, subjecting 815 to potential civil and/or criminal penalties. (JE 59.)

In addition, inconsistent or incorrect guidance from official sources or authority figures may result in unregistered voters being dissuaded from even attempting to vote. For example, on October 9, 2018, the president of UNH sent an email to students informing them that they were entitled to vote in New Hampshire and encouraging them to do so. (JE 80.) However, he stated that "[t]o register to vote in New Hampshire, you will need a photo ID, proof of your date of birth (a driver's license suffices), and proof of

domicile (where you live)." (*Id.*) The email offers examples of what would suffice for proof of domicile—such as a utility bill, lease, housing agreement, or any other document containing the student's name and address—but makes no mention of the possibility of filling out an affidavit when registering. (*Id.*) Therefore, a student reading the email from the president of the institution who did not have any of the referenced documents may have been led to believe that they would be unable to vote.

The credible testimony of Plaintiffs' expert witnesses, supported by testimony from a multitude of witnesses and the State's own data, suggests that the complicated and confusing nature of the forms will increase average registration times and result in longer lines at polls. The increased time waiting in line is a cost of voting that, together with navigating the forms and the penalties, may outweigh the benefit of voting for some individuals. To this point, an election observer testified that during the 2018 midterms, she witnessed five voters leave the registration line without registering or voting during a time that the line was continuing to grow without moving forward. (Trial Tr. (12/4) at 448-49.) This is a fact that the State's own materials concede. (*See* PX 41 at 10 (stating that "excessive waiting times deter voting"); PX 43 at 2 (same).) Moreover, the State failed to present testimony rebutting the well-supported opinions of Drs. Yang and Herron on these points.

The Court finds it is important to note that the data suggests that the number of individuals lacking proof of domicile is, overall, a small minority of new registrants. (*See, e.g.*, JE 93.) Most new registrants possess proof of domicile and thus never encounter SB 3's forms. While it is unlikely that the worst case scenarios in Dr. Yang's models will be realized, as they require 40% of same-day registrants to lack proof of

domicile, the models strongly indicate that the increased average registration time under SB 3 will have some negative impact on lines in the upcoming 2020 general election. Because this impact increases with population, Dr. Yang's credible testimony supports a conclusion that larger polling places and elections with larger turnout will both experience noticeably longer lines under SB 3. Because waiting in line constitutes a cost of voting, SB 3 will increase the likelihood that certain voters will not vote.

As to the penalties, at the outset, the Court notes that one of Plaintiffs' experts, Dr. Lorraine Minnite, testified at the preliminary injunction hearing that she reviewed the election codes of every state and determined that New Hampshire is the only state in the country that criminalizes the failure to return paperwork relating to election registration. (PI Tr. (8/31) at 30, 91–92.) SB 3 is therefore unique in that respect, and by definition imposes harsher penalties on the voter registration process than any other state in the country. In addition, as noted above and in this Court's order on the State's motion for summary judgment, it is easier to be charged with a Class A misdemeanor than a civil penalty under SB 3.

The Court further notes that an individual need not cast a fraudulent vote in order to be subject to the penalties set forth at RSA 659:34, I(h). Even assuming the new voter is entirely truthful about their domicile and is fully eligible to vote in New Hampshire, they could nevertheless be civilly fined $5,000 and/or face a criminal fine of up to $2,000 and a sentence of up to a year in prison if they knowingly and/or purposely fail to return paperwork. Holding someone accountable for both a civil fine and criminal penalties for failing to submit a document when that individual is otherwise domiciled in this state and voting in the proper location represents an overreach by the government.

Penalties associated with the failure to return paperwork are particularly unreasonable given the ease with which the State is capable of verifying the vast majority of registrants who lack documentary proof of domicile when they register. As set forth in more detail below, the State is capable of verifying domiciles with a variety of resources, and the number of individuals that require follow-up investigation by the Attorney General's Office after any given election is exceedingly low considering the number of affidavits filed.

