**UNITED STATES DISTRICT COURT**
**for the**
**DISTRICT OF NEW HAMPSHIRE**

**CAROLINE CASEY and MAGGIE FLAHERTY**

**Plaintiffs,**

**v.**

**WILLIAM GARDNER, in his official capacity as New Hampshire Secretary of State, and GORDON MACDONALD, in his official capacity as New Hampshire Attorney General**

**Defendants.**

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**NEW HAMPSHIRE DEMOCRATIC PARTY, By Raymond Buckley, Chair**

**Plaintiff,**

**v.**

**WILLIAM GARDNER, in his official capacity as New Hampshire Secretary of State, and GORDON MACDONALD, in his official capacity as New Hampshire Attorney General**

**Defendants.**

**Consolidated Case No.: 1:19-cv-00149-JL**

**CASEY AND FLAHERTY'S OBJECTION TO MOTION TO DISMISS THE CONSOLIDATED COMPLAINTS WITH INCORPORATED MEMORANDUM OF LAW**

Plaintiffs Caroline Casey and Maggie Flaherty ("the Individual Plaintiffs") submit this Objection with Incorporated Memorandum of Law to *Defendants' Motion to Dismiss the Consolidated Complaints* (DN 20).

## INTRODUCTION

A person may vote in New Hampshire if that person has a *domicile* in the state. RSA 654:1, I. "An inhabitant's domicile for voting purposes is that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence for domestic, social, and civil purposes relevant to participating in democratic self-government." *Id*. (emphasis added). Eligibility to vote in New Hampshire does not require legal "residence" in the state under RSA 21:6—which has long been a distinct legal concept entailing an intent to remain in the state "for the indefinite future," and which, unlike "domicile" status, triggers a range of costly obligations such as obtaining an in-state driver's license or New Hampshire license plates within 60 days of establishing such residency. For decades, federal and state courts alike have struck down efforts to impose barriers on New Hampshire domicilairies, especially college students and young voters, who want to register and vote in the state. *See Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972) (striking down law prohibiting citizen from voting if she has a firm intention of leaving town at a fixed date in the future); *Guare v. State*, 167 N.H. 658 (2015) (striking down registration form which incorrectly tells voters they must register cars in the state and domesticate driver's licenses); *League of Women Voters of N.H. v. Gardner*, Docket No. 226-2017-CV-433 (Hills. Cty. Super. Ct. North), Order on Preliminary Injunction (October 21, 2018) (blocking law imposing new confusing language on registration forms and imposing criminal penalties for failure to return paperwork).

2018 House Bill 1264 ("HB 1264"), which goes into effect on July 1, 2019, seeks an end-

run around these court rulings, and to impose financial obligations on those who seek to exercise their fundamental right to vote in New Hampshire, by redefining who is a "resident" of the state under RSA 21:6 and effectively equating this new standard with the "domicile" voter eligibility standard in RSA 654:1, I. HB 1264 amended the definition of "resident" and "residence" from RSA 21:6 and 21:6-a by removing the qualification that a person intend to designate her principal place of physical presence as her place of abode to the exclusion of all others "for the indefinite future." Now, by equating this "residency" standard of RSA 21:6 with the "domicile" voter eligibility standard in RSA 654:1, I, the intent and effect of HB 1264 is that, for the first time, by registering to vote in New Hampshire, a person effectively declares that he or she is a legal "resident" of New Hampshire under RSA 21:6. Now, if a voter drives, she is obligated to purchase a New Hampshire driver's license within 60 days of this declaration (at a cost of $50), and if she owns a car, she is obligated to pay to register that car in New Hampshire within 60 days of this declaration (at a cost of hundreds of dollars).

HB 1264, as detailed in the Complaint, was not treated by those involved in its passage as a motor vehicle law, but ***an election law***—with the purpose to and effect of making it more expensive and burdensome for people, including college students and young people, to vote. It was proposed and enacted as part of a history of New Hampshire lawmakers' targeting students and young people who vote by attempting to effectuate through indirect means a form of disenfranchisement that courts have prohibited directly. This history dates back to the early 1970's—following the 1971 ratification of the Twenty-Sixth Amendment which lowered the voting age to 18—when New Hampshire's law disqualifying a citizen from voting in a municipality if the citizen had a firm intention of leaving town at a fixed time in the future was struck down by this court, and continued through more recent efforts. Such efforts included

legislation enacted, and subsequently blocked by courts, in 2012 (changes to the registration form to suggest incorrectly that voters must register cars in New Hampshire) and 2017 (creating a requirement to demonstrate proof of domicile when registering to vote and establishing criminal penalties for non-compliance).

HB 1264 was considered by the House Election Law Committee and by the Senate Election Law and Internal Affairs Committee. One of its chief advocates was (and continues to be) the Defendant Secretary of State William Gardner. The New Hampshire Division of Motor Vehicles did not propose or take a position on HB 1264, nor did it offer a cost estimate. On January 25, 2018, the Deputy Secretary of State testified before the House Election Law Committee on the bill that: "You should be a resident to have your domicile in the locality where you are going to vote . . . A student would have to decide whether they want to claim if they're a resident of the state of New Hampshire . . . and if they do, they're subject to whatever else would be required of any other resident of the state of New Hampshire," *which includes motor vehicle residency fees*. State senators who supported the bill spoke publicly about how its intended effect was to target student voters. For example, Senator Sharon Carson released a Facebook advertisement that read: "STOP DRIVE-BY VOTING IN NH !!! The student being interviewed actually makes the case for the legislation; he wants to keep his out-of-state drivers [sic] license and drive his out-of-state registered car (because he doesn't live in NH) but wants to VOTE IN OUR STATE ELECTIONS! …. Call Gov. Sununu's office … and demand he sign HB 1264; only NH residents should vote in state and local elections." She further stated on the senate floor, "[W]e have a group of people who say this is where I live, but don't have to register my car here. I don't have to get my license like everyone else in this room has to. And yet we allow them to vote here. And I think that is the one sticking point."

The Complaint presents detailed allegations in support of the Individual Plaintiffs' challenges to the law under the *Anderson*/*Burdick* framework, the Twenty-Sixth Amendment, and the Twenty-Fourth Amendment. None of Defendants' premature arguments justify dismissal of the Individual Plaintiffs' claims. With respect to Defendants' argument for dismissal pursuant to Rule 12(b)(6), the Individual Plaintiffs have easily met their burden of pleading sufficient facts to survive a motion to dismiss. The Individual Plaintiffs' claims, in particular under the *Anderson*/*Burdick* framework and the Twenty-Sixth Amendment, are highly fact-intensive and require a court to carefully examine the factual record and weigh the burdens and justifications of the law, and to examine the record for discriminatory intent. Indeed, the Defendants' Motion to Dismiss ignores the binding First Circuit decision *Cruz v. Melecio*, 204 F.3d 14(1st Cir. 2000), which makes clear that *Anderson/Burdick* claims like the one brought here cannot be decided at the motion to dismiss stage. *See also Libertarian Party of N.H. v. Gardner*, No. 14-cv-00322-PB, 2014 WL 7408214 at *4 (D.N.H. Dec. 30, 2014) (same). Here, because the facts alleged support the valid legal theories in the Complaint, this "clinches the matter," *see Cruz*, 204 F.3d at 22, and the Defendants' Motion should be denied.

