THE STATE OF NEW HAMPSHIRE
SUPREME COURT

MANUEL ESPITIA, JR. AND DANIEL WEEKS
v.
SECRETARY OF STATE AND ATTORNEY GENERAL
AND
603 FORWARD, OPEN DEMOCRACY ACTION, LOUISE SPENCER, AND EDWARD R. FRIEDRICH
v.
SECRETARY OF STATE AND ATTORNEY GENERAL

DOCKET NO. 2023-0701

Rule 7 Mandatory Appeal
From Hillsborough Superior Court Southern Division
Docket Nos. 226-2022-CV-00236 and 226-2022-CV-00233

BRIEF OF MANUEL ESPITIA, JR. AND DANIEL WEEKS

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February 22, 2024

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QUESTION PRESENTED

This is a lawsuit brought by two registered voters and taxpayers against State Defendants seeking declaratory and injunctive relief that a new, restrictive voting law (SB 418) funded by taxpayer dollars violates the right to informational privacy under Part I, Article 2-b to the New Hampshire Constitution.

Did the trial court (*Temple*, J.) err in ruling that the plaintiffs lacked taxpayer standing under Part I, Article 8 of the New Constitution in granting the Defendants' Motion to Dismiss when the plaintiffs are challenging "the legality of specific governmental actions" involving the expenditure of funds under SB 418, especially where the Department of State (i) estimated that it would incur $3,000 in additional overtime pay and (ii) estimated that it would incur costs in the amount of $48,000 in fiscal year 2023 and $72,000 in fiscal year 2025 in implementing SB 418?

STATEMENT OF FACTS

This is a civil rights action brought by two registered voters and taxpayers. Manny Espitia and Dan Weeks challenge a recently-enacted change to voter laws because it unconstitutionally infringes upon the right to privacy in personal or private information protected by Part I, Article 2-b of the New Hampshire Constitution.

2022's Senate Bill 418 was the most recent effort by lawmakers in the General Court to place unnecessary roadblocks and burdens in front of New Hampshire voters in the guise of maintaining "voter confidence," even though voter fraud is startingly rare in New Hampshire and in the United States. *See N.H. Democratic Party v. Secretary of State*, 174 N.H. 312, 322

(2021) (striking down previously enacted statute because it "imposes unreasonable burdens on the right to vote."); *Guare v. State of New Hampshire*, 167 N.H. 658 (2015) (striking down as unconstitutional confusing changes to the voter registration form). SB 418 burdens voters by creating a new class of affidavit ballots. *See* App. 44-51.[1] Under this regime, if a person registers in New Hampshire for the first time on election day and does not present proof of identity or otherwise meet the identity requirements, they will be given an affidavit ballot. *See* App. 34. 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 will instruct the local election officials to retrieve the ballot and list by candidate or by issue the votes cast by the voter and return that list to the Secretary of State. *Id.* As a result, the voter's private or personal information protected under Part I, Article 2-b of the New Hampshire Constitution will be reviewed by election officials, destroying the secrecy of the ballot. *Id.*

SB 418 was introduced in the Senate and referred to the Senate Election Law and Municipal Affairs Committee. It was referred positively out of the committee on a vote of 3-2. *See* App. 36. It subsequently passed the Senate 13-11 largely along party lines. *Id.* It was then amended by the House Election Law Committee and recommended ought to pass with amendment by a vote of 11-9. *Id.* The full House passed it by a vote of 180 to 154.

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[1] References to the record are as follows:
App.__ refers to the appendix to this brief.
Add.__ refers to the addendum to this brief.

SB 418 was then amended again by the House Finance Committee and reported out ought to pass by a vote of 12 to 9. *See* App. 37. After passing the House of Representatives by a vote of 164 to 155, the Senate concurred with the House's changes. *See id.* It was signed by Governor Christopher Sununu on June 17, 2022. *Id.* It took effect January 1, 2023. It became Laws 2022, ch. 239, and is codified in sections of RSA ch. 659 and ch. 660.

SB 418 contains a "findings" clause that suggests it was enacted in response to "illegal ballots" and "unverified votes." *See* App. 37; 46. But voter fraud is extremely rare in New Hampshire, and the only case of double voting discussed in the findings clause would not have been prevented by SB 418, since the bill burdens only those without proof of identity, rather than proof of domicile.

Before SB 418 was enacted, there was a robust scheme designed to prevent unqualified people from voting. *See* App. 38. This included a requirement that all voters present documentary proof of identity or sign an affidavit attesting to their identity, as well as follow-up investigations on the affidavits provided in lieu of documents. *Id.*

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).

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.*

Despite the comprehensive nature of the previous scheme, and even though out of the 814,499 ballots cast in the November 2020 General Election the Attorney General's Office had not commenced *any* civil or criminal enforcement proceedings for wrongful voting and/or voter fraud as of April 8, 2022, *see* App. 53, the General Court enacted SB 418.

Voters who are 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* App. 46; RSA 659:23-a. An affidavit ballot is distinct from a regular ballot, in that it is numbered and the number on each ballot is associated with the name of the voter who cast that particular ballot. *See* App. 47. And unlike traditional ballots which may be counted by machine, an affidavit ballot, when cast, is segregated into a separate container and counted by hand. As part of the affidavit ballot packet, a voter is given a prepaid U.S. Postal Service Priority Mail express envelope for overnight delivery addressed to the Secretary of State. *See* App. 46-47. This costs the Secretary of State over $20 per envelope, whereby state tax dollars will be used to enforce this unconstitutional invasion of voters' private or personal information. *See* App. 38-39.

Further, according to SB 418's fiscal note, the Department of State estimated they would need 3,000 such packets for the primary and general elections. *See* App. 39. In addition, the Department of State estimated that it

would incur $3,000 in additional overtime pay. *Id.* In total, the Department of State estimated that it would incur a cost of $48,000 in fiscal year 2023 and $72,000 in fiscal year 2025. *See id.*

Moreover, during his testimony before the House Election Law Committee, the Secretary of State confirmed that the costs associated with SB 418 would come from the Department of State's budget. *See* App. 213. One telling exchange makes this clear:

> Representative Bergeron: Is it your intent that this [cost] is going to be taken up by the Secretary of State's [budget]? Are you going to write it out of your budget?
>
> Secretary Scanlan: That was my understanding. The way I read the Bills is that the Secretary of State is supposed to provide the packets that would be issued to a voter that was voting by an affidavit ballot with pre-paid overnight postage on those documents. We're working on refining the fiscal note, in fact [Senior Deputy Secretary of State] Patty Lovejoy has been working on that. And we should have a figure for you that is in the hundreds of thousands of dollars.

Id.

Under SB 418, affidavit voters are required to return their proof of identity to the Secretary of State's Office within seven days of the election. Affidavit votes will be counted on election day; however, if a voter does not return their proof of identity on time, the Secretary of State will instruct local election officials to retrieve the particular voter's affidavit ballot and list on a tally sheet the votes cast on that ballot. *See* App. 39; RSA 659:23-a. Election officials will then deduct those votes from the total voted for each affected candidate or issue. *See id.* As a result, election officials will know how that voter cast their ballot. This is contrary to the dictates of Part

I, Article 2-b of the New Hampshire Constitution, which provides: "An individual's right to live free from governmental intrusion into private or personal information is natural, essential, and inherent."

