

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DIVISION

SUPERIOR COURT

MANUEL ESPITIA, JR.

and

DANIEL WEEKS

v.

DAVID SCANLAN, IN HIS OFFICIAL CAPACITY AS NEW HAMPSHIRE SECRETARY
OF STATE

and

JOHN FORMELLA, IN HIS OFFICIAL CAPACITY AS NEW HAMPSHIRE ATTORNEY
GENERAL

226-2022-CV-00236
No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COME Plaintiffs Manuel Espitia, Jr. and Daniel Weeks and respectfully petition this Honorable Court for relief pursuant to RSA 491:22 and Part I, Article 2-b of the New Hampshire Constitution. In support of their Complaint, Plaintiffs state as follows:

INTRODUCTION

1. This is a civil rights action challenging newly-enacted Senate Bill 418 (“SB 418”). Despite the fact that voter fraud in New Hampshire is exceedingly rare (with zero prosecutions brought from the September and November 2020 elections), and despite the fact that Governor Sununu has stated that “New Hampshire’s voting process is the most reliable, safe, and secure in the country,”¹ the General Court enacted this bill which would infringe upon the constitutional

¹ <https://www.concordmonitor.com/On-the-trail-Windham-voting-discrepancy-boils-over-40356708>

right to privacy for certain voters who do not timely present proof of identity to their local election official or the Secretary of State.² Under this new regime, if a person registers in New Hampshire for the first time on election day and does not present proof of identity, that person will be given an “affidavit ballot.” Their vote will be counted, but if they do not return proof of identity to the Secretary of State’s office within seven days, the Secretary of State will instruct the local moderator to retrieve the “unqualified” affidavit ballot and list by candidate or by issue the votes cast by the voter and return that list to the Secretary of State. As a result, the voter’s “private or personal information” under Part I, Article 2-b of the New Hampshire Constitution—here, how they voted—is viewed by the Secretary of State or his agents, thus destroying the secrecy of the ballot. The secret ballot is fundamental to American democracy, as Defendant Scanlan himself has recognized. *See Rideout v. Gardner*, 838 F.3ed 65, (1st Cir. 2016) (“[Then-] Deputy of State David Scanlan spoke in support of the bill, emphasizing the need to prevent vote buying and to protect the ‘privacy of the ballot’”) (cleaned up).

2. Applying the appropriate level of scrutiny—here, strict scrutiny—to this intrusion on voters’ “private or personal information”, there is no governmental interest (let alone a compelling one) that can support this intrusion into a voter’s private political preferences. And, even if there was, the bill is not tailored in a way to advance those interests through the least restrictive means available.

FACTS

² Even the Secretary of State has admitted that the bill poses state constitutional questions, particularly with respect to the permissibility of affidavit ballots counted after election day. <https://www.concordmonitor.com/As-Sununu-indicates-support-legal-questions-around-provisional-ballot--bill-persist-46717882>

Parties

3. Plaintiff Manuel Espitia, Jr. is a New Hampshire resident, voter, and taxpayer. He is a member of the New Hampshire House of Representatives for Hillsborough County's 31st District. His address is 15 Hanover Street, Nashua, NH 03060, where he owns a home and pays property taxes on that home. Those property taxes go, in part, to the State of New Hampshire, including to fund the Secretary of State's Office and election administration. He has standing pursuant to RSA 491:22 and Part I, Article 8 of the New Hampshire Constitution.

4. Plaintiff Daniel Weeks is a New Hampshire resident, voter, and taxpayer. His address is 7 Shattuck Street, Nashua, NH 03064, where he owns a home and pays property taxes on that home. Those property taxes go, in part, to the State of New Hampshire, including to fund the Secretary of State's Office and election administration. He is also co-owner of a New Hampshire business that pays Business Profits and Business Enterprise taxes to the State of New Hampshire. He has standing pursuant to RSA 491:22 and Part I, Article 8 of the New Hampshire Constitution.

5. Defendant David Scanlan is the New Hampshire Secretary of State and is named as a Defendant in his official capacity. His office is located at 107 North Main Street, Concord, NH 03301. He is the chief elections officer in charge of administering New Hampshire's election laws pursuant to RSA 652:23. Defendant Scanlan, personally and through the conduct of his employees and agents, acted under color of law at all times relevant to this action.

6. Defendant John Formella is the New Hampshire Attorney General and is named as a Defendant in his official capacity. His office is located at 33 Capitol Street, Concord, NH 03301. The Attorney General is responsible for approving the elections manual biennially. RSA 652:22. He is also responsible for enforcement of the state's election laws. RSA 7:6-c, I. Defendant

Formella, personally and through the conduct of employees and agents, acted under color of law at all times relevant to this action.

Jurisdiction and Venue

7. This Court has jurisdiction over this matter pursuant to RSA 491:22. “Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court’s judgment or decree thereon shall be conclusive.” RSA 491:22.