Numerous witnesses testified at trial that the penalties would have a deterrent effect on voting. As set forth in more detail below, Dr. Herron testified that exposure to criminal penalties is a cost that will deter potential voters. Deputy Secretary of State David Scanlan testified that the Secretary of State's Office does not instruct local election officials to advise registrants about any of registration penalty provisions due to the potential for the "appearance of intimidation." (PI Tr. (9/6) at 172.) Significantly, while Form B does provide a warning that knowingly or purposely providing false information when registering to vote, or fraudulently registering to vote, could result in criminal and civil penalties, the form does *not* inform a reader that failing to return proof of domicile exposes the registrant to the same penalties. Instead, Option 1 merely says: "Failing to report and provide evidence of a verifiable action will prompt official mail to be sent to your domicile address by the secretary of state to verify the validity of your claim to a voting domicile at this address." (JE 11.) This avoidance of even referencing the penalties further supports the conclusion that exposure to these penalties will likely dissuade someone from voting, or at least from selecting Option 1.

Notably, the State dedicates only a single paragraph of its fifty-one-page post-trial brief to a discussion of the penalties associated with SB 3 and their burden on registrants. In that brief section, the State emphasizes the required mental states under the law and notes that voters have nothing to fear from accidentally forgetting to send in documents. The State argues that "any person dissuaded from voting because he or she would *intentionally* commit one of these offenses is hardly disenfranchised, as that person would not have a right to vote in New Hampshire in the first place." (State's Post-Trial Brief at 33.) However, this oversimplifies the statute's reach. Even assuming one were to register via Option 1 with the intent of not returning the paperwork or intentionally provide false information while attesting that another resides at a certain domicile, these actions may not say anything about that person's eligibility to vote under the criteria set forth in the State Constitution.

At other times, the State has attempted to address concerns about the penalties by raising the fact that prosecutors will exercise their discretion with respect to prosecuting violations of SB 3's new penalties. However, the Court finds this to be an unconvincing argument, and one that would be small comfort to the average citizen when deciding whether to subject themselves to such significant penalties. Regardless of the likelihood of being prosecuted, a voter may be dissuaded from voting because they are fearful of any post-election investigation. Whether or not that person is legally correct or intending to defraud, this is a valid reaction. Moreover, such an investigation only occurs when the individual has committed a documented actus reus, and no defendant wants to be limited to a defense of state of mind at trial. In addition, even assuming the voter is positive he or she could mount a successful defense, the financial

and social cost of defending against the prosecution is substantial enough to dissuade someone from even participating in the process in the first instance.

Finally, the Court finds the State's argument that Plaintiffs have failed to identify anyone who decided not to vote as a result of the penalties is somewhat disingenuous. As noted above, the penalties were enjoined less than a week after the law became effective. Therefore, at no time has any voter been subject to or even been made aware of these potential penalties while voting.

As noted by Dr. Herron, all of the foregoing falls disproportionately on certain groups of individuals who use same-day registration more frequently than others. Young, mobile, low-income, and homeless voters will all encounter SB 3 and be exposed to its penalties at a higher rate than other voters. Therefore, the burdens imposed by the law are discriminatory, in addition to being unreasonable.

The State argues that because SB3 does not burden *all* voters, it has a plainly legitimate sweep and therefore must survive a facial challenge. In support, the State cites *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008), *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016), and *Brakebill v. Jaeger*, 932 F.3d 671 (6th Cir. 2019). All of those cases state some variation of: "[E]ven assuming that a plaintiff can show that an election statute imposes excessively burdensome requirements on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters." *Brakebill*, 932 F.3d at 678. However, each of those cases involved a voter identification law that required all voters in the state to have some form of official identification to cast a vote. Here, in contrast, SB 3 only applies to and imposes burdens on unregistered voters, already a minority of the voting population

in New Hampshire. Even fully enforced, SB 3 would, by definition, only apply to *some* voters. Therefore, partial or full invalidation of the statute would not have the sweeping impact mentioned in the cases above. The Court is also concerned by the State's apparent position that so long as it only affects a small portion of the population, the State is entitled to enact targeted legislation that disenfranchises that population with impunity.

Moreover, 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. The problem with SB 3 is not that it creates a system that encourages voters to be actively turned away from the polls or physically prevents individuals from registering by, for example, requiring specific types of documentation that are impossible for one group to obtain. The burdens imposed by SB 3 are more subtle; the new process establishes enough hurdles, the forms contain enough complexity, and the penalties present enough risk that they tend to dissuade a specific type of voter from even engaging with the process. In this regard, the State's constant refrain that nobody was prevented from voting rings hollow. SB 3 does not stop someone at the polls from casting a ballot; it discourages them from showing up in the first place.