STATEMENT OF THE CASE

On June 17, 2022, the day Governor Sununu signed SB 418, 603 Forward, Open Democracy Action, Louise Spencer, Edward R. Friedrich, and Jordan M. Thompson[2] (collectively, "the 603 Forward Plaintiffs") filed suit in Hillsborough County Superior Court, Southern Division in case number 226-2022-CV-00233. App. 65-303. According to their Complaint, 603 Forward and Open Democracy Action are non-profit, nonpartisan organizations formed under section 501(c)(4) of the Internal Revenue Code, which work on voting issues, while the other plaintiffs are registered voters and taxpayers. *Id.*

The next business day, June 21, Manuel Espitia, Jr. and Daniel Weeks (collectively, "the Espitia Plaintiffs") filed this action, also in Hillsborough County Superior Court, Southern Division in case number 226-2022-CV-00236. App. 33-64. Manny Espitia was, at the time he filed this suit, a member of the New Hampshire House of Representatives,[3] a voter, and a taxpayer in New Hampshire. *See* App. 35. Dan Weeks is a registered voter and taxpayer in New Hampshire, and he is the co-owner of a New Hampshire business that pays Business Profits and Business

[2] Mr. Thomspon took a voluntary nonsuit on September 20, 2023.

[3] He did not run for reelection in 2022, but in 2023 was elected to the Nashua Board of Public Works.

Enterprise taxes. *Id.* On July 27, 2022, the trial court granted the Defendants' assented-to motion to consolidate the cases.

Espitia and Weeks brought their cases against the Secretary of State and the Attorney General. App. 35-36. The Secretary of State is the chief election officer in charge of administering New Hampshire's election laws pursuant to RSA 652:23, and the Attorney General is responsible for enforcing the state's election laws, RSA 7:6-c, I and approving the biennially-issued elections manual, per RSA 652:22.

The Espitia Plaintiffs' Complaint contained one count, which sought declaratory and injunctive relief that SB 418 violates Part I, Article 2-b of the New Hampshire Constitution. App. 42. In support of their Complaint, the Espitia Plaintiffs submitted the declaration of Professor Albert Scherr, Esq.[4] App. 55-64. Professor Scherr was one of the drafters of the language of Part I, Article 2-b which was ultimately approved by the voters in 2018. App. 57. Based upon his experiences and knowledge as one of the drafters, Professor Scherr explains that who a person votes for is personal or private information under the intended meaning of the provision, and therefore SB 418 would be "subject to the analytical strictures" of the provision. App. 63-64.

On August 26, 2022, the Defendants moved to dismiss both complaints. App. 304-317. As to the individual plaintiffs in each case, the Defendants argued that they had not "suffered a legal injury against which

[4] Professor Scherr's affidavit explains that it contains his views which do not reflect the views University of New Hampshire or Portsmouth Police Commission.

the law was designed to protect." App. 305, quoting *Libertarian Party of N.H. v. Secretary of State*, 158 N.H. 194, 195 (2008), This was because they will not be subject to SB 418 because they are all registered voters and SB 418 only impacts those registering to vote for the first time in New Hampshire. *See* App. 307. Defendants also argued that the individual plaintiffs do not have standing as taxpayers, and that 603 Forward and Open Democracy Action do not have standing as organizations or associations. *See* App. 310-313. Finally, the Defendants argued that the plaintiffs' claims were not ripe. *See* App. 314-316.

During the briefing on the motion to dismiss, the New Hampshire Republican State Committee ("NHRSC") moved to intervene on September 1, 2022. The Plaintiffs objected, and NHRSC filed a reply.

On September 26, 2022, the Espitia Plaintiffs and 603 Forward Plaintiffs filed separate objections. *See* App. 318-344; App. 346-390. On October 7, 2022, the Defendants filed a reply in support of their motion. *See* App. 391-398

The trial court (*Temple*, J.) issued a limited recusal order, and on December 21, 2022, the trial court (*Colburn*, J.) denied NHRSC's motion to intervene. App. 399; App. 400-403.[5] A hearing on the motion to dismiss was held on January 30, 2023, and the motion was taken under advisement. Meanwhile, NHRSC appealed the denial of its motion to intervene. *See 603 Forward et al v. New Hampshire Secretary of State et al.*, Case No. 2023-

[5] NHRSC had filed a joinder in the Defendants' motion to dismiss, but in its order on the motion to intervene, the trial court ruled that joiner "improper." App. 403, n. 2.

0041. The trial court then issued an order staying the case until NHRSC's appeal was resolved. *See* App. 404-406. The parties then stipulated to NHRSC's intervention, and the appeal was dismissed. *See* App. 407. On June 6, 2023, NHRSC, with new counsel, joined the Defendants' motion to dismiss. *See* App. 408

On November 1, 2023, the trial court concluded that the plaintiffs lacked standing and granted the Defendants' motion to dismiss. *See* Add 37-48. The trial court, relying in part on out-of-state cases analyzing other states' laws, held that "Part I, Article 8 taxpayer standing only exists if the plaintiffs demonstrate a sufficient nexus between their claims and the fiscal activities of the State." Add. 42 (citations and quotations omitted). The trial court asserted "the plaintiffs have not identified any specific funds earmarked by the legislature to carry out SB 418." *Id.* It continued, "[w]hile it is true that there may be incidental postage and staffing costs incurred by the Secretary of State's Office in executing SB 418, these minimal expenditures bear little to no relationship to the merits of the plaintiffs' claims. In other words, these limited expenditures are too attenuated from the alleged constitutional violations flowing from SB 418 to confer taxpayer standing in this case." *Id.*[6] The Espitia Plaintiffs appealed, but the 603 Forward Plaintiffs did not.

[6] The trial court also held 603 Forward and Open Democracy Action did not have standing to maintain this action and declined to address the Defendants' ripeness arguments. Add. 44-47. These decisions are not at issue on appeal.

SUMMARY OF ARGUMENT

This is a civil rights action brought by two registered voters and taxpayers in Nashua, seeking declaratory and injunctive relief that a recently passed restrictive voting law unconstitutionally burdens a voter's right to privacy in personal or private information. Under this law, when a person registers to vote for the first time in New Hampshire on election day and does not have proof of identity or otherwise meet the identity requirements, they are given an "affidavit ballot." Votes on an affidavit ballot are counted, but, if the voter does not return proof of identity to the Secretary of State's Office within seven days of the election, the Secretary's Office instructs the local election official to retrieve that voter's affidavit ballot and create a list of the votes cast by issue or candidate, potentially leading to election officials learning how that voter cast their ballot.

The trial court erred when it held that the Espitia Plaintiffs do not have standing to proceed as taxpayers, and dismissed their suit on the theory that any spending associated with SB 418 was too minimal and incidental to the claims at issue in this case to support such standing. The history of the taxpayer standing doctrine demonstrates that the legislative organs of the state have repeatedly sought to restore a broadly applicable doctrine of taxpayer standing, including most recently in 2018 when the voters approved an amendment to the New Hampshire Constitution. Taxpayer standing should thus be construed broadly consistent with the voters' intent.

The trial court further erred when it dismissed the suit because its holding that the spending associated with SB 418 was minimal and

incidental was both wrong and irrelevant. The ruling was wrong because, in fact, the spending associated with SB 418 is an important part of the regulatory scheme and not merely a byproduct. The ruling was irrelevant because New Hampshire law does not require a court to analyze whether spending has a sufficient nexus to the law challenged—all that is required is that taxpayers challenge a specific spending action.

As a result, the ruling of the trial court dismissing the case should be *reversed* and the case should be *remanded*.

ARGUMENT

This case presents an important opportunity for this Court to determine the scope of the taxpayer standing doctrine. This case also embodies the very type of taxpayer standing cases that were previously allowed in New Hampshire courts for decades alleging that specific governmental actions funded by taxpayers were illegal, and that the voters in 2018 explicitly sought to allow by amending Part I, Article 8 to the New Hampshire Constitution. Accordingly, while this Court would not be breaking new ground in holding that standing exists in this case consistent with its decades of prior precedent that the voters restored, this Court would undermine Part I, Article 8 and the voters' intent if it held otherwise.

