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

REPLY BRIEF OF THE DEFENDANTS

WILLIAM M. GARDNER,
NEW HAMPSHIRE
SECRETARY OF STATE

and

GORDON J. MACDONALD
NEW HAMPSHIRE
ATTORNEY GENERAL

By their Attorneys,

THE OFFICE OF THE
NEW HAMPSHIRE ATTORNEY GENERAL

Daniel E. Will, Bar #12176
Solicitor General

Anne E. Edwards, Bar #6826
Associate Attorney General

Anthony J. Galdieri, Bar #18594
Senior Assistant Attorney General

Samuel R.V. Garland, Bar #266273
Assistant Attorney General

New Hampshire Department of Justice
33 Capitol Street, Concord, NH 03301
603-271-3658

Fifteen Minute Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ARGUMENT

I. THE TRIAL COURT ERRED IN FACIALLY INVALIDATING SB 3.

This Court's standard for facial versus as-applied challenges is well established. It recognizes that the facial versus as-applied distinction goes to "the scope" of the challenge made. *Working Stiff Partners, LLC v. City of Portsmouth*, 172 N.H. 611, 622 (2019). "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." *Working Stiff Partners, LLC*, 172 N.H. at 622; *see Bucklew v. Precythe*, __ U.S. __, 139 S. Ct. 1112, 1127 (2019) ("A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications."). "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 constitutional under the particular circumstances of the case." *Working Stiff Partners, LLC*, 172 N.H. at 622.

These rules help ensure that courts have before them concrete factual scenarios in which to evaluate a law's effects. By design, these rules make facial challenges difficult to mount because: (1) facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (*Brandeis*, J., concurring)); and (2) facial challenges create a risk that a

court will "short circuit the democratic process" by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

Under this standard, a statute such as SB 3, applicable to all persons seeking to register to vote in New Hampshire, survives a facial challenge even if it imposes an unjustified burden on some voters. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 203 (2008) (*Stevens*, J.); *Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019); *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016).

The plaintiffs argue that this result permits restrictive voting laws to stand solely because they unconstitutionally burden the voting rights of some people. But that is not true. The proper challenge to a voting a law that is alleged to affect only the voting rights of some people is an as-applied challenge, not a facial challenge, and it exposes what the plaintiffs are trying to do in this case: invalidate a complex law of general applicability because a very small number of persons in certain high volume elections at certain polling places on election day will register to vote utilizing Form B and receive the VAD form and therefore encounter, as the trial court believes, a series of burdens that make SB 3 unconstitutional as to that group of persons in those specific circumstances. That result is inappropriate. The plaintiffs had to establish that SB 3 "violates the Constitution in all, or virtually all, of its applications" and failed to do so. *Working Stiff Partners, LLC*, 172 N.H. at 622.

The plaintiffs also claim that this Court "has never used the 'no set of circumstances' test to evaluate claims of facial invalidity of voting

laws," but has instead used solely the *Akins*-*Guare* framework. PB[1] 18. There are two problems with this assertion. First, it is incorrect. *Guare* involved a facial challenge to a statute and this Court applied its traditional facial invalidity standard to it. *See Opinion of the Justices (Definition of Resident and Residence)*, 171 N.H. 128, 134 (2018); *Guare v. State*, 167 N.H. 658, 661-62 (2015). Second, this assertion conflates the function of the facial versus as-applied standard with the substantive test to be applied to evaluate the constitutionality of a voting law. They are two separate things. As the United States Supreme Court has explained, "classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding breadth of the remedy, but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Bucklew*, 139 S. Ct. at 1127 (2019) (internal quotations omitted); *see Working Stiff Partners, LLC*, 172 N.H. at 622 (observing that the facial versus as-applied distinction goes to "the scope" of the challenge).

Consequently, a plaintiff seeking to invalidate a duly enacted law (like SB 3) on its face is required to show that the law "violates the Constitution in all, or virtually all, of its applications" to succeed. *Id.* Showing that certain portions of SB 3 may adversely affect a small subset of same-day registrants during certain high volume elections at certain polling places is insufficient to meet that high bar. The trial court erred in concluding otherwise and its decision should be reversed.

[1] "PB__" refers to the plaintiffs' brief.