8. Venue is proper in this Court pursuant to RSA 507:9 because Plaintiffs reside in this judicial district.

SB 418

9. Senate Bill 418 is the most recent effort by legislators in Concord to place unnecessary roadblocks and burdens in front of New Hampshire voters in the guise of maintaining “voter confidence,” even though voter fraud is startlingly rare in New Hampshire and in the United States. *See N.H. Democratic Party v. Secretary of State*, 174 N.H. 312, 332 (2021) (striking down previously enacted statute (SB3) which “imposes unreasonable burdens on the right to vote”); *see also Guare v. State of New Hampshire*, 167 N.H. 658 (2015) (striking down voter registration form language that would impose a chilling effect on the right to vote of those domiciled in New Hampshire).

10. On March 31, 2022, the New Hampshire Senate passed SB 418 on a vote of 13-11, largely along party lines having previously been endorsed by the New Hampshire Senate Election Law and Municipal Affairs Committee by a vote of 3 to 2. It was amended by the House Election Law Committee, recommended ought to pass with amendment 11-9, and then passed by the New Hampshire House of Representatives by a vote of 180 to 154.

11. It was then amended again in the house by the House Finance Committee, reported out of committee favorably by a vote of 12 to 9, and then passed again by the House of Representatives by a vote of 164 to 155. After the Senate concurred with the House’s changes, it was signed by the Governor on June 17, 2022. It takes effect January 1, 2023. *See* Exhibit 1.

12. The “findings” clause of SB 418 suggests that it was enacted in response to “illegal ballots” and “unverified votes.” But voter fraud is extremely rare in New Hampshire. *See N.H. Democratic Party v. Secretary of State*, 174 N.H. 312 (2021). Moreover, the findings refer to one case of double voting (occurring in 2016), but SB 418—which burdens only those voters without proof of identity, rather than without proof of domicile—would have done nothing to prevent that crime.

13. In the November 2020 General Election, there were 814,499 ballots cast. In the September 2020 Primary Election, there were 147,237 Republican ballots cast and 155,956 Democratic ballots cast. However, as of April 8, 2022, out of the over 1 million ballots cast between those elections, the Attorney General’s office had not commenced *any* civil or criminal enforcement proceedings for wrongful voting and/or voter fraud. *See* Ex. 2. As of that date, only five investigations were open into alleged wrongful voting from those elections. *Id.*

14. Governor Sununu said following the November 2020 election “Here in New Hampshire our elections are secure, accurate, and reliable—there is no question about it.” <https://www.governor.nh.gov/news-and-media/governor-chris-sununu-statement-following-certification-2020-election-results>.

15. SB 418 creates an entirely new voting scheme for people who are registering to vote for the first time in New Hampshire on election day and who do not have acceptable photo identification. *See* RSA 654:12 (describing photo identification scheme).

16. Even before SB 418 was enacted, there was a robust scheme designed to ensure only qualified people could vote. This included a requirement that all voters present documentary proof of identity or sign an affidavit attesting to identity, as well as follow-up investigations on the affidavits provided in lieu of documents.

17. Under previous law, a registrant who does not have documentary evidence of any of the four qualifications to vote (age, identity, domicile, and citizenship) could sign an affidavit under penalty of a felony as to that qualification. *See* RSA 654:7, III. If an individual registered to vote without documentary proof of identity, the Secretary of State’s office provides a mailer (with instructions to the Post Office not to forward) requesting written verification that the person receiving the mailer did, in fact, vote. RSA 654:12, V(b).

18. The Secretary of State then conducts an “inquiry” into all such letters returned as undeliverable by consulting with municipal officials and public records. RSA 654:12, V(e). Any voters the Secretary of State cannot confirm are forwarded to the Attorney General for further investigation. *Id.*

19. Moreover, lying on the affidavit used to prove identity is a crime. *See* RSA 659:34, II.

20. Despite the comprehensive nature of the previous scheme, the General Court was apparently unsatisfied and decided to impose new, additional burdens on some voters who do not have proof of identity. Under SB 418, a person who is registering for the first time in New Hampshire on election day without proof of identity will now be given an “affidavit ballot” when voting, as well as a packet explaining their new obligations. *See* RSA 659:23-a (Supp. 2022).

21. As part of that packet, a voter is given a prepaid U.S. Postal Service Priority Mail Express envelope for overnight delivery addressed to the Secretary of State.

22. This will cost the Secretary of State over \$20 per envelope,³ whereby state taxpayer funds will be used to enforce this unconstitutional scheme.

23. The Department of State estimates they would need 3,000 such packets for the primary and general elections, according to SB 418's fiscal note. In addition, the Department of State estimates it would incur \$3,000 in overtime pay.

24. In total, the Department of State assumes it would cost \$48,000 in fiscal year 2023 and \$72,000 in fiscal year 2025. *Id.*

25. Moreover, the Secretary will expend taxpayer funds to train his staff and local election officials of the new requirements of the SB 418, including to enforce this scheme that, as explained below, intrudes on voters' private or personal information. He and local election officials will have to further expend funds to explain those new requirements to voters.

26. Upon information and belief, at least hundreds of thousands of dollars (including staff time), if not more will be required to implement SB 418.

27. Affidavit voters will be required to return their proof of identity to the Secretary of State within 7 days of the election.

28. Affidavit votes will be counted on election day; however, if a voter does not return their proof of identity to the Secretary within 7 days, the Secretary of State will instruct the moderator of the town, city, ward or district to retrieve the associated affidavit ballot and list, on a tally sheet, by candidate or issue, the votes cast on that ballot. The votes cast by that voter will then be deducted from the voted total for each affected candidate or issue. RSA 659:23-a, V.