The 2018 constitutional amendment to Part I, Article 8 "was intended to return taxpayer standing in New Hampshire to its status prior to [the Court's] decisions in *Baer* [*v. Dep't. of Educ.*, 160 N.H. 727 (2010)] and *Duncan* [*v. State*, 166 N.H. 360 (2014)]." *Carrigan v. N.H. Dep't of Health and Human Servs*., 174 N.H. 362, 368 (2021). In so doing, New Hampshire voters asserted the independence of their own Constitution and rejected the notion that standing rules in state court should be in lockstep

with the United States Constitution's Article III "case or controversy" requirement—a requirement that exists nowhere in the New Hampshire Constitution.[7] While *Carrigan* imposes some limits on taxpayer standing, it does not, properly understood, preclude its application in this case.

The trial court erred when it held that the Espitia Plaintiffs do not have taxpayer standing to maintain this constitutional challenge to SB 418. The trial court's decision ignores the history of the taxpayer standing doctrine in New Hampshire, which demonstrates that the purpose of the 2018 constitutional amendment was to restore a line of cases which did not cabin the standing doctrine so narrowly. Moreover, the trial court's

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[7] *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 16-20 (2018) (arguing that American constitutional law is richest and most protective of individual rights when state supreme courts reject lockstepping and assert independence in interpreting their constitutions); *see also Recent Case: State Courts—State Standing Doctrine—Idaho Supreme Court Retains Federal Framework for Assessing Standing to Sue in State Court.—Reclaim Idaho v. Denney, 497 P.3d 160 (Idaho 2021)*, 135 Harv. L. Rev. 1945, 1950 (May 2022) ("Idaho's adoption of federal standing doctrine without grounding in the state constitution reflects the broader trend in state constitutional law toward "lockstepping"—'the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution.' Some courts and scholars have supported the practice, at least in instances where federal doctrines can be imported after case-by-case consideration of the independent value of a uniform approach. But many others have criticized this practice for myriad reasons. Idaho's "unreflective adoption[]" of federal standing doctrine without substantial explanation bears out many of these negative aspects of lockstepping.").

suggestions that taxpayer standing can only challenge "earmarked" funds, or cannot be used to challenge "minimal" expenditures impermissibly narrow the meaning of the constitutional amendment approved by the voters beyond what was intended. Nor does such a limitation exist in the numerous pre-*Baer* and pre-*Duncan* cases in which this Court found taxpayer standing. For these reasons, the trial court's order granting Defendants' motion to dismiss should be *reversed* and the case *remanded*.

A. STANDARD OF REVIEW

"In reviewing the trial court's grant of a motion to dismiss, our standard of review is whether the allegations in the plaintiffs' pleadings are reasonably susceptible of a construction that would permit recovery." *Appeal of Town of Salem*, 168 N.H. 572, 576 (2016) (brackets omitted) (quoting *In re Estate of Mills*, 167 N.H. 125, 127 (2014)). "We assume that the facts set for in the plaintiffs' pleadings are true, construe all reasonable inferences in the light most favorable to them, and then engage in a threshold inquiry that tests the facts in the complaint against the applicable law." *Id.* (cleaned up). "We will uphold the granting of the motion to dismiss if the facts pled do not constitute a basis for legal relief." *Estate of Ireland v. Worcester Ins. Co.*, 149 N.H. 656, 658 (2003).

"When a motion to dismiss does not contest the sufficiency of the plaintiff's claim, but instead challenges the plaintiff's standing to sue, the trial court must look beyond the allegations and determine, based upon the facts alleged, whether the plaintiff has demonstrated a right to claim relief." *Carrigan*, 174 N.H. at 366. "When the relevant facts are not in dispute—here, that the plaintiff is a New Hampshire taxpayer and eligible voter—we review the trial court's standing determination *de novo*." *Id.*

B. THE HISTORY OF TAXPAYER STANDING SUPPORTS PLAINTIFFS' ABILITY TO MAINTAIN THIS ACTION

The history of taxpayer standing in New Hampshire is one of a back-and-forth between the judicial branch and the political actors of the state. Twice, this Court had abrogated the taxpayer standing doctrine on statutory or constitutional grounds, and each time a legislative organ responded to reinstate the doctrine, once by changing a statute and once by amending the Constitution.

Historically, the New Hampshire Supreme Court had "two conflicting lines of cases regarding taxpayer standing to bring a declaratory judgment action." *Baer,* 160 N.H. at 730. Under one line, taxpayers were permitted to maintain actions in equity against public officials for unlawful acts because "every taxpayer has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched." *Id.* For example, in *Green v. Shaw*, the Court reversed a lower court's decision dismissing a challenge brought by taxpayers against sundry actions of the City of Rochester, reasoning that "every taxpayer has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched." *Green v. Shaw*, 114 N.H. 289, 292 (1974) (citations and quotations omitted). And in *Clapp v. Jaffrey*, 97 N.H. 456 (1952), the Court allowed a lawsuit against town officials challenging an agreement for the town to plow snow from private individuals' driveways to proceed. Under a different line of cases, taxpayers were required to demonstrate that their rights were directly impaired or prejudiced to maintain a declaratory judgment action. *See Baer*, 160 N.H. at 730.

In 2010, the Supreme Court recognized this conflict in *Baer.* It analyzed the declaratory judgment statute, which at the time provided:

> Any person claiming a present legal or equitable right or title may maintain a petition claiming adversely to such right or title to determine the question as between the parties, and the court's judgement or decree thereon shall be conclusive. The existence of an adequate remedy at law or equity shall not preclude any person from obtaining such declaratory relief. However, the provisions of this paragraph shall not affect the burden of proof under RSA 491:22-a or permit awards of costs and attorney's fees under RSA 491:22-b in declaratory judgment actions that are not for the purpose of determining insurance coverage.

RSA 491:22, I (2010 Supp.). Interpreting this statute, the Court then overruled the line of cases which had permitted taxpayer standing, finding "our more recent analysis of taxpayer standing," which required a present legal or equitable right, "to be more consistent with the language of RSA 491:22." *Baer,* 160 N.H. at 730.

Following *Baer*, the legislature amended RSA 491:22 with intention of restoring the doctrine of taxpayer standing in 2012. Following this amendment, the statute read:

> Any person claiming a present legal or equitable right or title may maintain a petition 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. *The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall*

> *not have to demonstrate that his or her personal rights were impaired or prejudiced…*

RSA 491:22 (emphasis added).

Two years later, in *Duncan v. State*, 166 N.H. 630 (2014), this Court considered this issue again. The *Duncan* Court recognized that "[t]he intent of the 2012 amendment was to restore taxpayer standing as it had been interpreted in the older line of cases identified in *Baer*." 166 N.H. at 638. It then observed that the "earlier line of cases" did not address the constitutionality of taxpayer standing, and thus did not consider itself bound by *stare decisis*. *Id.* at 640. Ultimately, the Court concluded that allowing taxpayers to sue without having a direct legal or equitable interest in the proceeding violated Part II, Article 74 of the New Hampshire Constitution, which limits advisory opinions to "important questions of law and upon solemn occasions" and only to each branch of the legislature and the Governor and Council. *Id.* at 643. In doing so, this Court adopted standing principles under the New Hampshire Constitution that were in lockstep with the United States' Constitution's "case or controversy" requirement in Article III—a requirement that exists nowhere in the text of the New Hampshire Constitution. *Id.* at 642.

In response to *Duncan*, in 2018, New Hampshire voters adopted an amendment to Part I, Article 8 of the New Hampshire Constitution. It clarifies that taxpayers challenging an official action need not demonstrate a specific or direct injury beyond their status as taxpayers. This amendment "was intended to return taxpayer standing in New Hampshire to its status prior to [the Court's] decisions in *Baer* and *Duncan*." *Carrigan*, 174 N.H. at 368. Part I, Article 8 now provides, in pertinent part:

> The public has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or approved spending, public funds in violation of a law, ordinance, or constitutional provision. *In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.*

(emphasis added).