Defendants also urge upon the Court several incorrect arguments for dismissal based on standing. The Individual Plaintiffs sufficiently allege that they will suffer an injury-in-fact. The Court may draw reasonable inferences that the Individual Plaintiffs, who are licensed to drive and who live in rural New Hampshire, will drive and thus be required to obtain New Hampshire drivers' licenses. In the alternative, the Individual Plaintiffs have alleged a sufficient injury-in-fact by virtue of having to choose, as a result of HB 1264, between forgoing driving for their remaining time in New Hampshire, despite their valid, non-expired licenses authorizing them to drive, or paying fifty dollars to buy a driver's license in the state.

Defendants' argument that the Individual Plaintiffs' injuries are not traceable to or redressable by the Secretary of State similarly lacks merit. In pressing this argument, the Defendants ignore the crucial role that the Secretary of State played in HB 1264's passage—a role which highlights that the Secretary of State is a necessary party and the fact that HB 1264 is an election-related law. For example, Defendant Secretary of State Gardner and Deputy Secretary of State Scanlan testified in support of HB 1264 before the Senate Election Law and Internal Affairs Committee on April 10, 2018. Deputy Secretary of State Scanlan further testified in support of HB 1264 during the January 25, 2018 House Election Law Committee hearing on this legislation. And, in April 2019, Secretary Gardner personally testified before legislative committees on two occasions in defense of HB 1264 when the legislature was considering repealing and/or replacing this law.[1] *In fact, the Secretary of State testified on April 17, 2019 that he was the person who asked the legislature to remove the words "for the indefinite future" from the definition of resident and residence* in RSA 21:6. Defendants further ignore that, as the State's chief elections officer, the Secretary of State is responsible for ensuring the orderly administration of elections, which includes training and informing local election officials and the public about the state's election laws. Indeed, the Secretary of State posts information on his website and includes information in his biennially published elections manual detailing the difference between "residence" and "domicile"—information that could change if this Court rules that HB 1264 is unconstitutional. To effectuate complete relief, and to ensure that the Individual Plaintiffs and the public are informed of the definition of :residence," the Secretary of State must remain before the Court as a

[1] During Deputy Secretary of State Scanlan's March 13, 2019 testimony before the Senate Election Law and Municipal Affairs Committee on 2019 Senate Bill 67—a bill which would modify HB 1264 by excluding voters who do not have an indefinite intention to remain in New Hampshire from HB 1264's motor vehicle residency obligations—he acknowledged that, under HB 1264, a driving voter's failure to obtain a New Hampshire driver's license within 60 days of voting "might be a violation of the statute." *See* https://www.youtube.com/watch?v=15I5EJ4qY74&feature=youtu.be (9:42-10:20).

defendant.

For these reasons, the Defendants' Motion to Dismiss should be summarily denied. Indeed, a prompt denial of Defendants' Motion is especially critical given the imminence of the 2020 Presidential Primary Election tentatively scheduled for February 11, 2020 and the need of the parties to develop a factual record so this matter can be resolved sufficiently in advance of this important election.

## STANDARD OF REVIEW

Defendants have moved to dismiss for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1) and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

"Standing is among the requirements of subject-matter jurisdiction" and may appropriately be adjudicated under Rule 12(b)(1). *Norkunas v. Sandeep Partners*, *LLC*, 2018 U.S. Dist. LEXIS 94836, *4 (D. Mass. June 5, 2018). "The party asserting jurisdiction bears the burden of pleading sufficient factual matter to plausibly demonstrate that he has standing to sue." *Id.* "The 'irreducible constitutional minimum of standing' has three elements: (1) injury in fact; (2) causation; and (3) redressability." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). In this circuit, 12(b)(1) motions come in two formats: challenges to the sufficiency of jurisdictional allegations, and challenges to the accuracy of jurisdictional allegations. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001). Defendants in this case advance only a sufficiency challenge. *Mem. Law Supp. M. Dismiss*, p. 10. In evaluating such a challenge, "the court must credit the plaintiff's well-pleaded factual allegations (usually taken from the complaint, but sometimes augmented by an explanatory affidavit or other repository of uncontested facts), draw all reasonable inferences from them in her favor, and dispose of the challenge accordingly." *Valentin*, 254 F.3d at 363.

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, a court must "accept as true all well-pleaded facts set forth in the complaint and draw all reasonable inferences therefrom in the pleader's favor." *Artuso v. Vertex Pharms., Inc.*, 637 F.3d 1, 5 (1st Cir. 2011). The court "may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." *Haley v. City of Boston*, 657 F.3d, 39, 46 (1st Cir. 2011). "Detailed factual allegations are not necessary," but "the complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Id.* (citations, quotations, and ellipsis omitted); *see also Cruz v. Melecio*, 204 F.3d 14, 21 (1st Cir. 2000) (grant of motion to dismiss must be reversed "if the well-pleaded facts, taken as true, justify recovery on any supportable legal theory."). Put another way, the complaint must have "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

## ANALYSIS

The Individual Plaintiffs address Defendants' standing arguments before turning to Defendants' merit arguments.

### 1. The Individual Plaintiffs Have Standing to Bring This Action

Defendants' argument that Plaintiffs do not have standing because they have failed to allege that they will drive in New Hampshire or register a motor vehicle in New Hampshire is easily rejected. Under HB 1264, every person who registers to vote will effectively be declaring legal "residency" under RSA 21:6 and will accordingly be required to purchase a New Hampshire driver's license (if they drive) within 60 days of this declaration. Viewed another way, every person who registers to vote will have to elect between purchasing a New Hampshire driver's

license or abstaining from driving in New Hampshire indefinitely.

"Standing doctrine assures respect for the Constitution's limitation of '[t]he judicial power' to 'Cases' and 'Controversies.'" *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731 (1st Cir. 2016) (quoting U.S. CONST. art. III, § 2, cl. 1). "The 'irreducible constitutional minimum of standing' has three elements: (1) injury in fact; (2) causation; and (3) redressability." *Norkunas v. Sandeep Partners, LLC*, 2018 U.S. Dist. LEXIS 94836, *4 (D. Mass. June 5, 2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The Individual Plaintiffs easily meet these elements: they will be injured by having to choose between obtaining a New Hampshire driver's license at a cost of $50 or electing not to drive in New Hampshire in order to exercise their right to vote, the injury would be caused by Defendants' enforcement of HB 1264, and such injury could be redressed by an injunction barring the enforcement of HB 1264.

HB 1264 amends RSA 21:6 and :6-a by striking the words "for the indefinite future" from the definition of residency. The law is not a simple terminology change; rather, this change is designed to impact individuals who are likely to vote in New Hampshire elections. The goal and effect of HB 1264 is to conclusively deem a voter who is domiciled in New Hampshire under RSA 654:1, I—but who does not have plans to stay in New Hampshire "for the indefinite future"—a "resident" under RSA 21:6 upon the act of registering to vote. Put another way, the Individual Plaintiffs, would now be declaring their "residency" under RSA 21:6 when registering to vote. The result is that, under HB 1264, these constitutionally-eligible voters would now need to, within 60 days of registering to vote, pay moneys to the State through car registration and driver's license fees. This is because, within 60 days of becoming a "resident" under RSA 21:6/RSA 259:88, a person must register their car, if they own one, in New Hampshire and, if they drive, obtain a New Hampshire driver's license. *See* RSA 259:88 (stating that the term "resident" for motor vehicle

purposes is defined under RSA 21:6); RSA 261:45, I (a person has 60 days to register a car in New Hampshire after becoming a legal resident); RSA 263:35 (a person has 60 days to obtain a New Hampshire driver's license after becoming a legal resident). These financial burdens conditioned on exercising the right to vote are not optional.