29. As a result, if a person casting an affidavit ballot does not return their proof of identity to the Secretary of State, the Secretary and his staff will know how that person voted for

³ <https://www.usps.com/business/prices.htm>

every candidate or issue. Moreover, that person will be disenfranchised, even if they are qualified to vote.

Part I, Article 2-b

30. In 2018, the citizens of New Hampshire amended the Constitution to provide an explicit right to privacy.

31. 2018's CACR 16 passed the House of Representatives by the necessary three-fifth's vote on February 22, 2018 by a vote of 235 to 96. It passed the Senate by the necessary margin on May 2, 2018 by a vote of 15 to 9. *See* N.H. Const. Part II, Art. 100(a).

32. It was then approved by two thirds of the voters at the State General Election in 2018. *See* N.H. Const. Part II, Art. 99.

33. Part I, Article 2-b provides "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."

34. The drafters of Part I, Article 2-b shared a common interest in the need for additional privacy regulation in the 21st century, and concerns about governmental entities accessing, collecting, retaining and using information without the consent of the individual with whom the information originated. *See* Affidavit of Professor Albert Scherr ("Scherr Aff.") at Exhibit 3.

35. They were similarly concerned about the inadequacies of the reasonable-expectation-of-privacy standard used in interpreting Part I, Article 19 of the New Hampshire Constitution and the Fourth Amendment of the United States Constitution. *Id.*, ¶ 15.

36. Part I, Article 2b intentionally creates broader constitutional protections than Part I, Article 19. *Id.*, ¶ 22.

37. The drafters of Part I, Article 2-b intended that “governmental intrusion” include: 1) the observation of personal or private information, wherever it is located, 2) the collection of personal or private information, however collected, 3) the retention of personal or private information, however retained, and 4) the use of personal or private information, however used. *Id.*, ¶ 23.

38. The drafters of Part I, Article 2-b had two definitions of “personal information” in mind. The first, from the National Institute for Science and Technology, was: “Personally Identifiable Information (PII): any information about an individual maintained by an agency, including (1) any information that can be used to distinguish or trace an individual’s identity, such as name, social security number, date and place of birth, mother’s maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information.” The second, from the European General Data Protection Regulations, was “[P]ersonal data’ means any information relating to an identified or identifiable natural person...; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.” *Id.*, ¶¶ 31-33.

39. The drafters also intended that the amendment cover “private information” that need not be “personal information.” *Id.*, ¶ 38.

40. The drafters of Part I, Article 2-b intended that the amendment create a fundamental right in privacy, and that any governmental intrusion into that right be subject to strict scrutiny. *Id.*, ¶ 43.

COUNT I

41. The way that a person in New Hampshire votes is both “private information” and “personal information” within the meaning of Part I, Article 2-b.

42. SB 418 infringes on that constitutionally-protected information by allowing the Secretary of State and his staff to know how affidavit ballot voters who did not return proof of identity within seven days cast their votes.

43. There is no governmental interest, let alone a compelling one, in the government knowing how a person voted.

44. Even if there were a governmental interest, SB 418 is not sufficiently tailored to advance any governmental interest in the least restrictive means.

45. SB 418 violates Part I, Article 2-b of the New Hampshire Constitution.

Prayer for Relief

WHEREFORE, Plaintiff respectfully prays that this Honorable Court:

- A. Declare that SB 418 is unconstitutional pursuant to Part I, Article 2-b of the New Hampshire Constitution;
- B. Issue a permanent injunction prohibiting Defendants from implementing or enforcing SB 418;
- C. Award Plaintiffs attorneys’ fees in this action;
- D. Award Plaintiffs their costs of suit; and
- E. Award such other relief as may be equitable.

Respectfully submitted,

MANUEL ESPITIA, JR. AND DANIEL WEEKS

By and through their attorneys affiliated with the
American Civil Liberties Union of New Hampshire
Foundation,

/s/ Henry R. Klementowicz
Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
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18 Low Avenue
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Date: June 21, 2022

EXHIBIT 1

SB 418-FN - VERSION ADOPTED BY BOTH BODIES

03/31/2022 1096s
21Apr2022... 1487h
4May2022... 1870h

2022 SESSION

22-3015
11/04

SENATE BILL ***418-FN***

AN ACT relative to verification of voter affidavits.

SPONSORS: Sen. Giuda, Dist 2; Sen. Bradley, Dist 3; Sen. French, Dist 7; Sen. Gannon, Dist 23; Rep. Howard, Belk. 8

COMMITTEE: Election Law and Municipal Affairs

ANALYSIS

This bill provides for verification of voter affidavits by establishing affidavit balloting.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struckthrough.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 418-FN - VERSION ADOPTED BY BOTH BODIES

03/31/2022 1096s
21Apr2022... 1487h
4May2022... 1870h

22-3015
11/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT relative to verification of voter affidavits.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Findings.