II. *GUARE* SHOULD BE OVERRULED.

Guare is substantively wrong in many respects, its analytical approach has been called into question by this Court and other courts, and its importation of the traditional intermediate scrutiny test into the *Anderson-Burdick/Akins* balancing test makes it inconsistent with federal case law and poses significant problems for the regulation of elections.

This Court's decision in *Guare* is premised entirely on an erroneous legal assumption regarding whether two differently worded statutory definitions imposed different requirements. In *Casey v. Gardner*, 173 N.H. 274, 274-75 (2020), this Court effectively confirmed that this was not the case in its discussion of *Newburger* v. *Peterson*, 344 F. Supp. 559 (D.N.H. 1972) and the use of language like "indefinite intention to remain" in the law of domicile.

Guare is also confusing. The decision purports to rely on actual application of facts to reach its conclusion under the applicable constitutional test, but three justices of this Court have explained that the trial court did not rely on this factual material and made no factual findings regarding it. *Opinion of the Justices (Definition of Resident and Residence)*, 171 N.H. at 134-35. The trial court, however, has read *Guare* differently, expressly relying on the testimony of the petitioners in *Guare* as integral to the Court's holding in that case. DAII at 85.

Since *Guare* issued, plaintiffs, including those in this case, have relied on it for the proposition that if a New Hampshire voting law is confusing to them, they may challenge it as unconstitutional under Part I, Article 11 of the New Hampshire Constitution and prevail if they show they

are confused by it. *Casey v. Gardner*, Docket No. 19-cv-00149-JL (D.N.H.), ECF No. 68 at 4, 6, 21-22 (Pls.' Amended Compl.); DAII 85. Yet, counsel is unaware of any decision other than *Guare* that has ever seemingly stated that because an election law is confusing to a few persons or is ambiguous (meaning that it is capable of more than one reasonable interpretation), it must survive intermediate scrutiny and may be adjudicated unconstitutional. Ambiguity in statutes is typically resolved through definitive judicial interpretation, not a declaration of unconstitutionality, except in extreme cases when the void for vagueness doctrine is implicated. If the analysis rises or falls on the individual subjective confusion of a few persons, many duly enacted election laws could be subjected to intermediate scrutiny and struck down as unconstitutional.

"[T]he purpose of the *Anderson-Burdick* test is to ensure that the courts carefully balance all the interests at stake, recognizing that 'there is no substitute for the hard judgments that must be made.'" *Fusaro v. Cogan*, 930 F.3d 241, 258 (4th Cir. 2019) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). No "'litmus test' exists that would neatly separate valid from invalid restrictions." *Crawford*, 553 U.S. at 190. The Court must carefully assess the burden of the law, "identify and evaluate the interests put forward by the State as justifications," and "then make the 'hard judgment' that our adversary system demands." *Id.* Shortcut labels and concepts like "intermediate scrutiny" are antithetical to this approach.

Additionally, *Guare* does not speak of an intention to depart from the *Anderson-Burdick* balancing test federal courts employ in analyzing election law challenges under the First and Fourteenth Amendments. This

Court adopted that federal approach in *Akins v. Sec'y of State*, 154 N.H. 67 (2006), and has not expressed a desire to depart from it. Nonetheless, by importing traditional intermediate scrutiny into that analysis, this Court has, perhaps inadvertently, departed materially from the *Anderson-Burdick* balancing test adopted in *Akins*. "[T]he *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). It differs from the analysis that applies to "other Equal Protection claims" where traditional intermediate scrutiny is involved and does not "limit[] the record that the State can build in order to justify a burden placed on the right to vote." *Id.* at 789. The United States District Court for the District of New Hampshire has made the same observation:

> First, LPNH objects that the preliminary-support justification for HB 1542 is a *post hoc* rationalization rather than the legislature's actual motivation for the law. If LPNH were correct in claiming that HB 1542 is subject to strict scrutiny, this argument might wield some force. But *Anderson* balancing, not heightened scrutiny, controls this analysis, and the Supreme Court's cases applying *Anderson* balancing have not barred states from invoking interests that either find scant support in the legislative history or otherwise look like *post hoc* justifications rather than actual motivations.