*A. The Individual Plaintiffs Have Alleged A Sufficient Injury-In-Fact*

Contrary to Defendants' arguments, the Individual Plaintiffs have sufficiently alleged an injury-in-fact to establish standing. "The contours of the injury-in-fact requirement, while not precisely defined, are very generous, requiring only that claimant allege some specific, identifiable trifle of injury." *Adams v. Watson*, 10 F.3d 915, 918 (1st Cir. 1993) (citation, quotations, and brackets omitted). The crux of standing is met when a plaintiff demonstrates "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) (citation and quotations omitted). "The standing inquiry is claim-specific: a plaintiff must have standing to bring each and every claim that she asserts." *Id*.

"A constitutionally sufficient injury arises from an invasion of a legally protected interest that is both concrete and particularized as well as actual or imminent, rather than conjectural or hypothetical." *Gustavsen v. Alcon Labs., Inc.*, 903 F.3d 1, 7 (1st Cir. 2018). As registered voters domiciled in New Hampshire who will become residents, by operation of HB 1264, the Individual Plaintiffs will need to domesticate their driver's licenses or decide never to drive in the State of New Hampshire.

It is beyond cavil that having to take a round-trip ticket to the nearest DMV and paying $50 for a new license is sufficient injury to support standing. *See Gustavsen*, 903 F.3d at 7-8 ("Certainly plaintiffs have a legally protected interest in their own money"; "we have actual

economic loss, which is the prototypical concrete harm."). Nevertheless, the Defendants say the Individual Plaintiffs do not have standing because "[t]here are no allegations in the Individual Plaintiffs' complaint that they operate or are in actual physical control of a motor vehicle in New Hampshire." *Mem. Law Supp. M. Dismiss*, p. 13. This argument must be rejected.

*First*, the Court may draw a reasonable inference that each Individual Plaintiff, having committed to living in the state through graduation in 2021, will drive a car at some point in the next two years. Each Individual Plaintiff alleges that 1) she will graduate in 2021, 2) she has a driver's license in another state, and 3) she is domiciled in Hanover, New Hampshire. *See Compl.* ¶¶1-2. The Court is aware that New Hampshire is a rural state with limited public transportation opportunities, and may take judicial notice of the reality of living in a state like New Hampshire. It is reasonable to infer that a licensed driver living in New Hampshire will, at some point in the next two years, drive.[2]

*Second*, Defendants' argument misses the mark because HB 1264 injures voters—including the Individual Plaintiffs—by forcing them to choose between paying to domesticate an out of state driver's license and foregoing driving entirely in order to vote. The harm to a person of foregoing the ability to drive, or forgoing their right to vote in New Hampshire, is sufficiently concrete and particularized to create standing. In other words, if one of the Individual Plaintiffs chose not to purchase a New Hampshire driver's license, the denial of her ability to drive would be sufficient injury to support a challenge to the law. Courts have, in other contexts, recognized

[2] In the event that the Court declines to draw this inference, the Individual Plaintiffs are prepared to seek leave to amend their Complaint to add the following allegation to Paragraph 1: "Plaintiff Caroline Casey has driven in New Hampshire while enrolled at Dartmouth College. Given the relative lack of public transportation in the area, and its rural nature, Caroline Casey anticipates she will likely need to continue to drive intermittently in New Hampshire while enrolled at Dartmouth" and the following allegation to Paragraph 2: "Plaintiff Maggie Flaherty has driven in New Hampshire while enrolled at Dartmouth College. Given the relative lack of public transportation in the area, and its rural nature, Maggie Flaherty anticipates she will likely continue to drive intermittently in New Hampshire while enrolled at Dartmouth to go to trail heads for hiking and to go with the water polo team to tournaments."

the importance that driving plays in daily life, and the significance of foregoing that method of transportation. *See Delaware v. Prousse*, 440 U.S. 648, 662 (1979) ("Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities."); *Bell v. Burton*, 402 U.S. 535, 539 (1971) ("[C]ontinued possession [of driver's license] may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees."); *Stinnie v. Holcomb*, 355 F. Supp. 3d 514, 532 (W.D. Va. 2018) (suspension of driver's license made it "impracticable, if not impossible, for [plaintiff] to carry out necessary tasks" and enjoining practice of suspending drivers' licenses without an ability-to-pay hearing); *Hixson v. Haslam*, 329 F. Supp. 3d 475, 491 (M.D. Tenn. 2018) ("Life in Tennessee is a prime example of the fact that, as the Supreme Court has observed, 'driving an automobile is a virtual necessity for most Americans'" and finding scheme of suspending drivers' licenses of indigent court debtors does not survive rational basis review) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

Defendants argue that because the Individual Plaintiffs do not allege that they will be required to register a car in New Hampshire, they do not have standing. That argument also fails because the Individual Plaintiffs have standing by reason of being forced to choose between obtaining a New Hampshire driver's license and forgoing driving—they do not also need to register cars to have standing.

The Individual Plaintiffs have advanced three claims as to why HB 1264 is unconstitutional—1) that HB 1264 severely and unreasonably burdens the fundamental right to vote, 2) that HB 1264 has the purpose and effect of abridging or denying the right to vote of New Hampshire voters on account of their age, and 3) that HB 1264 is an unconstitutional poll tax. The Individual Plaintiffs have established an injury-in-fact to support each claim: by having to choose

between paying to domesticate their drivers' licenses or foregoing driving in New Hampshire to be able to vote, their right to vote will be severely and unreasonably burdened, their right to vote will be abridged or denied on account of their age, and they will be confronted with an unconstitutional poll tax.

This is all that standing requires. The Individual Plaintiffs are not required to demonstrate that they will have to register cars in New Hampshire to challenge the law, just as they need not demonstrate they will have to obtain a registration certificate to operate a civil aircraft, RSA 422:28, II, or pay an individual resident registration fee for a snowmobile, RSA 215-C:39.

*B. Plaintiffs' Injuries Are Traceable To And Redressable By The Secretary of State*

The Court must also reject the Defendants' argument that the Secretary of State should be dismissed as a Defendant. The Secretary of State's office is responsible for training and informing local election officials and the voting public of New Hampshire's election laws and ensuring the smooth operation of elections in the State. If the Court agrees with the Individual Plaintiffs that HB 1264 is unconstitutional, the Secretary of State must be subject to an injunction to provide complete relief. This may be necessary to minimize voter confusion about the requirements of domesticating a driver's license or car registration, which confusion would pose constitutional issues in its own right. The Individual Plaintiffs requested this injunctive relief from the Secretary of State in their Complaint. *See Compl.* Prayer B ("Issue a . . . injunction prohibiting Defendants from implementing or enforcing HB 1264.").