Relying in part on the discredited testimony of Dr. Hood, the State argues that the increased turnout for younger voters in the 2018 midterm election indicates that SB 3 does not have a deterrent effect on this population. However, the Court finds two predominant factors contributed to the increased turnout independent of SB 3. First, although Dr. Hood did not account for it in his analysis, the Court finds it cannot ignore the current political climate when evaluating the data from 2018. Overall turnout was

increased in 2018 over prior midterm elections, both in New Hampshire and nationally. (JE F-1, F,2, F-3.) Dr. Herron testified that he analyzed the census data on this matter and determined that the increases in New Hampshire were qualitatively the same as those seen nationwide. (Trial Tr. (12/4) at 294-95.) As SB 3 only exists in New Hampshire, one cannot conclude that SB 3 had any particular effect on voter turnout.

Second, a consistent theme in the testimony of Plaintiffs' witnesses was the assistance of third-party organizations in voter education outreach, get-out-the-vote efforts, and assistance with the registration process itself. In direct response to SB 3, both the League of Women Voters of New Hampshire and the New Hampshire Democratic Party expended significant time and effort on voter outreach and education campaigns expressly focused on SB 3. Elizabeth Tantarelli, president of the League, testified that the League generated fliers intended to educate voters on SB 3. (*See* Trial Tr. (12/10) at 1021-22.) Lucas Meyer, president of the Young Democrats of New Hampshire, testified that his organization undertook voter education efforts both on and off campus, and devoted 45% of its time to addressing SB 3 leading up to the 2018 midterm elections. (*See* Trial Tr. (12/9) at 895-98, 906.) Meyer testified that these efforts were undertaken with a focus on keeping lines moving quickly on election day.

Colleges have also undertaken efforts to assist their students. Elizabeth McClain testified that the Office of Residential Life at Dartmouth College has a close relationship with the supervisors of the checklist and sends staff to the polls to confirm the domiciles of students, removing the need for these students to complete Form B. (Trial Tr. (12/4) at 401-02.) For the same purpose, UNH developed an app that allowed on-campus students to prove their domicile. (Trial Tr. (12/5) at 551-53.) Plymouth State College

created a student portal, and Keene State College provided a list of students and their addresses to prove domicile. (Trial Tr. (12/10) at 1199-1200; Trial Tr. (12/11) at 1344-45.)

At least one court has acknowledged the existence of third-party assistance in the context of voting rights in its analysis of whether an election law imposed a burden on voters. In *Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3D 808, 812-13 (S.D. Ohio 2014), Ohio enacted legislation that reduced the number of days that voters could participate in early in-person ("EIP") voting, including allowing EIP voting on only a single Sunday before the election. Among other arguments, the plaintiffs sought to enjoin the law because it would unlawfully burden black voters that participated in an initiative called "Souls to the Polls," in which voters would be driven to the polls after Sunday church services. *Id.* at 816. Many of these voters were low income and lacked access to transportation and therefore relied on the transportation offered by Souls to the Polls. *See id.* at 832. The Federal District Court for the Southern District of Ohio found that "[g]iven evidence of long lines occurring when only one Sunday with limited hours was available during the early-voting period, . . . Directive 2014-17's limitation of Sunday voting to a single day with limited hours burdens the voting rights of African Americans who have come to rely on Souls to the Polls initiatives." *Id.* at 842.

Here, the Court is not persuaded that the extraordinary efforts by third parties to address concerns raised by SB 3 can be discounted in the analysis of the law's effect on voter turnout. While it may not stand on its own as evidence of an unreasonable or severe burden on the right to vote, the Court finds that these efforts, at a minimum,

helped prop up the voter turnout numbers in 2018, and that similar efforts will need to continue going forward in order to ameliorate the burdens imposed by SB 3. In fact, both Dr. Yang and Ann Shump testified that they believed the UNH app helped to significantly reduce the percentage of voters who lacked proof of domicile in Durham in 2018. (Trial Tr. (12/10) at 1048, 1051; Trial Tr. (12/5) at 553.) The Court finds this reliance on the beneficence of third parties to be fraught with risk, as there is no guarantee and no requirement that such efforts continue.