2 I. According to the secretary of state, over the past 45 years, New Hampshire has had 44
3 state elections that ended in a tie or in a one-vote victory. On average, that is almost once per year,
4 not including the 1974 U.S. Senate race that was won by 2 votes - the closest U.S. Senate race in
5 history. This clearly proves that just one improperly cast vote can adversely influence an election
6 each year. Every improperly cast vote invalidates one legal vote. In the 2016 general election, at
7 least 10 illegal ballots were cast by voters who admitted guilt and were prosecuted by the attorney
8 general and counted, including one woman who was caught voting in both Massachusetts and in
9 Plymouth, New Hampshire. She only paid a \$500 fine; hardly a deterrent. In that same election,
10 the attorney general's office, after extensive investigation, was unable to verify the identity of 230
11 qualified and domicile affidavit voters. Allowing unverified votes to count in an election enables the
12 corruption of New Hampshire's electoral process. This must be addressed immediately to restore the
13 integrity of New Hampshire elections.

14 II. Currently, New Hampshire law allows for votes to be cast and counted by signing an
15 affidavit, even when the voter fails to produce documents to prove his or her identity, or that he or
16 she is a New Hampshire citizen or an inhabitant of that town, city, ward, or district. Although these
17 laws do allow for the post-election investigation of these unverified ballots, this merely identifies
18 when unqualified votes have been cast. It does nothing to prevent the nullification of legitimate
19 votes by the casting, counting, and certification of illegitimate ballots.

20 2 New Section; Election Procedure; Affidavit Ballot. Amend RSA 659 by inserting after section
21 23 the following new section:

22 659:23-a Affidavit Ballots.

23 I. For all elections, if a voter on election day is registering to vote for the first time in New
24 Hampshire and does not have a valid photo identification establishing such voter's identification, or
25 does not meet the identity requirements of RSA 659:13, then such voter shall vote by affidavit ballot
26 pursuant to this section.

27 II. The authorized election official shall hand the affidavit ballot voter an affidavit voter
28 package and explain its use. The affidavit voter package shall be designed, produced, and
29 distributed by the secretary of state, and shall contain the following:

SB 418-FN - VERSION ADOPTED BY BOTH BODIES

- Page 2 -

1 (a) A prepaid U.S. Postal Service Priority Mail Express (overnight delivery) envelope
2 addressed to the secretary of state for the affidavit voter to return the affidavit verification letter
3 described in subparagraph (b) and any required missing documentation that necessitated voting by
4 affidavit ballot. The return address on this envelope shall be for the office of the secretary of state.

5 (b) An affidavit voter verification letter, in duplicate form, which lists all the documents
6 required to qualify to vote in the state of New Hampshire. The authorized election official shall
7 mark on both copies of the verification letter which qualifying documents were not provided, thereby
8 necessitating voting by affidavit ballot. One copy of the affidavit verification letter shall be given to
9 the voter; the other copy shall be retained by the authorized election official. The voter shall be
10 required to return their copy of the affidavit verification letter and a copy of any required
11 documentation to the secretary of state in the provided prepaid U.S. Postal Service envelope within 7
12 days of the date of the election in order for the ballot to be certified.

13 III. The moderator shall mark each affidavit ballot "Affidavit Ballot #___" sequentially,
14 starting with the number "1".

15 IV. All affidavit ballots shall be cast in person at the polling place, placed in a container
16 designated "Affidavit Ballots," and hand counted after polls have closed using a method prescribed
17 by the secretary of state for hand counting and confirmation of candidate vote totals. After
18 completion of counting, the moderator shall note and announce the total number of votes cast for
19 each candidate, and the total number of affidavit ballots cast in the election. No later than one day
20 after the election, the moderator shall forward all affidavit ballot verification letters to the secretary
21 of state using a secure means of transmission or delivery.

22 V. On the seventh day after the election, if an affidavit ballot voter has failed to return the
23 verification letter with the missing voter qualifying documentation to the secretary of state, either in
24 person or using the prepaid U.S. Postal Service Priority Mail Express Envelope, the secretary of
25 state shall instruct the moderator of the town, city, ward, or district in which the affidavit ballot was
26 cast to retrieve the associated numbered affidavit ballot and list on a tally sheet, by candidate or
27 issue, the votes cast on that ballot. The counting of votes on affidavit ballots identified by the
28 secretary of state as unqualified shall be conducted by the town, city, ward, or district using the
29 same methods of counting and observation utilized on the day of the election for hand counted
30 ballots. The votes cast on such unqualified affidavit ballots shall be deducted from the vote total for
31 each affected candidate or each affected issue.

32 VI. No later than 14 days after the election, any town, city, ward, or district in which any
33 affidavit ballots were cast, and not subsequently verified, shall provide to the secretary of state a
34 summary report, by race or ballot issue, of the total votes cast by the unqualified voters. The total
35 vote minus the unqualified affidavit ballot vote for each race or issue shall be the final vote to be
36 certified by the appropriate certifying authority.

1 VII. The names of affidavit voters whose verification letters are either not returned to the
2 secretary of state or which do not provide the required voter qualifying information shall be referred
3 by the secretary of state to the New Hampshire attorney general's office for investigation in
4 accordance with RSA 7:6-c.

5 VIII. Any written, electronic, or other information related to an affidavit voter who provides
6 the required information verifying their right to vote shall not be subject to disclosure under RSA 91-
7 A or any other law.