Libertarian Party of N.H. v. Gardner, 126 F. Supp. 3d 194, 209 (D.N.H. 2015). Thus, *Guare* notably departs from the federal balancing analysis with which it purports to remain aligned.

Accordingly, for all of the above reasons, and the reasons provided in the defendants' opening brief, *Guare* should be overruled.

III. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE *ANDERSON-BURDICK/AKINS* BALANCING TEST.

"Because the 'right to vote in any manner . . . [is not] absolute' and the government must play an 'active role in structuring elections', election laws 'invariably impose some burden upon individual voters.'" *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). "Courts weigh these burdens against the state's interests by looking at the whole electoral system." *Id.* at 671-72. "Only when voting rights have been severely restricted must states have compelling interests and narrowly tailored rules." *Id.* at 672.

For the reasons stated in the defendants' opening brief, the trial court erred in its assessment of the burden SB 3 imposes. The trial court's primary concern was with the domicile portion of the back of Form B and the VAD form, forms which a small minority of registrants will encounter. That is because the front of Form B is largely identical to the previous registration form (and the current one in use today) and the bottom of the back portion of Form B is consistent with the sworn statement affidavit used for the 2016 general election. The trial court heard testimony from no one who actually registered to vote or who attempted to register to vote utilizing the domicile portion of the back of Form B or the VAD form. The trial court instead heard speculation, from experts, from observers of the behavior of others, and from activists and others who interacted with these forms outside the context of the registration process. None of this evidence speaks to the actual burden these small portions of SB 3 place on the minority of registrants going through the registration process.

Even the evidence developed after SB 3 was permitted to go into effect cannot be reliably used to quantify the burden. SB 3 went into effect on September 8, 2017, and its penalty provisions associated with agreeing to return domicile documentation in exchange for registering to vote and voting were enjoined beginning on September 12, 2017. That preliminary injunction required the defendants to inform registrants that the penalty for failing to return the documentation had been enjoined by the court. Consequently, the trial court distorted from the outset any evidence related to SB 3's penalty provisions that may reliably bear on the issue of burden. And the trial court's reliance on that evidence to support its burdens analysis – to treat the number of persons who did not return documents under Option 1 in subsequent elections as an accurate reflection of who would not return documents had SB 3's penalties been in place – was error.

Finally, the trial court was concerned that SB 3 might dissuade persons from showing up to register to vote in the first instance. DD 37[2]. The plaintiffs presented, and the record contains, no evidence to support this speculative finding. *See Washington State Republican Party v. Washington State Grange*, 676 F.3d 784, 792-93 (9th Cir. 2012) (rejecting claim that "Washington's statutes and regulations create voter confusion" because it was based on the "implausible premise that even well-informed voters are aware of the intricacies" of such statutes and regulations).

The trial court also erred in its insistence that the defendants had to present evidence in support of interests that courts have already deemed important, legitimate, and compelling. Safeguarding the electoral process

[2] "DD__" refers to the Defendant's Addendum.

against voter fraud is such an interest. *See Richardson v. Tx. Secretary of State*, 978 F.3d 220, 239 (5th Cir. 2020) ("It is well established that the electoral process poses a risk of fraud."). "[N]ot only is the risk of voter fraud real but . . . it could affect the outcome of a close election." *Crawford*, 553 U.S. at 196. Thus, "[w]hile the most effective method of preventing election fraud *may well be debatable*, the propriety of doing so is perfectly clear." *Id.* (emphasis added). The State "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

And courts do not require States to shoulder "the burden of demonstrating empirically the objective effects" of election laws. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). New Hampshire may "respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id.* at 195-96. "[E]vidence has never been required to justify a state's prophylactic measures to decrease occasions for vote fraud or to increase the uniformity and predictability of election administration." *Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 147 (5th Cir. 2020). For example, in *Crawford*, although "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history," the Court still concluded that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 194. In other words, the defendants do not need to show specific local evidence of fraud to justify legislatively-crafted preventative measures.