In evaluating the constitutionality of election laws, courts look at the statute's language, its implementation, its impact on voters, and the legislature's justifications for the law. *See generally*, *Burdick v. Takushi*, 504 U.S. 428 (1992); *Guare v. State*, 167 N.H. 658 (2015); *Akins v. Secretary of State*, 154 N.H. 67 (2006). This Court is unaware of any case in which the efforts of third parties were taken into account as a factor curing a constitutional defect in a law. Moreover, to conclude that an otherwise unconstitutional burden is lawful because of the actions of third parties would be a dangerous precedent to set. Legislation must be constitutional as written; the legislature cannot enact laws with the expectation that private individuals or entities will undertake the effort and expense of addressing its constitutional infirmities.

Based upon the foregoing, the Court finds that SB 3 imposes an unreasonable and discriminatory burden on the rights of voters in New Hampshire. As a result, the State must meet its burden under intermediate scrutiny to demonstrate that the law is "substantially related to an important government objective." *Guare*, 167 N.H. at 665. "[T]he State must 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." *Id.* at 667. As noted above, "[t]o meet this burden, the government may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations." *Id.* at 665 (quoting *Cmty. Res. for Justice v. City of Manchester*, 154 N.H. 748, 762 (2007)).

In its requests for findings of fact and rulings of law following the preliminary injunction hearing, the State articulated the following interests in support of SB3: (1) assessing the eligibility and qualifications of voters; (2) ensuring that only those individuals qualified to vote under Part I, Article 11 of the New Hampshire Constitution are registering and voting in the proper location; (3) safeguarding voter confidence in the election system; (4) protecting public confidence in the integrity of the State's elections; and (5) preventing and protecting against wrongful voting and/or voter fraud. In its post-trial brief, the State reiterated these interests. However, at the bench trial, the State also articulated a new basis for the law: reducing the number of sworn statements of domicile that state officials must investigate after an election, thus reducing the financial burden.

At the preliminary injunction stage, the State argued that the most reliable source of legislative intent, aside from the language of the statute, is the majority report of the committee recommending the adoption of the legislation. In this case, that report reads as follows:

> This bill, as amended by the committee, is designed to strengthen the public confidence in the integrity of our elections by closing the domicile loophole. Under current New Hampshire law, to be qualified to vote individuals must establish their domicile in the town or ward where they seek to register. Many new registrants satisfy this requirement by signing a "domicile affidavit" in which they attest under penalty of perjury that they are domiciled in the town or ward. The use of only an affidavit to prove domicile creates opportunities for voter

> fraud because election officials must take the applicant at his or her word. Furthermore, because the standard for domicile under RSA 654:1, I, is entirely subjective . . . , it is virtually impossible to prove that an individual has misrepresented domicile in the affidavit. . . . [This bill creates] an important change in the law because it makes false representations of domicile much more difficult and makes enforcement of the law much easier if there are misrepresentations. . . . The minority argues that the law should not be changed because there is not serious voter fraud. The majority rejects this as the standard the legislature should apply when considering election law reform. If current law creates opportunities for voter fraud the majority believes that the law should be changed to eliminate those opportunities regardless of whether anyone can demonstrate that the vulnerability in the law has been exploited.

(JE 3 at CHR 4.) Furthermore, Senator Regina Birdsell, one of the bill's sponsors, stated:

> This legislation has been in the making for a long time. Some people believe there is rampant voter fraud, while others believe that voter fraud is widespread enough to bother not doing anything about it. However almost no one believes that voter fraud does not exist at all and how could they? The secretary of state testified that in every election at least one case is discovered and prosecuted. As with all other kinds of crime, it is hard to know how many undiscovered cases occur. With our incredibly lax honor system voting we let people who vote simply because they say they are domiciled here. We have no way to know how many improper votes are cast by those not truly domiciled in the state each election. Mister President, we owe it to our constituents to balance two equally important ideas. One; we want to make voting and access to the polls easy enough that not one single qualified voter is turned away and denied the right to cast a legal ballot. Two; we want to make our voting system secure enough that not one single qualified voter has his or her vote cancelled out by ballots cast by someone who is not legally domiciled here. . . . If we continue to turn a blind eye to the fact that this happens in every election without making any effort to assure that only legal voters are casting ballots in our elections, then we are not doing right by our constituents.