8 IX. All written documentation relating to affidavit ballots shall be delivered to the secretary
9 of state by local election officials in sealed packages using a secure means of transportation and
10 stored pursuant to RSA 659:95 through 659:103.

11 3 New Section; General Provisions for Recounts; Affidavit Ballots. Amend RSA 660 by inserting
12 after section 17 the following new section:

13 660:17-a Affidavit Ballots; Recounts. In any election or referendum, if the total number of
14 affidavit ballots submitted for any local, district, county, or statewide race or issue would, if counted
15 in favor of either candidate or position, alter the outcome of the election, the deadlines for filing
16 recount requests imposed by RSA 660:1, 660:7, 660:10, 660:12, and 660:13 shall be extended until
17 after the deadline for submitting affidavit verification materials in RSA 659:23-a. In such instance,
18 the secretary of state shall publish new deadlines for filing recounts.

19 4 Election Procedure; Obtaining a Ballot. Amend RSA 659:13, I(c) to read as follows:

20 (c)(1) If the voter does not have a valid photo identification, the ballot clerk shall **direct**
21 **the voter to see the supervisor of the checklist.**

22 (2) **The supervisor of the checklist shall review the voter's qualifications and**
23 **determine if the voter's identity can be verified.**

24 (3) **If the supervisor of the checklist cannot verify the voter's identity, the**
25 **supervisor of the checklist shall** inform the voter that he or she may execute a challenged voter
26 affidavit **and cast an affidavit ballot in accordance with RSA 659:23-a.** The voter shall receive
27 an explanatory document prepared by the secretary of state explaining the proof of identity
28 requirements. If the voter executes a challenged voter affidavit **and casts an affidavit ballot,** the
29 ballot clerk shall mark the checklist in accordance with uniform procedures developed by the
30 secretary of state.

31 ~~[(2)]~~ (4) If the voter executes a challenged voter affidavit **and casts an affidavit**
32 **ballot,** the moderator or the moderator's designee shall take a photograph of the voter and
33 immediately print and attach the photograph to ~~[, and thus make it a part of, the affidavit form.~~
34 ~~However, if a photograph was taken under RSA 654:12, then a notation shall be made on the~~
35 ~~challenged voter affidavit stating that the photograph is attached to the qualified voter affidavit or~~
36 ~~sworn statement on the general election day registration form] **the duplicate copy of the affidavit**~~
37 **voter verification letter to be delivered to the secretary of state.** The photograph shall be 2

1 inches by 2 inches, or larger, and may be in color or in black and white. The moderator or his or her
2 designee who took the photograph and the voter shall then sign the challenged voter affidavit. The
3 moderator or designee shall delete the photograph from the camera in the presence of the voter. If
4 the moderator or his or her designee is unable to take the voter's photograph due to equipment
5 failure or other cause beyond the moderator's or his or her designee's reasonable control, the voter
6 may execute a challenged voter affidavit **and cast an affidavit ballot** without a photograph.

7 ~~[(3)]~~ (5) If the voter objects to the photograph requirement because of religious
8 beliefs, he or she may execute an affidavit of religious exemption in accordance with RSA 659:13-b,
9 which shall be attested to by an election officer and attached to the challenged voter affidavit.

10 ~~[(4)]~~ (6) The person entering voter information into the centralized voter registration
11 database shall cause the records to indicate when a voter has not presented a valid photo
12 identification and has executed a challenged voter affidavit **and cast an affidavit ballot**.

13 5 Voting Procedure; Obtaining a Ballot. Amend RSA 659:13, II(b) to read as follows:

14 (b) In addition to the forms of photo identification authorized in subparagraph (a), the
15 identification requirements of paragraph I may be satisfied by verification of the person's identity by
16 a moderator or supervisor of the checklist or the clerk of a town, ward, or city, provided that if any
17 person authorized to challenge a voter under RSA 659:27 objects to such verification, identifies the
18 reason for the objection in writing, and states the specific source of the information or personal
19 knowledge upon which the challenge of the photo identification is based, the voter shall be required
20 to execute a challenged voter affidavit as if no verification was made. ***When an election official
21 uses personal recognizance as a substitute for required documentation under this section,
22 the moderator or clerk shall print in the margin of the checklist, next to the name of the
23 voter so qualified, one of the following to identify the official who validated the voter: "P-x-
24 AB" where "P" indicates personal recognizance; "x" shall be "M" for moderator or "C" for
25 clerk; and AB are the first and last initials of the moderator or clerk. By initialing the
26 checklist, the moderator or clerk personally affirms, under penalty of perjury, the identity
27 of the voter they are qualifying to vote.***

28 6 New Subparagraphs; Voting Procedure; Obtaining a Ballot. Amend RSA 659:13, II by
29 inserting after subparagraph (c) the following new subparagraphs:

30 (d) The secretary of state shall provide training for supervisors of the checklist on how
31 the nonpublic data in the statewide centralized voter registration database may be used to satisfy
32 voter identification requirements.

33 (e) The secretary of state shall develop and make available an informational pamphlet
34 explaining the procedure established in RSA 260:21 for obtaining a picture identification card for
35 voter identification purposes only.