By way of background, the Secretary of State's office was a prime mover in HB 1264's passage. While Defendants' contention that the Secretary of State does not enforce the motor vehicle code is true, Defendants ignore the detailed allegations in the Individual Plaintiffs' Complaint about the legislative record. This record comprehensively details that the Secretary of

State and his office were intimately involved in the passage of HB 1264, and that the bill was intended to be target students perceived as having insufficient ties to the state to vote, despite is placement in the code. Specifically, the Complaint alleges that HB 1264 was considered by the House and Senate Election Law committees. *Compl*. ¶¶ 14-15. It alleges that one of the bill's chief advocates was the Secretary of State, and that the Division of Motor Vehicles did not propose or take a position on this bill or offer a cost estimate. *Compl*. ¶ 17. The Complaint alleges that the Secretary of State submitted a brief in the New Hampshire Supreme Court advisory opinion case, and that the Division of Motor Vehicles did not. *Compl.* n. 3. It alleges that, on January 25, 2018, Deputy Secretary of State David Scanlan testified in support of HB 1264 before the House Election Law Committee: "You should be a resident to have your domicile in the locality where you are going to vote … A student would have to decide whether they want to claim if they're a resident of the state of New Hampshire … and if they do, they're subject to whatever else would be required of any other resident of the state of New Hampshire," which includes motor vehicle residency fees. *Compl.* ¶ 18. Indeed, both Defendant Secretary of State William Gardner and Deputy Secretary of State Scanlan testified in support of HB 1264 before the Senate Election Law and Internal Affairs Committee on April 10, 2018.[3] Finally, the Complaint alleges public statements by six members of the Senate explaining that HB 1264 was enacted to restrict the franchise to only those who those senators believed had sufficiently strong connection to New Hampshire. *Compl.* ¶¶ 19-21.

In addition, and after the Complaint was filed, Secretary of State Gardner personally testified against 2019 House Bill 106, which would repeal HB 1264, before the Senate Election

[3] *See* Audio of Secretary of State's HB 1264 Apr. 10, 2018 Testimony before Senate Election Law and Municipal Affairs Committee, http://gencourt.state.nh.us/bill_Status/BillStatus_Media.aspx?lsr=2352&sy=2018&sortoption=&txtsessionyear=2018&txtbillnumber=HB1264 (3:12-20:04; 1:08-18-1:26:30).

Law and Municipal Affairs Committee for over thirty minutes on April 17, 2019. *See* https://www.youtube.com/watch?v=XhPPzMNtMqo&feature=youtu.be. He broadly testified that a statutory scheme whereby some, but not all, domiciliaries were subject to the legal obligations of residency was unfair. Secretary Gardner testified about a conversation that he had had with a local election official about the requirement that one be a resident to vote in New Hampshire. *Id.* at 7:29. *Significantly, he testified that he asked to have the four words, "for the indefinite future" removed from the residency statute*. *Id.* at 10:39. He testified that the legislature should promote equal rights to vote for everyone, "and with it comes equal responsibilities." *Id.* at 16:50. As the chief election officer in the state, the Secretary of State also has significant responsibilities in the area of training and providing information to local election officials and the public. RSA 652:23 provides that "The secretary of state shall provide information regarding voter registration procedures and absentee ballot procedures for all voters, including absent uniformed services voters, absent voters temporarily residing outside the United States, and federal ballot only voters domiciled outside the United States." It continues: "Instructional and informational materials published by the secretary of state for clerks to provide such voters shall include information on how to communicate electronically with election officials." RSA 652:23.

The Secretary of State further maintains a website accessible to the public. One link, "Voting as a College Student," takes the user to a .PDF which answers the question: "Is 'domicile' the same as 'resident'?" *See* http://sos.nh.gov/WorkArea/DownloadAsset.aspx?id=8589983573. The Secretary of State also releases an Election Procedure Manual to all election officials in New Hampshire. The Secretary of State is required to produce this manual before every state general election, and to distribute the manual free of charge to each moderator, board of selectmen, city council, and board of supervisors of the checklist and to each town, city, and ward clerk. RSA

652:22. Page 12 of the 2018-2019 edition of the manual addresses the question "Is 'Domicile' the same as 'Resident'?" *See* http://sos.nh.gov/WorkArea/DownloadAsset.aspx?id=8589982163. The Secretary of State's office also, 90 days after each election, writes letters to voters who "execut[ed] sworn statements on the voter registration form … starting 30 days before an election and on election day" informing them "of a driver's obligation to obtain a New Hampshire driver's license within 60 days of becoming a New Hampshire resident." *See* RSA 654:12, V(d); 2011 SB318 (requiring such letters to be sent, effective August 26, 2012). The Secretary of State's Office is deeply involved in educating voters about how the act of voting may trigger other obligations, including the residency obligation to domesticate a driver's license.

Given the public interest in and publicity of HB 1264, new potential registrants may well ask their local election officials if they will need to get New Hampshire driver's licenses as a consequence of voting. If the Court enjoins the enforcement of HB 1264, to provide complete relief it should order the Secretary of State to transmit accurate, constitutionally compliant instructions to local election officials and to post accurate information on the Department of State's website. *See Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270, 1300 (N.D. Ga. 2018) (ordering the Georgia Secretary of State to establish and publicize on its website a hotline or website for provisional ballot counters to access to determine whether their ballots were counted). This is because confusion over the state of the law itself can create an unconstitutional burden on the right to vote, effecting all voters including the Individual Plaintiffs.

In *Guare v. State*, 167 N.H. 658 (2015), the New Hampshire Supreme Court examined a voter registration form which read "In declaring New Hampshire as my domicile, I am subject to the laws of the state of New Hampshire which apply to all residents, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire[] driver's license within 60 days

of becoming a resident." 167 N.H. at 660. Finding that the language "inaccurately state[s] New Hampshire law" and was confusing, the Supreme Court held that the burden of such confusion was unreasonable, and, assuming intermediate scrutiny applied, found it wanting: "Accordingly, because the challenged language unreasonably burdens the fundamental right to vote, and because, even if we assume that the burden is not severe, the State has failed to advance a sufficiently weighty interest to justify the language." *Id.* at 669. If this Court enjoins HB 1264 from being enforced, but does not require the Secretary of State to inform the public and election officials about the injunction, voters may be faced with the same untenable scenario struck down in *Guare*—namely, being told by election officials that registering to vote will require them to obtain a New Hampshire driver's license when that is not the case.

**2. The Individual Plaintiffs' *Anderson/Burdick* Challenge States A Claim For Relief**

A plaintiff may bring a facial challenge to a statute if it "lacks any 'plainly legitimate sweep.'" *Saucedo v. Gardner*, 335 F. Supp. 3d. 202, 213 (D.N.H. 2018) (quoting *Hightower v. City of Boston*, 693 F.3d 61, 77 (1st Cir. 2012)). "Therefore, in practice, a facial challenge is best understood as a challenge to the terms of the statute, not hypothetical applications, and is resolved simply by applying the relevant constitutional test to the challenged statute." *Id.* at 213-14 (citation, quotations, brackets omitted). Here, the standard for a facial constitutional challenge sufficient to survive a motion to dismiss is met if plaintiffs sufficiently allege an undue burden on the right to vote under the Fourteenth Amendment *Anderson/Burdick* standard; intentional discrimination on the basis of age in violation of the Twenty-Sixth Amendment; or an unconstitutional poll tax in violation of the Twenty-Fourth Amendment. If these standards are satisfied—and they are here—then "no set of circumstances" would exist under which the challenged statute would be constitutional. *See Daskalea v. Wash. Humane Soc'y*, 480 F. Supp. 2d 16, 36 n.22 (D. D.C. 2007)

(noting that "[a] statute that does not satisfy the requirements of the Fourteenth Amendment *does satisfy* the 'no set of circumstances' test of *United States v. Salerno*") (emphasis added); *Saucedo,* 335 F. Supp. 3d. at 213-15 (striking down signature mismatch absentee ballot law on its face by simply applying the procedural due process test set in *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

*A. The* Anderson/Burdick *Challenge Is Fact-Intensive And Cannot Be Resolved On A Motion To Dismiss*

The Individual Plaintiffs have challenged HB 1264 under the *Anderson*/*Burdick* framework. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). This is an inherently fact-intensive inquiry. A court considering such a challenge must carefully balance the character and magnitude of the injury to the rights that the plaintiff seeks to vindicate against the justifications put forward for the burdens imposed. In this procedural posture, the Court must accept the Individual Plaintiffs' factual allegations as true. Because there are sufficient factual allegations to support the claim, the Individual Plaintiffs' *Anderson*/*Burdick* claim cannot be dismissed. To be sure, Defendants will have ample opportunity in this litigation to marshal evidence sufficient to meet their burden of proving that HB 1264 is constitutional. But Defendants do not show that a claim premised on the violation of the right to vote is subject to dismissal at the pleading stage merely because the State has averred, in a brief in support of a Rule 12 motion to dismiss without any evidentiary record, that the State has acted constitutionally.