(JE 2 at CSR 15–16.) Senator Andy Sanborn, another sponsor of the bill, stated:

> I would hope that . . . if you truly believe that every eligible voter has a right to vote, that you have an equally strong requirement to make sure their vote counts. . . . Some people in this room have had exceptionally close races. So shouldn't we be trying just as hard to

> make sure that we know we have done all in our power to make sure that every vote was eligible, and that every vote counted? Because if one person slips in to decide a race who is not eligible, it has disenfranchised every person who showed up who was eligible. So when we talk about fraud, . . . because we don't have any protection on fraud, because we are one of the most lax states in America. . . . Additionally, while I don't think there is widespread fraud and abuse, we received testimony from the secretary of state himself . . . that said that in every single election in recent history, they have brought someone up on voter fraud. . . . [I]f we do not ensure integrity, integrity of the process, that beyond any other measure will discourage people from voting.

(*Id.* at CSR 25–26.)

Although the legislative record is practically overwhelmed with references to voter fraud, the reality is that voter fraud is virtually non-existent in this state, a fact that the State conceded at trial. In its opening statement, the State said: "[L]et me clearly state that there is no widespread voter fraud in New Hampshire. The State has never taken the position that there is." (Trial Tr. (12/3) at 45.) Consistent with this concession, Dr. Lorraine Minnite testified that her research into voter fraud in New Hampshire revealed less than one confirmed case per year over the past twenty years. Put into more concrete numbers, Dr. Herron testified that there was a single case of voter fraud in 2016, representing a fraud rate of 0.0166% when compared to the number of domicile affidavits signed (6,033), and 0.00013% compared to the number of total ballots cast that year (755,850). Prior elections had similarly low rates of fraud: 0.00076% in 2006 (3 investigations out of 393,056 ballots cast), 0.0014% in 2008 (10 investigations out of 719,403 ballots cast), and 0.00087% in 2010 (4 investigations out of 461,423 ballots cast).

Finally, the State has failed to prove that the restrictions imposed by SB 3 are actually necessary to address voter fraud. Although additional hurdles have been put in

place, the fact remains that new voters may register by affidavit without proof of domicile and cast a valid vote. Notably, the ballots filled out by voters registering via affidavit are not provisional; there is no way of distinguishing between ballots once they have been cast. Therefore, any individual intent on casting a fraudulent vote will be able to do so by selecting Option 2, for which there are no additional penalties under SB 3. Even assuming a fraudulent voter faced greater penalties under SB 3, the State presented no evidence that these would be a deterrent to a fraudulent voter. Therefore, to the extent the legislature enacted SB 3 with the purpose of combating voter fraud, the Court is not convinced that it succeeded.

The State also articulates justifications about ensuring the integrity of New Hampshire elections and boosting voter confidence. However, the Court agrees with Plaintiffs that these are simply arguments about voter fraud in disguise. As the court (Brown, J.) noted in its preliminary injunction order, "[a]ll remarks regarding improving confidence in and the integrity of the State's elections were made in the context of closing 'loopholes' and tightening up the 'lax' system that supposedly enables ineligible voters to cast ballots throughout the State." (PI Order at 20; *see generally* JE 2.) Moreover, Dr. Herron testified that voter confidence is already very high in this state, as indicated by the high rate of participation in elections. New Hampshire boasts some of the highest voter turnout numbers in the country, ranking third overall in the 2016 general election. In addition, Dr. Herron testified that the most significant factor for voters with respect to the perception of election integrity is the "winner effect": an individual is more likely to believe that the election process is fair when their preferred candidate wins, and vice versa. Finally, because SB 3 does not in fact impede

fraudulent voters, any perceived increase in the integrity of New Hampshire's elections is illusory.

The Court finally addresses the State's argument that SB 3 serves the important government interest of reducing the administrative cost of post-election investigation. First, as noted by plaintiffs, this administrative convenience justification is particularly recent; it was not until the final bench trial that the State began to articulate administrative convenience as a justification for the law. Moreover, the legislative record contains only one single reference to this concept. On June 1, 2017, during a debate on the House floor, Representative Barbara Griffin stated:

> Currently, the state does send out letters or cards as provided in law, but using that information to make any factual conclusion as to the validity of a domicile assertion is a nearly impossible task and over the years the volume and lack of follow up with thousands of voters would make that task a difficult ongoing and very costly use of state resources. SB 3 is intended to and does shift from the state to the voter the responsibility of proving where they are domiciled by requiring a production of a piece of paper or documentary evidence in support of the assertion that the person lives where he or she says she does. . . . [D]ocumentary evidence of domicile will dramatically reduce the number of new registrants whose claim of domicile must be investigated by the state. This will result in more focused investigations and greater likelihood of timely prosecution of voter fraud where it occurs . . . .