36 7 Effective Date. This act shall take effect January 1, 2023.

SB 418-FN- FISCAL NOTE
 AS AMENDED BY THE HOUSE (AMENDMENT #2022-1487h)

AN ACT relative to verification of voter affidavits.

FISCAL IMPACT: State County Local None

STATE:	Estimated Increase / (Decrease)			
	FY 2022	FY 2023	FY 2024	FY 2025
Appropriation	\$0	\$0	\$0	\$0
Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	\$48,000	\$0	\$72,000
Funding Source:	<input checked="" type="checkbox"/> General	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input type="checkbox"/> Other

LOCAL:

Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	\$0	Indeterminable Increase

METHODOLOGY:

This bill establishes affidavit balloting for voters who are registering to vote in New Hampshire for the first time and who do not have a valid photo identification. The affidavit balloting would include a serial numbered ballot to be used for voting at the municipality. The voter would also receive a voter packet containing a USPS Priority Mail Express (overnight delivery) envelope and an affidavit voter verification letter, in duplicate form. The voter is to leave one copy of the verification letter with the authorized election official and return their affidavit verification letter with required documentation, in the provided envelope, within 7 days of the election to the Secretary of State's Office. If an affidavit voter fails to send the required documentation to the Secretary of State within 7 days, the Secretary of State would notify local election officials, who would retrieve the voter's ballot and deduct it from the election totals and votes contained on the ballot.

The Department of State indicates there would be an increased expense to the General Fund in FY 2023 and FY 2025 of \$48,000 and \$72,000 respectively. The Department assumes they would need 3,000 packets, accounting for both the primary and general elections to ensure a sufficient amount of packets at each polling locations. The cost of the preparation of the packets is estimated to be \$5 per packet equating to \$15,000. The Department assumes in FY 2023 there will be the same amount of voters using the challenge voter affidavit process due to

lack of ID as the November 2020 election (733) and an additional 50% for the primary (367). The Department is not able to separate out how many of the voters in the November 2020 election were registering to vote for the first time in NH versus those who were already registered and didn't have an ID on election day, so the Department is making the assumption that all voters using the challenged voter affidavit were first time voters. The postage for each returned envelope is \$26.95. Multiplying the 1,100 voters by the postage cost rounds to an estimated \$30,000 for postage cost. The Department also would incur \$3,000 in overtime pay. The Department assumes in FY 2025, because it is a presidential year, the expenses will increase by 1.5 times.

The New Hampshire Municipal Association (NHMA) states there could be a small indeterminable fiscal impact on local expenditures. The NHMA states due to the potential increase in hand counted ballots and the need to take additional action with respect to those ballots after elections the expenditure could increase. The expenditures will vary depending on the municipality.

AGENCIES CONTACTED:

Department of State and New Hampshire Municipal Association

EXHIBIT 2

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOHN M. FORMELLA
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

April 8, 2022

SENT BY EMAIL ONLY

Henry Klementowicz, Esquire
American Civil Liberties Union of New Hampshire
henry@aclu-nh.org

Re: April 6, 2022, Follow-up Right to Know re Wrongful Voting cases
relative to September 8, 2020, and November 3, 2020, elections

Dear Attorney Klementowicz:

We have completed our search for and review of records with regard to your request under New Hampshire RSA 91-A for open investigations for wrongful voting and/or voter fraud from the September 8, 2020, and November 3, 2020, elections.

This office currently has five active alleged wrongful voting investigations stemming from the September 8, 2020, or November 3, 2020, elections, and have closed 18 investigations relating to those two elections. This office does not have any criminal or civil proceedings pending in relation to alleged wrongful voting stemming from the September 8, 2020, or November 3, 2020, elections at this time.

This Office does not have any documents that are responsive to this request. At this time, no convictions or final judgments have been entered with respect to wrongful voting matters stemming from the September 8, 2020, or November 3, 2020, elections.

Sincerely,

A handwritten signature in black ink, appearing to read "Myles B. Matteson".

Myles B. Matteson
Deputy General Counsel
Attorney General's Office

EXHIBIT 3

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
COURT
SOUTHERN DIVISION

SUPERIOR

MANUEL ESPITIA, JR.

And

DANIEL WEEKS

v.

DAVID SCANLAN, IN HIS OFFICIAL CAPACITY AS NEW HAMPSHIRE
SECRETARY OF STATE

And

JOHN FORMELLA, IN HIS OFFICIAL CAPACITY AS NEW HAMPSHIRE
ATTORNEY GENERAL

No. _____

AFFIDAVIT OF ALBERT SCHERR, ESQ.

I. INTRODUCTION

I, Albert Scherr swear as follows:

1. I have been a law professor at University of New Hampshire School of Law for 28 years.
2. Prior to that, I was an attorney at the New Hampshire Public Defender for 13 years.
3. As a law professor, my responsibilities have included teaching courses in Constitutional Criminal Procedure and Genetics and the Law, both of which include detailed examinations of the intersection of the Fourth and Fifth Amendments and privacy.
4. My scholarship has also focused on the intersection of the Fourth and Fifth Amendments and privacy, including A Scherr, *Genetic Privacy & The Fourth Amendment*:

Unregulated Surreptitious DNA Harvesting, 47 Ga. L. Rev. 445 (2013); A. Scherr, "Privacy in Public Spaces: The Problem of Out-of-Body DNA," in *Privacy in Public Space: Regulatory and Legal Challenges*, Timan, Newell & Koops, eds., Edward Elgar Publishing, 2017 as well as a law review work-in-progress on "A State Constitutional Right To Information Privacy."