Indeed, the ample weight of legal authority shows that dismissal of challenges such as the one the Individual Plaintiffs bring is inappropriate at this state of the litigation. Without a detailed factual record, created through probing discovery and demonstrated through factual and expert testimony and documentation, the Court is not able to examine the burdens and justifications and weigh them appropriately.

In *Libertarian Party of N.H. v. Garder*, the most recent such case in this district, the court denied a motion to dismiss an *Anderson*/*Burdick* challenge denying ballot access to the Libertarian Party, writing:

> With no factual record before me, I cannot predict whether the Party will be able to prove its claim that the law it challenges imposes a heavy burden on its ability to participate in the election process. Nor can I predict whether the State will succeed in articulating and justifying its interests in the restriction if it is called on to do so. Which standard of review will ultimately apply, and whether either party will ultimately meet its burden under the appropriate standard, are sufficiently open questions that I cannot conclude, on the pleadings, that no set of facts exists under which the Party might prevail. …. I cannot evaluate the strength of the State's justification at this stage solely on the face of the complaint.

No. 14-cv-00322-PB, 2014 U.S. Dist. LEXIS 178195, at *10-11 (D.N.H. Dec. 30, 2014) (citations, quotations, and alterations omitted).

The First Circuit has similarly cautioned against dismissing such cases at the pleading stage. In a 2000 case, the circuit reversed the district court's granting a motion to dismiss a challenge to ballot access law. *See Cruz v. Melecio*, 204 F.3d 14 (1st Cir. 2000). *Cruz* concerned members of the Partido Acción Civil, a group in Puerto Rico trying to register in the Commonwealth as a party so its candidates could appear on the general election ballot. *Id.* at 17. Puerto Rican law required that to do so, the group had to submit approximately 100,000 signatures. The petitioners challenged the requirement. *Id.* The *Cruz* court held that such a requirement was subject to exacting scrutiny, and that "[t]his showing requires the Commission to come forward with proof. Whether it ultimately can succeed in this endeavor is a sufficiently open question that we cannot conclude, *on the pleadings*, that no set of facts exists under which the appellants might prevail." *Id.* at 22 (emphasis in the original). "That clinches the matter, the fact-specific nature of the relevant inquiry, *see*, *e.g.*, *Anderson*, 460 U.S. at 789-90 (warning that this type of inquiry is never 'automatic'), obviates a resolution of this case on the basis of the complaint alone.

Consequently, the district court acted too hastily in dismissing the action for failure to state a potentially viable claim." *Id.*

Other courts have also held the dismissal of *Anderson*/*Burdick* claims at the pleading stage is inappropriate. *See*, *e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 450 (9th Cir. 2018) ("We refrain from prejudging whether California's statutes will survive further scrutiny under the *Anderson*/*Burdick* framework once both sides have developed their evidence. We decide only that at this juncture, judgment in the Secretary's favor is premature. Lacking any evidence showing the true extent of the burden on candidates like Soltysik and the weightiness of California's interests in imposing that burden, we find ourselves in the position of Lady Justice: blindfolded and stuck holding empty scales."); *Duke v. Cleland*, 5 F.3d 1399, 1405-06 & n.6 (11th Cir. 1993) (vacating dismissal of ballot-regulation challenge and remanding for further proceedings because "[d]iscovery has not commenced" and "[t]he existence of a state interest . . . is a matter of proof"); *Wilmoth v. Sec'y of N.J.*, 731 Fed. Appx. 97 (3rd Cir. 2018) (reversing order granting motion to dismiss *Anderson*/*Burdick* challenge to law requiring persons circulating petitions on behalf of candidates for national office be state residents) (pursuant to circuit court rule not binding precedent); *Opinion of the Justices (Definition of Resident and Residence*), 171 N.H. 128, 152 (2018) (opinion of Hicks and Bassett, JJ.) ("Without a developed factual record we cannot evaluate the merits of these conflicting claims [of the burdens imposed by HB 1264]"); *see also Dunn v. Blumstein*, 405 U.S. 330, 343 (1973) (in considering whether a law is narrowly drawn, a court must evaluate whether "there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity.").

Put simply, how many voters are burdened by HB 1264, the magnitude of those burdens, whether the State's interests are sufficiently weighty and justifiable, and whether HB 1264 is appropriately tailored are not questions that can be answered without a detailed factual record.

*B. The Individual Plaintiffs Have Adequately Alleged That HB 1264 Is A Severe Burden On Individual Plaintiffs' Right To Vote*

The Fourteenth Amendment safeguards the "precious" and "fundamental" right to vote. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). The Equal Protection Clause prohibits any encumbrance on the right to vote that is not adequately justified by a valid state interest. *See Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). As explained by the Supreme Court in *Anderson* and *Burdick*, a court reviewing a challenge to a burdensome voting law must apply a balancing test that weighs the severity of the burden (that is, its "character and magnitude") imposed on the exercise of the franchise against the state's "precise interests" proffered as justifications for the law. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

The U.S. Supreme Court in *Anderson* set forth the analysis to be employed in considering the constitutionality of state election laws that impact the right to vote:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

460 U.S. at 789. This balancing test is a "flexible" sliding scale standard, where the "rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [voting] rights." *Burdick*, 504 U.S. at 434. Applying this standard,

the degree of scrutiny applied to the state's justifications becomes more rigorous with the increasing severity of the burden on the right to vote. *Id.*; *see Green Party of Ark. v. Priest*, 159 F. Supp. 2d 1140, 1143 (E.D. Ark. 2001) (The degree of scrutiny varies with the "extent of the asserted injury."). At one end of that sliding scale, where voting rights are subjected to "severe" restrictions, strict scrutiny applies and the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 428 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). However, if the law imposes only "reasonable, nondiscriminatory restrictions" upon the rights of voters, the Court must nonetheless weigh the burdens imposed on the plaintiff against "the precise interests put forward by the State." *Id.* at 434. Under this more deferential standard, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788); *see also Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108-109 (2d Cir. 2008) (explaining difference between rational basis review and the *Anderson/Burdick* analysis of reasonable/nondiscriminatory restrictions).[4] The cases that fall in between where the burden is not reasonable, but not severe, may be subjected to intermediate scrutiny, *Guare v. State*, 167 N.H. 658 (2015), or be "subject to ad hoc balancing," such that "a