The plaintiffs, and the trial court, have expressed their view that they do not believe that SB 3 will prevent all voter fraud or may not deter voter

fraud. But that viewpoint is not a proper basis on which to deem the State's interest in preventing voter fraud or other forms of wrongful voting less than compelling, legitimate, and important. As the case law recognizes, while the best way to combat voter fraud and other forms of wrongful voting "may well be debatable," the propriety of trying to do so "is perfectly clear." *Crawford*, 553 U.S. at 196. The determination of how to combat voter fraud lies within the policymaking legislature. The trial court did not follow these principles in evaluating the State's proffered interests. Accordingly, this Court should find that the State's interests outweigh the minimal burden the plaintiffs were able to prove and reverse the trial court's decision.

IV. THE TRIAL COURT ERRED IN INVALIDATING SB 3 WITHOUT PERMITTING THE DEFENDANTS THE OPPORTUNITY TO MODIFY FORM B AND THE VAD FORM.

The trial court did little to explore whether any alleged burden in this case could be mitigated or remedied in a fashion more focused than outright invalidation of an entire legislative act. As the defendants have shown in their opening brief, the phrase "substantially in the following form" vests discretion in the defendants to cure the types of form issues that caused the trial court and the plaintiffs concern. Long sentences can be broken into shorter sentences; passive voice expressions changed to active voice expressions to reduce words; redundant words or phrases can be eliminated or simplified; indentation and other formatting can be used to more clearly convey how the form works. The statutory language used – "substantially in the following form" – does not preclude these types of changes to alleviate the predominately form-based burden that concerned the trial court.

Permitting the defendants the opportunity to revise the form in accordance with their statutory discretion could eliminate the burden or, in the balancing analysis, reduce the burden to such a degree that the State's interests outweigh it. If such revisions did not fully cure any unconstitutionality, the doctrine of severability may further reduce the burden, without striking SB 3 in its entirety. For example, the penalty provision may be severable. Certain language on Form B or the VAD form may be severable. And any lingering confusion could be cured through judicial declaration. The trial court eschewed this type of careful remedial approach and instead "chose the most blunt remedy—permanently

enjoining the enforcement of" SB 3 "and thereby invalidating it entirely." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 331 (2006). That was error and trial court's decision should be reversed for this reason too.

CONCLUSION

Accordingly, for the reasons the defendants advance in their opening brief, and those set forth herein, the trial court's decision should be reversed and *Guare* should be overruled.

Respectfully Submitted,

WILLIAM M. GARDNER,
NEW HAMPSHIRE SECRETARY OF STATE

By their Attorneys:

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

February 22, 2021

/s/*Anthony J. Galdieri*
Anthony J. Galdieri
NH Bar No.: 18594
Senior Assistant Attorney General

/s/Daniel E. Will
Daniel E. Will
NH Bar No.: 12176
Solicitor General

/s/Anne M. Edwards
Anne M. Edwards
NH Bar No.:6826
Associate Attorney General

/s/Samuel R.V. Garland
Samuel R.V. Garland
NH Bar No.: 266273
Assistant Attorney General

New Hampshire Department of Justice
33 Capitol Street, Concord, NH 03301
603.271.3650

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 2,999 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.

February 22, 2021 /s/ *Anthony J. Galdieri*
Anthony J. Galdieri

CERTIFICATE OF SERVICE

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

Richard K. Lehmann, Esquire, counsel for Regina Birdsell

James S. Cianci, Esquire, counsel for Barbara Griffin and Kathleen Hoetzel

William E. Christie, Esquire and **Suzanne Amy Spencer, Esquire**, Counsel for the New Hampshire Democratic Party

Amanda R. Callais, Esquire, Bruce V. Spiva, Esquire, John M. Devaney, Esquire, Marc E. Elias, Esquire, Paul J. Twomey, Esquire, and **Steven J. Dutton, Esquire**, counsel for Adriana Lopera, Douglas Marino, Garrett Muscatel, Phillip Dragone, Seysha Mehta, and Spencer Anderson

Amanda R. Callais, Esquire, Bruce V. Spiva, Esquire, John M. Devaney, Esquire, Marc E. Elias, Esquire, Paul J. Twomey, Esquire, Steven J. Dutton, Esquire, Alexander G. Tischenko, Esquire, and **Stephanie R. Holstein, Esquire**, counsel for The League of Women Voters of New Hampshire

February 22, 2021 /s/ *Anthony J. Galdieri*
Anthony J. Galdieri