5. I have also lectured at a number of conferences and institutions on issues surrounding privacy, including most recently on "A Constitutional Right to Information Privacy" at the 8th Annual Conference on *Governing Emerging Technology & Science* at Arizona State University School of Law (May, 2022).

6. I am also an elected Police Commissioner in the City of Portsmouth, New Hampshire since November, 2021.

7. In that capacity, I function as a member of the "board of directors" for the Portsmouth Police Department, setting and reviewing policy, including in areas of privacy.

8. The views and/or information expressed in this affidavit are my own and do not reflect the views of either UNH School of Law, UNH or the Portsmouth Police Commission.

9. Over the last five years, I have also worked as an advocate for criminal justice reform in the New Hampshire legislature in my individual capacity.

10. In that capacity, I have testified many times in support of or in opposition to legislation affecting the criminal justice system as well as affecting the privacy of New Hampshire citizens.

11. As an advocate, I have frequently drafted proposed legislation for legislators from across the political spectrum, including successful legislation about debtors' prisons, bail reform, "ban-the-box", notice of the right-to-decline-to consent-to-a-car-search and revisions in the Office of Cost Control eligibility and processes.

II. THE ORIGINS OF PART I, ARTICLE 2B

12. During the 2017 – 2018 legislative session, I had begun working with then Representative Neal Kurk (R) on a variety of privacy legislation.

13. We shared a common interest in the need for additional privacy regulation in the 21st century. Each of us was very aware of the ability of 21st century technology to create new kinds of information and to much more easily access information previously inaccessible.

14. We also shared concerns about commercial and governmental entities accessing, collecting, retaining and using information without the consent of the individual with whom the information originated.

15. We also shared concerns about the inadequacies of the reasonable-expectation-of-privacy standard used by the New Hampshire Supreme Court in interpreting Part I, Article 19 and by the U.S. Supreme Court in interpreting the Fourth Amendment, particularly in light of 21st century technology.

16. Representative Kurk had made several unsuccessful efforts in past legislative sessions to capture a foundational principle about privacy in an overarching constitutional amendment.

17. He asked me to draft a version of a constitutional amendment that captured that which we had been covering in our conversations. From that conversation came the language of Part I, Article 2b (hereinafter “2b.”)

18. 2b passed both the state House of Representatives and the state Senate by three fifths vote . On the November, 2018 state ballot, it received over 81% of those voting.

19. 2b reflects the shared intent of the drafters that, in New Hampshire, “ordinary peoples' expectation of information privacy is the norm, not the exception, and government “snooping” into our personal and private information is prohibited.”¹

20. This affidavit reflects the meaning of the drafters' language in 2b.

III. THE MEANING OF PART I, ARTICLE 2B, AS INTENDED BY THE DRAFTERS

21. Part I, Article 2b: “*An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.*”

22. Most broadly, 2b is intended to liberate the consideration of the privacy of information from the constraints of Part I, Article 19 which focuses a court's analysis on containers and locations of information rather than on the information itself. 2b intentionally creates much broader constitutional protection for personal or private information by its language.

A. “...GOVERNMENTAL INTRUSION...”

23. The two drafters of 2b (the undersigned and the amendment's prime sponsor in the legislature, then Representative Neal Kurk) intended that “governmental intrusion” include:

- (1) the observation of the personal or private information, wherever it is located;
- (2) the collection of the personal or private information, however collected;
- (3) the retention of the personal or private information, however retained; and
- (4) the use of the personal or private information, however used.

21. The drafters intended that the observation, collection and retention of personal or private information need not actually be used in any way for it to count as an “intrusion.”

¹ Neal Kurk, *Vote for Your Privacy on Question 2*, Union Leader (Nov. 2, 2018), <https://perma.cc/A2EJ-UT5U>.

24. That the government is collecting one's personal or private information just to have it in their possession whether they use it now, in the future or not at all, offends the protection intended by the drafters.

25. The drafters recognized that consent of the individual may allow for observation, collection, retention or use of the personal or private information. Consent must exist for each type of intrusion as observation, collection, retention and use represent different, albeit overlapping, types of governmental intrusions.

26. The drafters intended that any so-called blanket consent must include notice of all of these types of intrusions as well as possible multiple uses of the personal or private information. Consent for one use is not consent for all uses.

B. "... PERSONAL ... INFORMATION..."

27. The drafters of 2b intended that the coverage offered by the amendment be expansive.

28. It was the drafters' intent to use language that made the scope of protection of information under 2b much broader than the protection offered by Part I, Article 19 (Art. 19) or the Fourth Amendment.

29. Art. 19 and Fourth Amendment in the first instance offer protection for information based primarily on container and location: homes, bodies, personal effects. In the last 60 years, that protection was further refined to include protection for searches that invaded a reasonable expectation of privacy. And so the inquiry has become whether the search invaded this kind of property or this particular sense of privacy. The inquiry has become more challenging with 21st century technology, which has dramatically expanded the means and goals of searches.