[4] This analysis need not be an "either/or" proposition where the burdens imposed by the regulation are either "severe," (thus, triggering strict scrutiny), or "reasonable and nondiscriminatory" (thus, triggering more deferential review). This is a sliding scale. If the burden of an election regulation is significant or substantial—thus, in the middle of this sliding scale—then intermediate scrutiny can be applied. *See Guare v. State*, 167 N.H. 658, 666 (2015) (applying intermediate scrutiny to voter registration form language that would have a chilling effect on the right to vote; noting that, in applying intermediate scrutiny, "the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations"); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 701 (N.D. Ohio 2006) (in evaluating an Ohio third-party voter-registration law subjecting voter-registration workers to felony charges if registration forms are not returned to an appropriate state agency within ten days of being collected, determining that intermediate scrutiny was appropriate because burdens were "substantial"), *same result reached on summary judgment in* 2008 WL 397585 (N.D. Ohio Feb. 11, 2008). Under intermediate scrutiny, the government must articulate an important or substantial governmental interest, and "the Court must determine if the means chosen to enforce that interest is no greater than is essential to the furtherance of that interest." *Id.* As with strict scrutiny, the State may not rely on post hoc rationales in the application of the intermediate scrutiny analysis. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (in applying intermediate scrutiny to gender classification, the government must demonstrate that its justification is "genuine, not hypothesized or invented *post hoc* in response to litigation").

regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 & n.6 (4th Cir. 1995); *see also Libertarian Party of Va. v. Judd*, 718 F.3d 308, 317-18 (4th Cir. 2013) (applying strict scrutiny to and invalidating a law requiring circulators of petitions for third-party ballot access to be accompanied by State residents as witnesses).

The *Anderson*/*Burdick* analysis presupposes that even restrictions imposing a less than severe burden on the right to vote are subject to appropriate balancing and scrutiny, and requires that "[h]owever slight [the] burden may appear ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (internal quotation marks omitted) (plurality opinion). Even if the burden imposed "is not insurmountable," plaintiffs may obtain relief "[if] the interests put forth by the defendant do not adequately justify the restriction imposed." *Fulani v. Krivanek*, 973 F.2d 1539, 1545 (11th Cir. 1992) (law denying a signature verification fee waiver to minor-party candidates fails *Anderson*/*Burdick* analysis even under a rational basis test).

Defendants' argument that HB 1264 does not burden voters at all fails. The claim is sufficiently pleaded in the complaint and cannot be dismissed absent factual development.[5] *See*

[5] Defendants' argument that HB 1264 is a transportation law, not an election law, is belied by the legislative record alleged extensively throughout the Complaint. The bill went through the House and Senate election law committees, and several of its supporters publically discussed the bill's effect on voting. Further, on March 28, 2019, on the floor debate of 2019 Senate Bill 67, which would modify HB 1264 to exclude from its motor vehicle residency obligations voters who do not have an indefinite intention to remain in New Hampshire, Senator Regina Birdsell, who supported HB 1264 and was Chair of the Senate Election Law and Internal Affairs Committee, said: "Moreover, what opponents of HB 1264 characterize as legislators' discriminatory intent to disenfranchise voters is based on circular reasoning in that it assumes the point at issue. That is, the [opponents'] claim is premised entirely upon the assumption that the targeted persons have a constitutional right to vote in New Hampshire. *When the very purpose of the legislation [HB 1264] is to establish a more reliable system by which that question [of whether certain targeted voters are constitutionally-entitled to vote] is determined*." Thus, Senator Birdsell made clear that HB 1264 was not only election-related, but that it was predicated on the assumption that certain targeted voters subject to its provisions may not even be entitled to vote in New Hampshire in the first place. http://sg001-

*Opinion of the Justices (Definition of Resident and Residence*), 171 N.H. 128, 156 (2018) (opinion of Hicks and Bassett, JJ.) (declining to decide whether HB 1264 imposes a burden on the right to vote without a factual record; "Absent a developed factual record, we cannot assess the motivation of the New Hampshire Legislature for passing HB 1264. Nor can we assess whether, as some opponents suggest, even if HB 1264 is applied neutrally, it would have a disparate impact upon eligible college student voters."); *see also Anderson v. Celebrezee*, 460 U.S. 780, 789 (a court must consider the "character and magnitude" of the asserted injury). The Individual Plaintiffs have alleged sufficient facts to show that it does.

The Complaint alleges how, as a result of HB 1264, every person[6] who registers to vote in New Hampshire will be obligated to purchase a New Hampshire driver's license, if they drive, and register their car in New Hampshire, if they own one. *Compl.* ¶¶ 8-13. A driver's license costs $50 and registration fees can rise to hundreds of dollars. *See* RSA 261:141 (governing state fees for registration) and RSA 261:153 (governing municipal fees for registration). And getting to a DMV to purchase a license can be a burden itself. *See Compl.* ¶1 (alleging Casey believes the nearest DMV office is far away from campus).

As Deputy Secretary of State David Scanlan, Senator Regina Birdsell, and Senator James Gray correctly noted in advocating for HB 1264, these burdens are voting restrictions because they arise directly from a person's decision to register to vote. *See Compl.* ¶¶ 18, 21. A person may vote in New Hampshire if that person has a domicile in the state. RSA 654:1, I. "An inhabitant's domicile for voting purposes is that one place where a person, more than any other place, has

harmony.sliq.net/00286/Harmony/en/PowerBrowser/PowerBrowserV2/20190328/1029/21360#info_ (10:55:30).

[6] According to a letter sent by the Secretary of State and Commissioner of the Department of Safety to the Speaker of the House, 6,540 people registered to vote on November 8, 2016 using an out of state driver's license, and, by August 31, 2017, 5,313 of those held neither a New Hampshire driver's license nor had registered a motor vehicle in New Hampshire. Had HB 1264 been the law at that time *up to 5,313 people* would have been required to purchase a license and/or car registration or be in violation of the law.

established a physical presence and manifests an intent to maintain a single continuous presence for domestic, social, and civil purposes *relevant to participating in democratic self-government*." *Id.* (emphasis added). Voting is, of course, the primary means by which most people participate in democratic self-government. By registering to vote, one is manifesting an intent to maintain a presence for purposes relevant to participating in democratic self-government. Thus, if one has an established physical presence in the state, by the text of the statute, the act of registering to vote serves as a declaration of domicile. After HB 1264 made the definitions of residency and domicile "effectively the same," *Opinion of the Justices (Definition of Resident and Residence)*, 171 N.H. 128, 139-40 (2018) (opinion of Lynn, C.J. and Hanz-Marconi and Donovan, JJ.), registering to vote becomes effectively a declaration of residency.[7] The burdens of acquiring a New Hampshire driver's license or car registration arise directly from that declaration of residency. Defendants' suggestion that the Individual Plaintiffs may simply forego driving in New Hampshire, despite their license to drive in all 50 states, *see Mem. Law Supp. M. Dismiss*, pp. 19-20, or may surrender their right to vote in federal elections in New Hampshire, and instead vote by absentee ballot in "the State they came from," *see Mem. Law Supp. M. Dismiss*, pp. 28-29, to avoid having to buy a new driver's license only bolsters the Individual Plaintiffs' claim that HB 1264 imposes unconstitutional obstacles to voting. Indeed, even if the state from which the two Individual

[7] Other states do not link the act of registering to vote to motor vehicle requirements, or exempt out-of-state students from having to comply with motor vehicle requirements. *See* 23 Ver. Stat. Ann. 4(3) ( "persons who live in the State for a particular purpose involving a defined period of time, including students, migrant workers employed in seasonal occupations, and persons employed under a contract with a fixed term, are not residents for purposes of [the Motor Vehicle title] only."); Ariz. Rev. Stat. § 28-2001 (explicitly exempting out-of-state students from requirement to register a vehicle); Ark. Code Ann. § 27-16-104(7)(B) (same); Cal. Veh. Code §516 (voter registration is only one of nine factors to consider in determining residency for motor vehicle purposes); Nev. Rev. Stat. Ann. § 482.103 (2) (out-of-state students explicitly exempted from definition of resident for motor vehicle purposes); N.C. Gen. Stat. § 20-4.01 (34) (residents for motor vehicle purposes exclude those "who resides within this state for . . . a temporary or transitory purpose"); Or. Rev. Stat. Ann. § 807.062 (listing actions which establish residency for motor vehicle purposes and not including registering to vote); Utah Code Ann. § 41-1a-202 (ii) (exempting out of state students from requirement to register vehicles); W. Va. Code § 17B-2-2 (same).