Following that amendment, the Court considered *Carrigan*. In *Carrigan*, the plaintiff alleged that the Department of Health and Human Services "failed to abide by its mandatory, substantive, and procedural obligations to respond to and protect children who are subject to … child abuse and neglect." 174 N.H. at 365. The general thrust of her complaint was that the Department had a "poor allocation of resources, which relate to a series of spending decisions the Department has made and continues to make" and its "unconstitutional budgetary decision-making in the face of uncontroverted evidence regarding the connection between the absence of resources and the inability of New Hampshire to abide by its mandated legal obligations." *Id.* (cleaned up).

This Court ruled that the *Carrigan* plaintiff did not have standing as a taxpayer because she was not challenging a "specific governmental spending action or approval of spending," but rather a governmental body's "comprehensive response to a complex issue." *Id.* at 370. As this Court explained, the voters approving the 2018 constitutional amendment would not have understood the amendment to permit people to challenge, as taxpayers, "a governmental body's overall management of its operation and

functions, including its allocation of appropriations." *Id.* In contrast, the voters would have instead understood it to authorize "one or more discrete acts or decisions approving certain spending." *Id.* The Court added that, "[w]hen Part I, Article 8 is read as a whole, the phrase 'has spent, or has approved spending' must be understood as referencing a specific category of 'governmental action.'" *Id.* In other words, for taxpayer standing to exist, a plaintiff must challenge the legality of specific governmental actions funded by taxpayers. As explained below, consistent with this Court's pre-*Baer* and pre-*Duncan* precedent, this is such a garden variety taxpayer standing case challenging with specificity SB418 and the funds being used to implement its unconstitutional provisions.

C. THE TRIAL COURT ERRED BY REJECTING PLAINTIFFS'STANDING AFTER HOLDING THE SPENDING IN SB 418 WAS "MINIMAL" AND "INCIDENTAL"

The trial court erred in two ways when it held the Espitia Plaintiffs do not have standing to challenge the law because "the plaintiffs have not identified any specific funds earmarked by the legislature to carry out SB 418" and the law involved only "minimal expenditures" which were "too attenuated from the alleged constitutional violations flowing from SB 418 to confer taxpayer standing in this case." Add. 43. This holding was in error because it was both wrong (the expenditures associated with SB 418 are an important part of the statutory scheme) and irrelevant (whether a taxpayer has standing to challenge a particular spending action does not depend on the amount of money spent or whether specific funds have been earmarked). In fact, the Espitia Plaintiffs challenge "the legality of specific

governmental actions" involving the expenditure of funds, which is all that is required. *Carrigan*, 174 N.H. at 371.

1. The Spending Associated With SB 418 Is Not Minimal or Incidental

First, the trial court was wrong when it decided that "there may be 'incidental' postage and staffing costs incurred by the Secretary of State's Office in executing SB 418" but "these minimal expenditures bear little to no relationship to the merits of the plaintiffs' claims." *See* Add. 42-43. In fact, the postage and staffing costs are important parts of the legislation and are not "incidental."

As amended by SB 418, RSA 659:23-a creates a new statute entitled "Affidavit Ballots." Section I of the statute explains who is to use an affidavit ballot—those registering to vote for the first time in New Hampshire on election day who do not have a valid photo identification or otherwise meet the identity requirements of RSA 659:13. Section II of the statute explains that the election official "*shall* hand the affidavit ballot an affidavit ballot and explain its use. The affidavit voter package *shall* be designed, produced, and distributed by the secretary of state and *shall* contain the following:" (emphasis added) a) a prepaid U.S. Postal Service Priority Mail Express (overnight delivery) envelope addressed to the Secretary of State for the voter to return the missing document, and b) an affidavit voter verification letter (in duplicate) explaining the documents used to prove identity in New Hampshire, one copy of which shall be retained by the election official and one copy of which shall be given to the voter to return to the Secretary of State. *See* RSA 659:23-a, II.

Seven days after the election, the Secretary of State's office shall go through the returned verification letters and proofs of identity, and, if a voter has failed to return that packet, shall instruct the moderator of the town, city, ward, or district to retrieve the associated numbered ballot and list on a tally sheet the voters cast on that ballot. RSA 659:23-a, V. "The votes cast on such unqualified affidavit ballots shall be deducted from the vote total for each affected candidate or each affected issue." *Id.*

Indeed, the very same statute that creates affidavit ballots (and the alleged constitutional invasion of voters' rights to privacy) mandates that the Secretary of State's office design, produce, and distribute an affidavit voter verification letter. It also requires them to distribute United States a Postal Service Priority Mail Express envelope to accompany each affidavit ballot. This also requires staff at cataloging Secretary of State's office to spend time reviewing incoming mail, cataloguing incoming documentary proof of identity, and contacting local election officials to instruct them to retrieve the votes cast on unqualified affidavit ballots.

As the prime sponsor of the bill, Senator Guida, explained at the Senate Election Law and Municipal Affairs Committee hearing, part of the reason the Secretary of State is required to do this is to avoid increasing expenses on cities and towns:

> Senator Guida: Cities and towns will not be required to hire any additional staff. That will be addressed, I think, by Secretary Scanlan here shortly. The work is done. The Secretary of State designs, produces, and pays for the affidavit ballot package. Okay. All that's done right now is no more than is done already by the moderator to mark and number the ballot. Okay. The letter and the envelope go home with the voter. And the voter then sends back the documentation that's

> required that's shown as not being presented but necessary in the letter, the verification letter. The work is done by the Secretary of State, not the local clerks.

App. 124-25. The legislature made a deliberate policy choice when enacting the affidavit ballot scheme to assign these expenses to the Secretary of State rather than downshifting them to the local municipalities.

Similarly, the legislature made a deliberate policy choice to require the Secretary to create and distribute the affidavit voter verification letter. It made a deliberate policy choice to distribute the prepaid express overnight mailers, even though they cost more than $20 per envelope. Creating the affidavit ballot scheme increases burdens on voters because it now requires voters to send documents in after the election or risk having their vote ultimately not counted. That burden has to be justified by a sufficiently weighty state interest. *See N.H. Democratic Party v. Secretary of State*, 174 N.H. 312 (2021) (describing generally the weight courts weight burdens against state interests in evaluating voting laws under Part I, Article 11). As the burdens on voters increase, so does the interest the General Court needs to put forward to justify the burden. And requiring a voter to send documents back to the Secretary of State's Office within seven days would become significantly more burdensome if the State does not provide a prepaid overnight envelope. Whether lawmakers were concerned that requiring voters to submit proof of documentation without prepaid envelopes was unconstitutional or just bad policy does not matter, but either way the inclusion of prepaid envelopes is an important and integral part of SB 418. This might have led to lawmakers' decisions to

include the prepaid envelopes. These expenditures are not merely "incidental."

Nor are these expenditures "minimal." As alleged in the Complaint, it costs more than $20 per envelope, and the Department of State estimates that they would need 3,000 such envelopes. *See* App. 39. In addition, the Department estimates it would incur $3,000 in overtime pay to effectuate the scheme. *Id.* In total, the Department of State estimated it would cost $48,000 in fiscal year 2023 and $72,000 in fiscal year 2025 to implement SB 418. *Id.* All told, the Espitia Plaintiffs alleged that upon information and belief, the true cost to implement SB 418 could be at least hundreds of thousands of dollars (including staff time), if not more to implement SB 418.[8] This includes money required to pay the salaries of staff members at the Secretary of State's Office who identify and deduct the votes cast by unqualified affidavit ballot and in so doing intrude upon the voters' constitutional right to a private ballot.