(JE 48 at 133.) Given the fact that of the dozens of pages of minutes from debates and speeches in both the Senate and the House, the above quote is the only reference to the administrative cost of voter registration, the Court finds this was not a focus of the legislature. Nevertheless, even assuming the foregoing is sufficient to make administrative convenience an official justification for the law, the Court finds the State has failed to meet its burden to establish that it is an important governmental objective that is actually addressed by SB 3.

Chief Investigator Tracy testified that for 2016, the Attorney General's Office utilized the internet, made phone calls, and/or visited the domicile address provided in order to verify affidavits submitted. Investigator Tracy testified that the vast majority of domiciles were verified using the internet and phone calls. The Attorney General's investigators spent 817 hours verifying domicile affidavits and qualified voter affidavits submitted from May 2016 to January 2017. (PI Tr. (9/5) at 230.)

Between July and December 2018, 1,669 individuals registered to vote without providing documentary evidence of domicile. (JE 59.) 1,104 of those used Option 1, promising to return documentation. (*Id.*) However, only 289 of those actually submitted documentation; 815 did not. (*Id.*) As a result, the State investigated 1,380 voters (the 815 that did not return documentation plus the 565 that selected Option 2), 1,307 of whom were verified using online databases. (*Id.*) The Secretary of State mailed letters to the remaining 73 addresses, 66 of which were delivered as addressed. (*Id.*) The final 7 were forwarded to the Attorney General's Officer for further investigation. (*Id.*) The State provided no information on how much time was spent investigating any of these individuals.

The State also appears to completely gloss over the fact that under a fully implemented SB 3 regime, it is not enough to verify the addresses of those who selected Option 1 and failed to return documentation. Assistant Attorney General Nicholas Chong Yen, current head of the election law office, testified that if SB 3's penalties were not enjoined, the Attorney General's office would have to conduct an analysis and follow-up to assess whether each of the 815 people who did not return documentation in 2018 could be criminally charged or civilly fined under the statute.

(Trial Tr. (12/9) at 989-90.) While the State may employ its discretion in choosing not to ultimately prosecute some or all of these individuals, under SB 3 the State *must* conduct these preliminary investigations; to do otherwise would render the penalty provision either entirely meaningless or would result in completely arbitrary enforcement. SB 3 therefore creates potential for significant costs that, at a minimum, would match the cost of the verification system pre-SB 3. Moreover, due to the penalties being enjoined, Attorney Chong Yen testified that the Attorney General's office has not yet developed any enforcement plan. (*Id.* at 987.) Therefore, the State is unable to address the cost of SB 3's implementation; as a result, it has failed to demonstrate that SB 3 actually addresses the stated goal of reducing the administrative cost of running elections.

For all of the foregoing reasons, the Court finds the State has failed to meet its burden under intermediate scrutiny. In light of this finding, the State argues the proper remedy is not to strike down the statute in its entirety, but to merely excise the offending language and leave the remainder intact, as the Supreme Court did in *Guare*. As the State acknowledges, "[i]n determining whether the valid provisions of a statute are severable from the invalid ones, we are to presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved." *Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 217 (1999). "We must also determine, however, whether the unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure." *Id.*

Here, because the unreasonable burden imposed by the statute is largely due to the language on Form B and the VAD, those forms must be stricken in their entirety.

Form B and the VAD are the centerpieces of SB 3, without which much, if not all, of the legislation ceases to make sense. The penalties enacted rely on words defined in or actions take pursuant to forms that no longer exist, and the two-tiered registration system no longer functions, as there is no longer an affidavit to submit within thirty days of an election and on election day.

The State argues that it is free to alter the language in the forms because RSA 657:7, IV(c), as modified by SB 3, provides that "[t]he secretary of state shall prescribe the form of the voter registration form . . . , which shall be in substantially the following form." However, Deputy Secretary Scanlan testified that the language contained within the forms was mandated by the legislature, and that the only discretion the Secretary of State had was to alter the form's physical layout. (Trial Tr. (12/11) at 1420-21.) The Court finds this to be the proper reading of the statute. This is, therefore, not a problem the Secretary of State's office can fix; repair of SB 3 must be undertaken by legislative action. As a result, the unconstitutional provisions of the statute are so integral and essential to the general structure of SB 3 that the act must fail in its entirety.