Plaintiffs came before arriving at Dartmouth permissively allowed them to vote by absentee there, the Individual Plaintiffs indisputably have a right to vote *here*, in New Hampshire, where they live more than any other place.

*C. HB 1264 Is Not Narrowly Tailored To Advance A Compelling State Interest*

Defendants write that "the State has a compelling interest in ensuring a community of interest among its electorate and ensuring that those members of the community are all appropriately regulated in the same manner if they own and drive a motor vehicle on the roadways of this State," and that these interests are sufficiently compelling to save HB 1264. *Mem. Law Supp. M. Dismiss*, p. 25.

Even assuming that ensuring a community of interest among its electorate is a compelling state interest, there is no way for the Court to examine whether HB 1264 would in any way advance that interest, let alone in a narrowly tailored fashion, without a factual record.[8] Both before and after HB 1264, all registered voters are required to be domiciliaries of New Hampshire, and the definition of domiciliary is unchanged: "An inhabitant's domicile for voting purposes is that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence for domestic, social, and civil purposes relevant to participating in democratic self-government." RSA 654:1, I. HB 1264 does nothing to change the level of connection that a person must have with the State to vote—it simply imposes fees. Under the Defendants' logic, a more explicit poll tax could survive strict scrutiny under *Anderson*/*Burdick.* The State could just as easily assert that it has an interest in ensuring that voters

[8] Defendants emphasize a quotation from *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972) that "Surely the prevention of such fraud is a legitimate and compelling governmental goal." The Defendants have not and, Individual Plaintiffs assert, cannot show that HB 1264 in any way reduces fraud.

have a significant connection with the state through such a tax: what better way to make sure they do than to close the polling place doors to those who are unwilling to pay?

Similarly, Defendants' argument that HB 1264 survives strict scrutiny because it ensures members of the community "are all appropriately regulated in the same manner" fails because HB 1264 does not advance that goal. Prior to HB 1264, it was already the case that all resident drivers had to obtain a New Hampshire driver's license. Drivers were treated consistently: if one was a domiciliary of New Hampshire and intended to remain for the indefinite future, one had to procure a New Hampshire driver's license to operate a motor vehicle. If one was not, one could continue to use an out of state driver's license. HB 1264 does not cause all members of the community to be regulated in the same manner if they own or drive a motor vehicle on the roadways of the State; it simply redefines what those regulations are.

**3. The Individual Plaintiffs Have Sufficiently Alleged A Claim Under The Twenty-Sixth Amendment**

The Court should reject Defendants' attempt to dismiss the Twenty-Sixth Amendment claim. Like the *Anderson/Burdick* claim, claims brought under the Twenty-Sixth Amendment are fact specific, and the Individual Plaintiffs have alleged sufficient facts to meet their burden under the applicable standard discussed below.

The Twenty-Sixth Amendment, ratified in 1971, provides "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1. That the text of this amendment tracks that of the Fifteenth and Nineteenth Amendments, which prohibit the denial or abridgement of voting rights on account of race and sex, respectively, is no accident: "The authors of the Twenty-Sixth Amendment consciously modeled it after the Fifteenth and

Nineteenth." Note, Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1175 (2012). Accordingly, consistent with the Fifteenth and Nineteenth Amendments, the Twenty-Sixth Amendment prohibits age-based discrimination in the voting context. *See Walgren v. Howes* ("*Walgren I*"), 482 F.2d 95, 101 (1st Cir. 1973) (noting that "the Fifteenth and Nineteenth Amendments served as models for the Twenty-Sixth" and stating that "[m]ost relevant would seem to be the general admonitory teaching of" *Lane v. Wilson*, 307 U.S. 268 (1939), a 15th Amendment case).

"[T]he backers of the amendment argued . . . that the frustration of politically unemancipated young persons, which had manifested itself in serious mass disturbances, occurring for the most part on college campuses, would be alleviated and energies channeled constructively through the exercise of the right to vote." *Walgren I*, 482 F.2d at 100-01; *see also Sloane v. Smith*, 351 F. Supp. 1299, 1304 (M.D. Pa. 1972); *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 223 (Colo. 1972). Further, "[t]he goal was not merely to empower voting by our youths but was affirmatively to encourage their voting, through the elimination of unnecessary burdens and barriers, so that their vigor and idealism could be brought within rather than remain outside lawfully constituted institutions." *Worden v. Mercer Cnty. Bd. of Elections*, 294 A.2d 233, 243 (N.J. 1972).

The most recent First Circuit opinion analyzing the Amendment is *Walgren v. Board of Selectmen* ("*Walgren II*"), 519 F.2d 1364 (1st Cir. 1975). The *Walgren II* court declined to adopt an explicit standard in considering a Twenty-Sixth Amendment challenge where the Selectboard of Amherst, Massachusetts, home of the University of Massachusetts, had held a town caucus during winter recess when many of the student voters were absent. *Id.* at 1364-65. The court considered a framework for a burden of proof, explaining that it "seems only sensible that if a

condition, not insignificant, disproportionately affects the voting rights of citizens specially protected by a constitutional amendment, the burden must shift to the governmental unit to show how the statutory scheme effectuates, in the least drastic way, some compelling governmental objective." *Id.* at 1367 (citation and quotation omitted). It further held that "[i]t is difficult to believe that [the Twenty-Sixth Amendment] contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden would have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment." *Id.* at 1367. The court proceeded to uphold the trial court's denial of relief on the basis that the town had acted in good faith, examining a novel and complex issue on a shortened time frame. *Id.* at 1368. The court took pains to note, however, that it "would not wish the end result of this lengthy litigation to be construed as authority for setting critical election dates during college recesses in communities having a very large if not majority proportion of students who are also eligible voters in the 18-20 year age group, without a showing of some substantial justification." *Id.* at 1367-68.

"Courts considering Twenty-Sixth Amendment claims have acknowledged the dearth of guidance on what test applies." *League of Women Voters of Fla., Inc. v. Detzner*, 314 F.Supp.3d 1205, 1221 (N.D. Fla. 2018) (citation and quotation omitted). "A consensus has been emerging, however, as recent courts have applied the *Arlington Heights* standard for Twenty-Sixth Amendment claims." *Id.*; *see also Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). Under this framework, a court considers evidence of an act's discriminatory purpose and intent, and, if the law is intentionally discriminatory on the basis of age, it is unconstitutional. *See League of Women Voters of Fla.*, 314 F.Supp.3d at 1221 ("Defendant's Opinion also violates Plaintiffs' Twenty-Sixth Amendment rights because it is intentionally discriminatory on account

of age."). "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious . . . discrimination." *Arlington Heights*, 429 U.S. at 265 (citation and quotation omitted). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* Evidentiary sources appropriate for consideration include historical background, the "specific sequence of events leading up to the challenged decision," legislative history, and disparate impact. *Id.* at 266-68.