30. 2b takes a different approach. It identifies information as the primary focus by using the expansive language of "personal or private information."

31. The drafters had two particular definitions of personal information in mind, those of the National Institute for Science & Technology (NIST) and of the General Data Protection Regulations (GDPR) in Europe.

32. The NIST definition: “Personally Identifiable Information (PII): any information about an individual maintained by an agency, including (1) any information that can be used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information.”²

33. The two GDPR definitions:

- A. “[P]ersonal data’ means any information relating to an identified or identifiable natural person ...; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.”³
- B. “Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person,

² NIST Special Publication 800-122, csrc.nist.gov/publications.

³ General Data Protection Regulation, Article 4 (1), European Union. Note that, while these definitions identified here did not go into formal effect until May, 2018, the language quoted here had been available at the time of the drafting of 2

data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.”⁴

34. The drafters intended an understanding of what is personal information to be expansive because the nature of 21st century technology is to evolve newer and newer types of information and, even more importantly, newer and newer ways to access that information.

35. The drafters understood that these new types of information and methods for access information were unknown in previous centuries and some are only creatures of one's imagination even today, as yet undeveloped. 2b is both a present-day and future-looking statement of a foundational constitutional principle about information privacy.

36. For example, personal information will include common-place data like records of: books withdrawn from the library; commercial transactions; Venmo transactions; financial transactions; whether one voted; for whom one voted; political contributions; social media conversations; data generated by one's car; other geo-location data; other private political activity; phone conversations; e-conversations; other digital information etc.

C. **“... PRIVATE INFORMATION...”**

37. It may be that some information is not, on its face, personal but, nonetheless, has been deemed private by a statute, regulation or other mechanism, given the particular circumstances in which that information exists. The drafters intended that that kind of information also be protected by 2b.

38. Under 2b, personal information need not be private and private information need not be personal. It was not the goal of the drafters to anticipate every possible circumstance in which

⁴ General Data Protection Regulation, Article 9, (1), European Union.

information may exist and be subject to intrusion. Instead the drafters' goal was to lay down a foundational principle tailored to the 21st century and beyond.

D. "... NATURAL, ESSENTIAL AND INHERENT."

39. The drafters intended that the language of 2b create a fundamental right to live free from intrusion by the state on the personal or private information, therein the description of the right as natural, essential and inherent.

40. The "natural, essential and inherent" language is taken directly from Part I, Article 2 itself.⁵ It is the first and the most foundational description of protected rights in the New Hampshire Constitution.

41. Unlike Article 19, 2b does not use a modifier to condition the right, like "unreasonable." It also does not mention search warrants supported by probable cause. It is an unconditioned and unambiguous fundamental right.

42. The drafters intended that courts view any intrusion on personal or private information as directly affecting the fundamental right vested in that information. Any such intrusion deprives one of the fundamental right: freedom from governmental intrusion on personal or private information.

43. Analytically, the drafters understood and intended that, as to 2b, directly affecting a fundamental right always brings with it a strict scrutiny analysis. "To comply with strict judicial

⁵ "All men have certain natural, essential, and inherent rights among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." Part I, Article 2, New Hampshire Constitution.

scrutiny, the governmental restriction must ‘be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.’”⁶

44. It may well be that the government has a compelling interest in gathering certain kinds of personal or private information. If so, then the particular kind of intrusion must also be *necessary* to accomplish that purpose. It is not sufficient that the intrusion is one way to accomplish the purpose but that other ways also exist. If that is the case, the intrusion is not necessary.

45. The statute in question must present a circumstance in which the only way to accomplish the compelling purpose is by the described intrusion. For example, if another way exists but it is more cumbersome or expensive, then the intrusion on the compelling interest is not sufficient to survive constitutional strict scrutiny because it is not necessary. Nor is a justification that it would be useful to have the personal or private information sufficient in itself to merit identification as a *compelling* interest. Any intrusion on the fundamental right to be free of governmental intrusion on personal or private information is constitutionally significant enough to require a *compelling* governmental interest implemented in a way that is *necessary*, not merely convenient or most practical.

46. Based upon my experience and knowledge as one of the drafters of Part I, Article 2b, identification of for whom an individual has voted is personal or private information under the intended meaning of 2b. That is, SB 418’s provision allowing the government to collect and observe for whom one has voted is an intrusion under 2b. It would therefore be subject to the

⁶*Akins v. Secretary of State*, 154 N.H. 67, 73 (2006) quoting *Follansbee v. Plymouth Dist. Ct.*, 151 N.H. 365, 367, 856 (2004).

analytical strictures of 2b as described above. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

FURTHER THE AFFIANT SAY NOT

Dated: June 21, 2022

Albert Scherr
Albert Scherr, Esq.

STATE OF New Hampshire

COUNTY OF Merriamack

Albert Scherr personally appeared before me, this 21st day of June, 2022, and made oath that the facts contained in this Affidavit are true and accurate, to the best of his knowledge and belief.

Before me,

Karen M. Puse
Notary Public/Justice of the Peace
My Commission Expires: 10/21/25