Accordingly, for the foregoing reasons, the Court finds in Plaintiffs' favor on Count I of their complaint and finds that SB 3 in its entirety is facially unconstitutional.

II. Equal Protection

"In considering an equal protection challenge under our State Constitution, we must first determine the appropriate standard of review by examining the purpose and scope of the State-created classification and the individual rights affected." *In re Sandra H.*, 150 N.H. 634, 637 (2004). As noted in the previous section, "[a]lthough the right to vote is fundamental, we do not necessarily subject *any* impingement upon that right to

strict scrutiny." *Guare*, 167 N.H. at 663. The Court "must balance the legislature's right to regulate elections with citizens' rights to vote and be elected." *Akins*, 154 N.H. at 72. Because the burdens here are the same as in Section I, the Court will apply the same intermediate scrutiny standard in reviewing whether SB 3 violates the equal protection clause.

Part 1, Article 11 of the New Hampshire Constitution guarantees 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."

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Bush v. Gore, 531 U.S. 98, 104–05 (2000). "The equal protection provisions of the State Constitution are designed to ensure that State law treats groups of similarly situated citizens in the same manner." *McGraw v. Exeter Region Co-op. School Dist.*, 145 N.H. 709, 711 (2001). "The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." *LeClair v. LeClair*, 137 N.H. 213, 222 (1993).

Relying upon Dr. Herron's research, Plaintiffs argue that SB 3 impacts certain voters more than others. Specifically, as indicated above, young voters, college students, mobile voters, low-income voters, and Democrats[5] are more likely to be

[5]While the Court does not specifically rely on the alleged partisan nature of SB 3, the Court finds it worth noting that a statute governing elections that targets a specific political party may be particularly problematic under an equal protection analysis.

impacted by SB 3. These voters are similarly situated with all other voters in New Hampshire in that they are domiciled here and, pursuant to the State Constitution, have an equal right to vote. Unlike situations where voters are in different geographic areas that are operating under different forms of government, SB 3 impacts the act of voter registration which functions the same throughout the State. *Cf. McGraw*, 145 N.H. at 713 ("We have previously upheld different treatment of voters based upon their residence in separate, geographic communities operating under different forms of government."). While all new registrants who lack proof of domicile must fill out Form B and otherwise navigate the hurdles set up by SB 3, those in the demographics noted above are demonstrably impacted by the negative effects of SB 3 at a greater rate due to their increased use of same-day registration.

The Court notes that the State did not separately analyze Plaintiffs' equal protection claims in its post-trial memorandum. That being said, the State briefly argues that Plaintiffs have failed to establish that SB 3 disproportionately burdens certain groups of voters more than others. (State's Post-Trial Mem. at 3.) Specifically, the State argues that young voter turnout was noticeably increased in 2018, and college students and other identified demographics at the polls were able to vote without incident, despite SB 3 being partially in effect. (*Id.*) In addition, the State argues that "[c]ollege students, more than other groups of people, have many advantages that enable them to more easily register to vote." (*Id.*) However, the State's position is not supported by these arguments, and was in fact contradicted by the evidence submitted at trial.

Dr. Hood did not challenge Dr. Herron's conclusion that certain groups utilize same-day registration more than others. To the contrary, he conceded that that conclusion is supported by the political science literature and was empirically established by Dr. Herron's data. (Trial Tr. (12/9) at 804-05.) Instead, Dr. Hood simply challenged the cause-and-effect conclusion that increased exposure to SB 3's forms resulted in an increased burden on the right to vote. (*Id.* at 805.) The Court again notes that it did not find Dr. Hood to be a credible witness. Moreover, as noted above, turnout among young voters increased nationally in 2018 at qualitatively the same levels, a point not addressed by Dr. Hood at all. This indicates that the turnout in 2018 was a reflection of the political climate rather than anything that can be attributed to SB 3.

Moreover, multiple witnesses testified to their belief that the ease with which college students voted in 2018, at least in Durham and other college towns, was due in large part to the efforts of the colleges themselves to supply proof of domicile. The Court has already expressed its position that such third-party efforts do not represent a valid alleviation of the unconstitutional burdens imposed by SB 3. In addition, the fact that college students and others who went to the polls were able to register and vote does not undermine Plaintiffs' position. Plaintiffs have never maintained that SB 3 would prevent *all* members of certain groups from being able to vote. Rather, Plaintiffs have maintained that SB 3 will dissuade people from attempting to vote and will ultimately suppress voter turnout. This position was supported at trial by the credible testimony of Dr. Yang and Dr. Herron, as well as numerous other lay witnesses. The evidence at trial indicates that SB 3 imposes an unreasonable burden on the right to vote, which will be felt most by those who utilize same-day registration. Because

specific, identifiable groups utilize same-day registration at demonstrably higher rates than others, SB 3 disproportionately burdens those individuals.