2. New Hampshire Law Does Not Require A Judicial Assessment of Whether Spending is Minimal or Incidental

Second, the trial court erred when it imposed upon the Espitia Plaintiffs requirements beyond those necessitated by New Hampshire law. When it ruled that the Espitia Plaintiffs could not proceed on their claims as taxpayers, the trial court variously the Defendants' argument that "SB 418

[8] Given the posture of this case, Espitia Plaintiffs have not been able to conduct discovery to support this allegation. However, at this stage, the Court is required to accept as true all well-pleaded allegations in the complaint.

is not an appropriation or authorization statute, and the legislation is not related to government spending" (even though the bill had a fiscal note and the Secretary of State testified it would cost "hundreds of thousands of dollars"), and described the spending in SB 418 as "minimal," and "an incidental expenditure of state funds" without a "sufficient nexus" between the plaintiffs' claims and the fiscal activities of the state. *See* Add. 43 (citations and quotations omitted).

As discussed in Section B of this brief above, the purpose of the 2012 legislation and 2018 constitutional amendments were to restore the taxpayer standing doctrine to what it was before *Baer*. A taxpayer plaintiff can challenge whether "a specific act or approval of spending conforms with the law." *Carrigan*, 174 N.H. at 370. But they cannot challenge a "governmental body's comprehensive response to a complex issue … which encompasses many decisions to spend or approve spending, as well as decisions not to spend or approve spending" without demonstrating a specific legal right or interest that would justify the more traditional, Article III-type of standing. *Id.*

This is all New Hampshire requires for taxpayer standing. It does not require that the expenditure of funds be more than incidental or minimal. For example, in *Clapp v. Jaffrey*, 97 N.H. 456, 460-61 (1952), the Court considered a challenge brought by taxpayer plaintiffs to a town decision to contract to plow snow from the private driveways of certain individuals. First, the Court rejected a theory that the plaintiffs could bring the action as citizens, residents, or voters of Jaffrey. *Id.* at 460. It also concluded that they could not bring their challenge as owners of competing equipment. *Id.* But the Court *did* permit the plaintiffs to bring their challenge as taxpayers:

"our decisioning and the better reasoning permit taxpayers to maintain an equitable action, assuming that the acts here are *ultra vires*, *even though it cannot be shown that they result in financial loss to the town*." *Id.* at 460-61 (emphasis added). In other words, not only is there not some "minimal" level of expenditures taxpayers cannot challenge, they can in fact bring actions as taxpayers *even if the government ends up making money*.

The prior New Hampshire cases restored by the 2018 amendment support the Espitia Plaintiffs' standing in this case, none of which were engaged with by the trial court. For example, in *Blood v. Electric Company*, 68 N.H. 340, 340-41 (1895), the Supreme Court upheld a taxpayers' suit to challenge the decision of a city council to enter into a streetlight operating contract (on the merits, the Court rejected the claim that Manchester could not enter into a ten year contract). The Court explained: "In this state, taxpayers have a right to resort to equity to restrain a municipal corporation and its officers from appropriating money raised by taxation to illegal or unauthorized uses. The remedy is direct, convenient, and adequate, and falls within the rule which entitles parties to the best practical remedy for the redress of their wrongs." *Id.* at 340. The Court did not conduct an inquiry into the amount of money in question or whether it was more than minimal; it instead recognized simply that government spending decisions can be reviewed by courts in suits brought by taxpayers.

In *Sherburne v. Portsmouth*, 72 N.H. 539, 540 (1904), the Court allowed a taxpayer standing challenge to the City's decision to build a baseball park on an eleven-acre field called the Plains which used to be a mustering ground. In doing so, it considered two discrete but related points. *First*, the City Council had the power to regulate the use of the Plains

because it was a public common but must not allow the Plains to be put to an "unreasonable use of the land." *Id.* at 542. The Council could allow an individual or association to occupy part or all of the plains for the purpose of public recreation if that was a "reasonable use of the premises." *Id.* at 542-43. *Second*, even if the council could permit someone to build a baseball stadium at the plains, they could not build one with public money, for at the time there were limited statutory purposes towards which tax dollars could be spent and building a baseball stadium was not one of them. *Id.* at 543. Ultimately, the Court ruled that "the city councils may be enjoined from taking any action under this resolution toward building a baseball park and from permitting any person to build one . . . if that would be an unreasonable use of the premises." *Id.* at 542-43.

Importantly, the Court found that the plaintiffs had standing as taxpayers and addressed both arguments, even though there was no spending action associated with the theory that the council could not, as a steward of a public common, allow somebody else to construct a baseball stadium if it would be an unreasonable use of the land. In other words, the Court did not require any sort of "nexus" between the any spending and alleged illegality.

And in *N.H. Wholesale Beverage Ass'n v. N.H. State Liquor Comm'n*, 100 N.H. 5, 6-7 (1955), the Supreme Court ruled that taxpayers holding liquor permits had standing to challenge the Liquor Commission's policy regarding the issuance of liquor licenses. There was a statute which limited the Commission's sale of permits for off-premises consumption such that "No person shall directly or indirectly hold more than two off-sale permits at one time." *Id.* at 7. The Liquor Commission had treated

corporations as separate entitles and allowed the sale of off-premises consumption regardless of whether the people who own or control the corporation owned other permits. *Id.* A group of taxpayers sued, and the Court agreed with the plaintiffs. *Id.* The Court explained: "Taxpayers are legitimately concerned with the performance by public officers of their public duties. Their right to preservation of an orderly and lawful government at the municipal level has been recognized as one which they may protect, regardless of whether any loss to the municipality is shown or wither their purses are immediately touched." *Id.* at 6 (cleaned up). "No good reason appears why taxpayers should not posses al like right as to acts of public officers at the State level." *Id.*; *see also Seabrook Citizens for Defense of Home Rule v. Yankee Greyhound Racing*, 124 N.H. 103 (1983) ("We conclude that the plaintiffs, in their capacity as taxpayers and citizens of the Town of Seabrook, have standing to challenge the constitutionality of [legislation creating state control of greyhound racing]").

The *N.H. Wholesale Beverage Ass'n* Court allowed the group of taxpayers to challenge the Liquor Commission's interpretation of the statute without examination of whether any expenditures were more than "minimal" or whether any spending was "incidental" to the interpretation of the statute. Nor did it examine whether there was a nexus between the claim (that the Liquor Commission had interpreted the statute incorrectly) and the spending (presumably revenue from the sale of the permits) or evaluate whether that nexus was sufficiently strong. When the trial court in this case decided that the spending required by SB 418 was "minimal" and "incidental" to the Espitia Plaintiffs' claims, it erred because as *Clapp*,

Sherburne, and *N.H. Wholesale Beverage Ass'n* demonstrate, that is not a requirement of New Hampshire law.

Rather than addressing these binding New Hampshire authorities, the trial court relied on out-of-state cases analyzing other states' different sources of law. It is appropriate for trial courts to consider out-of-state cases, of course, but they are at most persuasive authority as other state's courts are not the final arbiters of the meaning of the New Hampshire Constitution. Moreover, here, the cases cited by the trial court are easily distinguishable. For example, the trial court cited *Shavers v. Kelley*, 267 N.W.3d 72, 81 (Mich. 1978) for the proposition that Part I, Article 8 does not "permit[] a group to challenge any legislation merely because of an incidental expenditure of state funds." *See* Add. 43. *Shavers* considered whether Michigan's No-Fault Act (a comprehensive legislative initiative whereby the prior system of tort liability for motorist accidents was replaced with a scheme requiring every motorist to purchase no-fault insurance) was constitutional. The Michigan Supreme Court, with limited analysis, decided that a court rule and statute governing "taxpayers' suit[s]" did not apply because "Plaintiffs are not concerned with the illegal expenditure of state funds" and "The No-Fault Act does not, on its face, contemplate the 'expenditure of state funds.'" *Id. First*, unlike the No-Fault Act, SB 418 *expressly does* contemplate the expenditure of state funds. It has a fiscal note on it. The Secretary of State testified it would cost hundreds of thousands of dollars to implement. *Second*, the taxpayer standing doctrine in Michigan was created by a court rule and a statute, whereas in New Hampshire there is a constitutional dimension and history to consider where the voters have made their choice clear. The taxpayer

standing provision in Part I, Article 8 was enacted by the voters in response to multiple judicial decisions narrowing the doctrine and was done to restore the ability of taxpayers to seek judicial redress to ensure the orderly operation of government.