The Individual Plaintiffs have sufficiently alleged facts to survive a Rule 12(b)(6) motion under either standard. Here, the Complaint alleges that the challenged provision was motivated, at least in part, by an intent to discriminate against New Hampshire's youngest voters, some of whom go to college[9] in this State but who do not have an indefinite intention to remain. Senator Gannon was clear as to this intent when acknowledging, on the Senate floor when HB 1264 was debated, that these college students do not "really have skin in the game" that justifies them voting. *Compl.* ¶ 19. HB 1264 was enacted against a historical background of attempts to fence out from the franchise young voters dating back to the 1970s. *See Compl.* ¶¶ 22-28. The sequence of events since the 2016 election further establishes this discriminatory intent. At least one of HB 1264's proponents has expressed that college students swayed the 2016 election in close New Hampshire races that had national implications.[10] After the election, then Senator Dan Innis argued that these college students "shouldn't be able to vote here." *Id.* ¶ 19. As a result, immediately after that

[9] The *Walgren II* court noted that, in keeping with common sense, most of the students who lived on campus at the University of Massachusetts were in the 18-20-year age group. *Id*. at n. 2. The court did not question that a law targeting college students also targets young voters.

[10] For example, Representative Moffett, who voted for HB 1264, wrote on Facebook after the 2016 election that "[m]any out-of-state college students in Durham, Plymouth, Keene, Manchester, Henniker and Hanover registered late and most voted Democrat … Ayotte had her reelection stolen from her by out-of-staters … and Clinton's razor-thin victory was stolen as well …" *See Compl.* ¶ 26.

election, legislators began a strategy of imposing new voting restrictions that made it more difficult for college students to vote, including through HB 1264 which imposes new barriers including requiring a trip to the DMV and expenditure of funds *simply as a consequence of voting*.[11] Whether the law was enacted with a discriminatory intent, and the "impact of the official action," *i.e.* whether it bears more heavily on one age group than another, can only be assessed after discovery and upon review of a factual record, and not at the pleading stage. *See Arlington Heights*, 429 U.S. at 266 ("Determining whether … discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *see also Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (en banc) ("Legislative motivation or intent is a paradigmatic fact question.") (quotation omitted), *cert. denied*, 137 S. Ct. 612 (2017); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 489 (1997) (assessing discriminatory intent requires examining impact of the official action at issue as well as "the historical background" of the challenged law, "the specific sequence of events" leading up to passage of the law, and "legislative … history, especially any contemporary statements by members of the decisionmaking body") (quotations, ellipsis, and brackets omitted).

**4. The Individual Plaintiffs' Twenty-Fourth Amendment Claim Should Not Be Dismissed**

Defendants' argument that, as a matter of law, HB 1264 cannot be a poll tax is easily rejected. They argue that requirements like having to purchase a New Hampshire driver's license

[11] For example, during a March 28, 2019 Senate floor debate on 2019 Senate Bill 67 (which would exempt voters who do not have an indefinite intention to remain from motor vehicle residency fees), Senator Bob Giuda—a HB 1264 supporter—made plain his view that "our obligation is not to out-of-state students, it is to the citizens of the State." http://sg001-harmony.sliq.net/00286/Harmony/en/PowerBrowser/PowerBrowserV2/20190328/1029/21360#info_ (11:23:05). Senator Sharon Carson—a HB 1264 supporter—similarly suggested that college students should simply vote in the state from which they came, and not New Hampshire (despite the fact that they may be domiciled here and constitutionally-eligible to vote here). *Id.* at 11:27:00.

or register a car in New Hampshire do not flow from voting but rather from establishing residency and so the requirements are not a "condition on the right to vote." *Mem. Law Supp. M. Dismiss*, p. 10. This argument overlooks that the Twenty-Fourth Amendment applies to sophisticated schemes that impair the right to vote, like HB 1264. It also ignores that HB 1264 causes residency obligations to flow directly from registering to vote.

The United States Supreme Court has made clear in the context of the Twenty-Fourth Amendment that its provisions "nullif[y] sophisticated as well as simple-minded modes of impairing the right guaranteed." *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965). In *Harman*, the Court struck down a scheme in which individuals who did not pay the revised, non-mandatory Virginia poll tax would have to file a certificate attesting to their residency in the state six months prior to an election. *Id.* at 541. The Court held that this scheme placed a "real obstacle" to those asserting their right to vote without paying a poll tax. *Id.*

The category of forbidden poll taxes is broad in order to root out any procedural requirements that deny or abridge the right to vote. *Id*. It therefore covers not just direct taxes on the right to vote but any imposition that constitutes a "material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id*. The fact that these fees are imposed after one votes, rather than before one votes, is also irrelevant. As in *Harman*, regardless of whether the State requires motor vehicle fees to be paid before or after one registers, they still constitute a "material requirement" imposed "solely upon those who refuse to surrender their constitutional right to vote." *Id.* Again, the fees associated with obtaining a driver's license and registering a vehicle—as well as the certification of payment of taxes necessary to obtain a driver's license—can amount to hundreds of dollars. *See also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) ($1.50 poll tax for state elections

unconstitutional). For current non-resident college students, this financial burden would not fall on these student voters automatically under HB 1264; rather, it would be triggered if that voter elects to exercise his or her constitutional right to vote.

Contrary to Defendants' arguments, HB 1264's burdens arise directly from a person's decision to register to vote. A person may vote in New Hampshire if that person has a domicile in the state. RSA 654:1, I. "An inhabitant's domicile for voting purposes is that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence for domestic, social, and civil purposes *relevant to participating in democratic self-government*." *Id.* (emphasis added). Voting is, of course, the primary means by which most people participate in democratic self-government. By registering to vote, one is manifesting an intent to maintain a presence for purposes relevant to participating in democratic self-government. Thus, if one has an established physical presence in the state, by the text of the statute, the act of registering to vote establishes domicile. Because HB 1264 made the definitions of residency and domicile "effectively the same," *Opinion of the Justices (Definition of Resident and Residence)*, 171 N.H. 128, 139-40 (2018) (opinion of Lynn, C.J. and Hanz-Marconi and Donovan, JJ.), the act of registering to vote also constitutes a declaration of residency. And the obligations, such as to buy a New Hampshire driver's license for $50, arise from that declaration of residency.

In short, HB 1264 is a "sophisticated" poll tax. Under the law, a person who registers to vote consequentially declares her residency, which in turn mandates the payment of fees for those who drive or own a car. As legislator after legislator made clear, that was the point.

## CONCLUSION

For the reasons discussed above, the motion to dismiss should be denied.

## RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully requests that this Court:

A. Deny Defendants' Motion to Dismiss the Consolidated Complaints (DN 20.0); and

B. Grant such other and further relief as this Court deems just and proper in the circumstances.

Respectfully submitted,

CAROLINE CASEY AND MAGGIE FLAHERTY,

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

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Date: May 30, 2019

**CERTIFICATE OF SERVICE**

The undersigned certifies that he has electronically filed this date the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in the consolidated case. This filing is available for viewing and downloading from the ECF system.

Dated: May 30, 2019

/s/ Henry R. Klementowicz
Henry R. Klementowicz