The State has not offered any specific justifications for this disparate treatment separate from those already addressed and rejected in Section I. Because the State bears the burden under intermediate scrutiny, the Court finds it has failed to justify the unequal impact that SB 3 has on certain classes of voters in this state. Accordingly, for the foregoing reasons, the Court finds in favor of Plaintiffs on Count III of their complaint.

III. Void for Vagueness

Plaintiffs' final challenge to SB 3 is that it is unconstitutionally vague. "A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality." *State v. Wilson*, 169 N.H. 755, 767 (2017). "A statute can be impermissibly vague for two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* at 770; *see State v. Smagula*, 117 N.H. 663, 666 (1977) ("It is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever reasonably possible."). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Montenegro v. N.H. Div. Motor Vehicles*, 166 N.H. 215, 222 (2014). "The absence of clear standards guiding the discretion of the

public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *Id.*

In their complaint, Plaintiffs argued the statute is void for vagueness in two respects: (1) the penalties imposed by SB 3 contain conflicting mental states; and (2) the statute lacks guidance on what documentation qualifies as valid "verifiable acts of domicile" for purposes of completing Form B. In ruling on the State's motion for summary judgment, the Court found the competing mental states did not render SB 3 void for vagueness. Therefore, the Court shall only address Plaintiffs' second argument.

In their post-trial brief, Plaintiffs elaborate on their argument by stating: "SB 3 is unconstitutionally vague because its penalty provisions interact with its documentation requirements in a way that fails to afford ordinary voters a reasonable opportunity to understand what conduct is prohibited, while also promoting arbitrary and discriminatory enforcement that will chill the exercise of the fundamental right to vote." (Pls.' Post-Trial Brief at 143-44.) More specifically, Plaintiffs argue that because of the lack of clarity involved in when a voter should select Option 1 over Option 2, and due to the discretion afforded local election officials in determining what qualifies as acceptable proof of domicile, voters in different locations will be subject to arbitrary exposure to SB 3's penalty provisions by being inconsistently directed toward Option 1.

"Although the [void for vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the United States Supreme Court] ha[s] recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish

minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 358. Such is not the case here. As argued by the State, SB 3 *does* give guidance as to the types of documents that are acceptable as proof of a verifiable act of domicile. (*See* JE 12.) Although the Court has found that the VAD contains confusing language, "perfect clarity and precise guidance has never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304 (2008). In order to ensure that otherwise qualified voters are not turned away due to possessing only atypical documentary proof of domicile, some form of discretion by local election officials is required; it would be impossible for the State to create a list of *every* conceivable acceptable document, and making a restrictive list would certainly disenfranchise some individuals who lacked the prescribed documentation. Although imperfectly drafted, SB 3's forms are a far cry from "standardless," and provide adequate guidance to both the voter and local officials on what constitutes acceptable proof of domicile for purposes of selecting between Options 1 and 2.

To the extent Plaintiffs argue the statute does not provide an opportunity to understand the conduct it prohibits, the Court also disagrees. The new penalties under SB 3 largely come into play when a new registrant selects Option 1 on Form B, and prohibits (1) the provision of false information related to the registrant's own domicile or verifiable action of domicile; (2) the provision of a false statement as to someone else's domicile; and (3) the failure to return documentary proof of domicile. Although the Court

found above that these penalties—specifically the final one—contributed to an unreasonable burden on the right to vote, the penalty itself and the conduct it applies to are clearly set out in the statute.

Accordingly, for the foregoing reasons, the Court finds that SB 3 is not void for vagueness. Therefore, the Court finds in the State's favor on Count IV of Plaintiffs' complaint.

IV. Conclusion

The Court finds in Plaintiffs' favor on counts I and III, and in the State's favor on IV. In light of its rulings on Counts I and III, the Court strikes down SB 3 as unconstitutional for unreasonably burdening the right to vote and violating equal protection under the New Hampshire Constitution.

SO ORDERED.

April 8, 2020
Date

Judge David A. Anderson