In *Rudder v. Pataki*, 711 N.E.2d 978 (N.Y. 1999), the New York Court of Appeals considered a challenge brought by a taxpayer to a governor's executive order which created a board comprised of gubernatorial appointees with broad abilities to effectively kill any executive branch rules. *Id.* at 980. In particular, they challenged its disapproval of a rule that would have required urban hospitals to have an organized social work department led by someone with a master's degree in social work. *Id.* Unlike SB 418, the *Rudder* court rejected that rule because the plaintiff "essentially seeks to obtain judicial scrutiny of the State's nonfiscal activities." *Id.* at 982 (cleaned up).

Reeves-Toney v. Sch. Dist. No. 1 in City & Cnty. Of Denver, 442 P.3d 81 (Colo. 2019) is likewise distinguishable. Although Colorado "permits relatively broad taxpayer standing," the Colorado Constitution requires that a plaintiff must show they suffered "an injury in fact." *Id.* at 86. This "injury-in fact requirement provides conceptual limits to the doctrine [of taxpayer standing] when plaintiffs challenge an allegedly unlawful government action." *Id.* (brackets omitted). To meet the injury-in-fact requirement, "a plaintiff relying on her status as a taxpayer to confer standing must demonstrate a clear nexus between her status as a taxpayer and the challenged government action." *Id.* (cleaned up). But unlike in Colorado, the New Hampshire Constitution does not contain an injury-in-fact requirement: "In such a case, the taxpayer *shall not* have to

demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer." N.H. Const. Pt. I, Art. 8 (emphasis added). Thus, the Colorado Court's decision to narrow taxpayer standing by requiring such a "nexus" (based on the separation of powers principles contained in the Colorado Constitution) do not apply here, because the New Hampshire Constitution specifically provides a plaintiff need not identify an injury beyond their taxpayer status. Accordingly, it was error for the trial court to rely on this inapplicable principle here.

CONCLUSION

For the reasons explained above, the decision of the trial court to grant Defendants' motion to dismiss should be *reversed*, and the case *remanded*.

REQUEST FOR ORAL ARGUMENT

Appellants request oral argument before the full Court. Attorney Henry R. Klementowicz will present oral argument for Appellants.

RULE 16(3)(i) CERTIFICATION

Appellants certify that the decision being appealed is in writing and is contained in an addendum to this brief.

Respectfully Submitted,

Manuel Espitia, Jr. and Daniel Weeks,

By and through their attorneys,

/s/ Henry Klementowicz

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February 22, 2024

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tales of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 8,090 words (including footnotes) from the "Questions Presented" to the "Request for Oral Argument" sections of the brief.

/s/ Henry Klementowicz
Henry Klementowicz, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 22nd day of February, 2024 through the electronic-filing system on all counsel of record.

/s/ Henry Klementowicz
Henry Klementowicz, Esq.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2022-CV-00233

603 Forward; Open Democracy Action; Louise Spencer; and Edward R. Friedrich
v.
David M. Scanlan, in his official capacity as the New Hampshire Secretary of State; and John M. Formella, in his official capacity as the New Hampshire Attorney General

and

Docket No. 226-2022-CV-00236

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

ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiffs have brought these actions challenging the constitutionality of a newly-enacted law affecting voters who are unable to prove their identity prior to voting. See Laws 2022, ch. 239 ("SB 418"). The defendants now move to dismiss on the basis of standing and ripeness.[1] The plaintiffs object. The Court initially held a hearing on this motion on January 30, 2023. Thereafter, on June 23, 2023, the Court issued an order in which it requested the parties to address the scope of SB 418. After the Court received the requested briefing, it held a further hearing on September 11, 2023. For the reasons that follow, the defendants' motion to dismiss is GRANTED.

Background

The governor signed SB 418 into law on June 17, 2022, and it took effect on January 1, 2023. Prior to the enactment of SB 418, "New Hampshire law allow[ed] for

[1] The intervenor, the New Hampshire Republican State Committee, joins in the defendants' motion.

votes to be cast and counted by signing an affidavit, even when the voter fail[ed] to produce documents to prove his or her identity[.]" Laws 2022, ch. 239:1, II. In the legislature's view, "[a]llowing [these] votes to count in an election enable[d] the corruption of New Hampshire's electoral process." Laws 2022, ch. 239:1, I. SB 418 was thus purportedly enacted "to restore the integrity of New Hampshire elections." Id.

In (alleged) furtherance of that goal, SB 418 created a new type of ballot known as an "affidavit ballot" for voters who use a challenged voter affidavit[2] to prove their identity prior to voting. See RSA 659:13; RSA 659:23-a. The affidavit ballot is distinct from a traditional ballot. For instance, affidavit ballots are numbered and the number on each ballot is associated with the name of the voter who cast that particular ballot. And, unlike traditional ballots, after an affidavit ballot is cast, it is "placed in a container designated 'Affidavit Ballots,' and hand counted after polls have closed." RSA 659:23-a, IV. If a voter is required to use an "affidavit ballot," the voter is also given "an affidavit voter package," RSA 659:23-a, II, which includes a prepaid overnight mail envelope, a list of "the documents required to qualify to vote in the state of New Hampshire," and a letter indicating which "qualifying documents were not provided" at the polling location, RSA 659:23-a, II(b). The voter must then "return their copy of the . . . letter and a copy of any required documentation to the secretary of state in the provided . . . envelope within 7 days of the date of the election in order for the ballot to be certified," RSA 659:23-a, II(b), a process informally known as "curing." If the voter fails to return the necessary documentation within the seven-day period, "[t]he votes cast on [his or her]

[2] Challenged voter affidavits are used when a voter is unable to prove his or her identity with photo identification, and the election officials are unable to verify the voter's identity through other means, such as personal recognition, see RSA 659:13, II(b), or perhaps using "nonpublic data in the statewide centralized voter registration data," RSA 659:13, II(d).

affidavit ballot[] shall be deducted from the vote total for each affected candidate or each affected issue," RSA 659:23-a, V, and the voter will be referred to "the New Hampshire attorney general's office for investigation," RSA 659:23-a, VII.

Shortly after the governor signed SB 418, the plaintiffs brought these actions challenging the constitutionality of SB 418.[3] The plaintiffs claim that SB 418 violates several provisions of the New Hampshire Constitution, including Articles 1, 2, 2-b, 10, 11, 12, 14, 15 of Part I, and Article 32 of Part II. They seek a declaration "that SB 418 violates the New Hampshire Constitution," (233 Compl. Prayer ¶ A), as well as a permanent injunction enjoining the defendants, "their respective agents, officers, employees, successors, and all persons acting in concert with each or any of them from implementing, enforcing, or giving any effect to SB 418," (id. Prayer B). Several of the plaintiffs are individuals who are already registered to vote in New Hampshire, including: (1) Louise Spencer; (2) Edward Friedrich; (3) Manuel Espitia; and (4) Daniel Weeks. In addition, there are two organizational plaintiffs: 603 Forward and Open Democracy Action ("ODA"). 603 Forward ("603") is a domestic non-profit corporation. Its mission "is, above all else, the maintenance and promotion of a healthy democracy." (Id. ¶ 10.) To that end, it runs a "sophisticated voter education program," in which it helps individuals register to vote. (Id.) ODA is also a domestic non-profit corporation. Its "mission is to bring about and safeguard political equality for the people of New Hampshire." (Id. ¶ 11.) ODA "pursues its mission through significant voter education efforts that focus on informing prospective voters about voter registration rules and advising voters on how to vote either through absentee ballot or in person." (Id. ¶ 12.)

[3] The Court will refer to the complaint filed in Docket No. 226-2022-CV-00233 as the "223 Complaint" and the complaint filed in Docket 226-2022-CV-00236 as the "236 Complaint."

Discussion

The defendants move to dismiss the plaintiffs' claims on the basis of standing. "Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiffs'] pleadings are sufficient to state a basis upon which relief may be granted." Avery v. N.H. Dep't of Educ., 162 N.H. 604, 606 (2011). "To make this determination, the [C]ourt would normally accept all facts pled by the [plaintiffs] as true, construing them most favorably to the [plaintiffs]." Id. However, when as here, the issue is "the plaintiff[s'] standing to sue," the Court "must look beyond the allegations and determine, based upon the facts alleged, whether the plaintiff[s] ha[ve] demonstrated a right to claim relief." Carrigan v. N.H. Dep't of Health & Human Servs., 174 N.H. 362, 366 (2021).

A. Individual Plaintiffs

The defendants first argue that the individual plaintiffs lack standing because "[n]o allegations have been pled . . . that SB 418 has or will interfere with [their] right to vote in any way." (Defs.' Mot. ¶ 22.) In response, the individual plaintiffs claim that they "have standing to challenge SB 418 under the taxpayer standing amendment in Part 1, Article 8 of the state constitution." (603's Obj. at 8.) That provision provides, in pertinent part:

> The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

N.H. Const. pt. I, art. 8 (emphasis added). Under this provision, a plaintiff may "call on the courts to determine whether a specific act or approval of spending conforms with the law." Carrigan, 174 N.H. at 370. However, this provision does "not empower courts to audit a governmental body to determine whether its policy decisions regarding the allocation of resources are prudent or sufficient to comply with legal requirements." Id.

Here, the plaintiffs allege that "[t]he Fiscal Note attached to SB 418 indicates that the law will require the State to expend funds to prepare affidavit ballot verification packets, to pay for postage for returned verification packets, and to disburse overtime pay for Department of State workers required to administer the law." (233 Compl. ¶ 111.) The estimated amount of these expenditures is $48,000 in fiscal year 2023 and $72,000 in fiscal year 2024. (Id.) The plaintiffs generally maintain that these specific expenditures will be incurred to carry out an unconstitutional law—SB 418—and therefore they have taxpayer standing to challenge SB 418. For their part, the defendants argue that the plaintiffs are not challenging a "specific spending action," but the legality of the entire voting law. (Defs.' Mot. ¶ 27.) The defendants further note that "SB 418 is not an appropriation or authorization statute, and the legislation is not related to government spending." (Id.) Consequently, the defendants maintain that the individual plaintiffs do not have taxpayer standing under Part I, Article 8 to challenge SB 418. After careful consideration, the Court agrees with the defendants.

The Court does not read Part I, Article 8 "as permitting a group to challenge any legislation merely because of an incidental expenditure of state funds." Shavers v. Kelley, 267 N.W.2d 72, 81 (Mich. 1978). Indeed, as "almost all legislation involves some public spending," id., and "most activities can be viewed as having some

relationship to expenditures," Rudder v. Pataki, 711 N.E.2d 978, 982 (N.Y. 1999), such a broad reading of Part I, Article 8 "would create standing for any citizen who had the desire to challenge virtually all governmental acts," id., and "our state courts would be transformed into forums in which to air generalized grievances about the conduct of state government," Reeves-Toney v. Sch. Dist. No. 1 in City & Cnty. of Denver, 442 P.3d 81, 87 (Colo. 2019); cf. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007) ("[I]f every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."). Rather, Part I, Article 8 taxpayer standing only exists if the plaintiffs "demonstrate a sufficient nexus" between their claims and the "fiscal activities of the State." Rudder, 711 N.E.2d at 982; see also Jones v. Samora, 395 P.3d 1165, 1173 (Colo. Ct. App. 2016) (holding that plaintiff lacked taxpayer standing where he did not show "a clear nexus between his status as a taxpayer" and the challenged activity (cleaned up)).

In this case, the plaintiffs have not identified any specific funds earmarked by the legislature to carry out SB 418. Cf. Conrad v. City & Cnty. of Denver, 656 P.2d 662, 667 (Colo. 1982) (holding that taxpayer had standing to challenge funds spent on religious nativity scene where city "had admitted that funds are appropriated for the display and storage of the nativity scene"). Nor do the plaintiffs "seek a declaration that any of the [potential] expenditures identified in [their] complaint [are] illegal." Carrigan, 174 N.H. at 374. Rather, the thrust of the plaintiffs' complaint is that SB 418 as a whole is an infringement on a variety constitutional rights belonging to other New Hampshire citizens. While it is true that there may be incidental postage and staffing costs incurred

by the Secretary of State's Office in executing SB 418, these minimal expenditures bear little to no relationship to the merits of the plaintiffs' claims. In other words, these limited expenditures are too attenuated from the alleged constitutional violations flowing from SB 418 to confer taxpayer standing in this case. See Hickenlooper v. Freedom from Religion Found., Inc., 338 P.3d 1002, 1008 (Colo. 2014) (holding that use of "public funds to pay for the paper, hard-drive space, postage, and personnel necessary to issue" an allegedly unconstitutional religious proclamation were "incidental overhead costs" that were insufficient to confer taxpayer standing); see also Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 74 (2d Cir. 2001) (noting that "[n]early all governmental activities are conducted or overseen by employees whose salaries are funded by tax dollars" and "[t]o confer taxpayer standing on such a basis would allow any municipal taxpayer to challenge virtually any governmental action at any time"); Andrade v. Venable, 372 S.W.3d 134, 139 (Tex. 2012) ("A government employee's time spent on the allegedly illegal activity must be significant to serve as a basis for taxpayer standing.").

In short, the Court does "not believe that [Part I, Article 8] is intended to give plaintiffs standing to test the constitutionality of an entire act when the expenditure of funds alleged is incidental to its implementation." Shavers, 267 N.W.2d at 81. As that is precisely the case here, the Court finds that the individual plaintiffs lack taxpayer standing to bring this action pursuant to Part I, Article 8 of the State Constitution. The defendants' motion to dismiss their claims is therefore GRANTED.[4]

[4] The Court previously asked the parties to brief whether the individual plaintiffs may have standing based on the Court's own interpretation of SB 418. After consideration, the Court declines to consider that issue because neither complaint alleges that SB 418 should be read the way the Court suggested it should, and there are no allegations in either complaint related to standing under the Court's proposed interpretation.

B. Organizational Plaintiffs

The defendants next argue that the so-called organizational plaintiffs—603 and ODA—lack standing because "[t]hey are unable to" show that "some legal right of theirs is impaired or prejudiced." (Defs.' Mot. ¶¶ 39, 41 (cleaned up).) In making this argument, the defendants note that the organizational plaintiffs "do not register to vote," "do not register qualified voters to vote," have no constitutional rights at stake, and have "no legal right to be free of having to routinely manage resources to change or increase their volunteer or educational efforts." (Id. ¶ 42.) In response, the organizational plaintiffs assert that they have standing because "SB 418 requires them to divert resources to combat the burdensome effects of the new law." (603's Obj. at 14 (emphasis omitted).)

The organizational plaintiffs' argument is based on the so-called "diversion-of-resources" theory of standing. "Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1341 (11th Cir. 2014). The "diversion-of-resources" theory of standing originated in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). In that case, the plaintiff organization, Housing Opportunities Made Equal ("HOME"), alleged that Havens, a real estate company, steered black applicants, but not white applicants, away from its apartments, and that this practice violated the Federal Fair Housing Act. 455 U.S. at 368. HOME, a nonprofit organization whose purpose was "to make equal opportunity in housing a reality" in its geographic area, id., alleged that it was injured because Havens' racial steering

practices had frustrated its counseling and referral services and, consequently, served as a drain on its resources. On appeal, Havens argued that HOME lacked standing to sue. The United States Supreme Court disagreed, reasoning:

> If, as broadly alleged, [Havens'] steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests[.]

Id. at 379. Consequently, the Court held that HOME had satisfied the "injury in fact" requirement of its Article III standing analysis.[5]

Upon reflection, the Court is not convinced that the diversion-of-resources theory of standing is sufficient to establish standing in this case. Here, the plaintiffs seek to

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[5] In the years since Haven, some federal district and circuit courts have adopted the diversion-of-resources theory of standing in cases involving challenges to voting laws. See, e.g., Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (holding that NAACP had standing to challenge a new voting requirement because the NAACP "reasonably anticipate[d]" it would need to "divert personnel and time" from other projects "to educating . . . voters on compliance with" the requirement"); Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007), aff'd, 553 U.S. 181 (2008) (holding that political party had standing to challenge voter law that compelled "the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote"); Black Voters Matter Fund v. Raffensperger, 508 F. Supp. 3d 1283, 1292 (N.D. Ga. 2020) ("The Court thus finds that Plaintiffs have established organizational standing under a diversion-of-resources theory."); Ga. State Conf. of NAACP v. DeKalb Cnty. Bd. of Registration & Elections, 484 F. Supp. 3d 1308, 1315 (N.D. Ga. 2020) ("According to Eleventh Circuit precedent, organizations can establish standing to challenge election laws by showing that they will have to divert personnel and time to educating potential voters on compliance with the laws and assisting voters who might be left off the registration rolls on Election Day."). Indeed, in a previous case, the undersigned found that a voting rights organization had standing to challenge a voting law based on diversion-of-resources allegations. See N.H. Democratic Party v. Gardner, No. 2017-CV-00432, 2018 WL 5929044, at *3 (N.H. Super. Apr. 10, 2018). Other state courts, however, have been more skeptical of the theory. See, e.g., Ariz. Sch. Bds. Ass'n, Inc. v. State, 501 P.3d 731, 736 (2022) (rejecting "proposition that an organization has standing to challenge the constitutionality of a statute if it demonstrates merely that the contested statute drained its resources and frustrated its mission"); Grassroots Collaborative v. City of Chicago, 186 N.E.3d 995, 1006 (Ill. App. Ct. 2020) ("The fact that plaintiffs reallocated their resources to counter the effects of the City's actions does not represent a palpable and distinct injury to plaintiffs, as the reallocation of resources is inherent in the operations of such organizations."); People for the Ethical Treatment of Animals, Inc. v. Bandera Wranglers, No. 04-21-00466-CV, 2023 WL 1810496, at *3 (Tex. App. Feb. 8, 2023) ("Although organizational standing has been recognized in federal courts for forty years, no Texas state court has recognized the concept of organizational standing" and noting that "one sister court has outright rejected its adoption outside the context of Fair Housing Act claims").

challenge the constitutionality of SB 418 by way of a declaratory judgment. See generally Grinnell v. State, 121 N.H. 823, 825 (1981) (noting that declaratory judgment statute "has long been construed to permit challenges to the constitutionality of actions by our government or its branches"); Avery, 162 N.H. at 607 (noting that declaratory judgment statute "provides a means to . . . question the validity of a law" (cleaned up)). Unlike standing in other contexts, "a party does not obtain standing [to bring a declaratory judgment action] merely by demonstrating that he has suffered an injury." Avery, 162 N.H. at 608. Rather, in order to have non-taxpayer standing "to question the validity of a law, or any part of it" in a declaratory judgment action, a party must "show[] that some right of his is impaired or prejudiced thereby." Id. (emphasis in original); see RSA 491:22. The Court does "not have the authority to circumvent this statutory requirement." Baer v. N.H. Dep't of Educ., 160 N.H. 727, 731 (2010).

Generally speaking, the "legal or equitable" rights sufficient to give rise to a declaratory judgment action are "substantive rights" belonging to the plaintiff, Emps. Liab. Assur. Corp. v. Tibbetts, 96 N.H. 296, 298 (1950), such as constitutional rights, property rights, and contractual rights. See, e.g., Benson v. N.H. Ins. Guar. Ass'n, 151 N.H. 590, 594 (2004) (holding that medical society lacked standing to bring declaratory judgment action regarding insurance coverage where it was not covered by policy, but holding that those covered by policy had sufficient contractual legal right to bring action); Faulkner v. City of Keene, 85 N.H. 147, 153 (1931) (holding that declaratory judgment action could be used to determine city ordinance's effect on plaintiffs' property rights). In this case, the organizational plaintiffs have failed to identify any similar type of right of theirs that is being impeded by the provisions of SB 418. While they allege

that SB 418 may lead to a drain on their resources in various ways, which may be sufficient to constitute an "injury" under the diversion-of-resources theory of standing for Article III purposes, they have not shown that they have a legal, equitable, or otherwise "protectable interest in their allocation of resources" as it existed prior to the enactment of SB 418. Grassroots Collaborative, 186 N.E.3d at 1006.[6] Indeed, as our supreme court has held, "an economic stake in [a] statute possibly being ruled unconstitutional" is not a "legal or equitable right" that is sufficient to confer standing to challenge the validity of a statute. Silver Bros. Co. v. Wallin, 122 N.H. 1138, 1140 (1982).

In sum, it seems abundantly clear to the Court that the "rights" at issue in this litigation are the constitutional rights of New Hampshire's voters, which the organizational plaintiffs maintain have been (or will be) violated by SB 418. However, under long-standing case law, the organizational plaintiffs may only challenge the constitutionality of SB 418 based on an invasion of their own rights. See Eby v. State, 166 N.H. 321, 334 (2014) ("The general rule in New Hampshire is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected."); Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 36 (2005) (holding that plaintiffs lacked standing to bring declaratory judgment action based on "the rights of the property owner, for the plaintiffs have no constitutionally protected rights in the property at issue"); State v. Roberts, 74 N.H. 476 (1908) ("A party will not be heard to question the validity of a law, or of any part of it, unless he shows that some right of his is impaired or prejudiced thereby."). For the reasons stated above, the plaintiffs have failed to identify the necessary "present legal or equitable right" belonging

[6] Notably, the plaintiffs cite no New Hampshire Supreme Court cases suggesting that a mere diversion-of-resources would be sufficient to establish standing to bring a declaratory judgment action, nor do they articulate why the theory is consonant with this State's declaratory judgment standing jurisprudence.

to them "to which the [defendants] [are] asserting an adverse claim." Delude v. Town of Amherst, 137 N.H. 361, 364 (1993). Absent that showing, the Court finds that the organizational plaintiffs lack standing to bring this declaratory judgment action. See also Carrigan, 174 N.H. at 366 (explaining that plaintiffs must "demonstrate[] a right to claim relief"). The defendants' motion to dismiss their claims is therefore GRANTED.[7]

So ordered.

Date: November 1, 2023

Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 11/03/2023

[7] In light of this finding, the Court need not address the defendants' ripeness argument.