UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

LEON H. RIDEOUT, ANDREW LANGLOIS, and BRANDON D. ROSS, Plaintiffs, v. WILLIAM M. GARDNER, Secretary of State of the State of New Hampshire, in his official capacity, Defendant	Civil Case. No. 1:14-cv-00489-PB

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

Now Comes the Defendant William M. Gardner, Secretary of State, by and through his counsel, the Office of the Attorney General, and respectfully submits this Memorandum of Law in Support of Defendant's Cross Motion for Summary Judgment.

INTRODUCTION AND
SUMMARY OF THE ARGUEMENT

At the heart of this case lies the authority of the New Hampshire Legislature ("the Legislature") to proactively amend its current statutory scheme in to order protect the purity and integrity of the State's election process in light of the leaps and bounds of technology over the past century. House Bill 366 (HB 366) is the Legislature's latest effort to ensure that the voters of New Hampshire may cast their vote free from the threat of reprisal, ensuring that elections in New Hampshire are not purchased or coerced. The purpose of HB 366 was to update RSA

659:35, I, a statute which was first enacted in the 1890s, in an effort to maintain its effectiveness in an age of social media and digital photography.

Prior to the 2014 amendment the statute, in pertinent part, read as follows, "[n]o voter shall allow his ballot to be seen by any person with the intention of letting it be known how he is about to vote except as provided in RSA 659:20." RSA 659:35, I (2013). The Statute as it previously existed was only effective during the short period of time when the voter left the voting booth and when the voter inserted the ballot in the ballot box or electronic counting device.

As amended during the 2013/14 legislative session, effective September 1, 2014, the statute reads as follows:

> No voter shall allow his ***or her*** ballot to be seen by any person with the intention of letting it be known how he ***or she*** is about to vote ***or how he or she has voted*** except as provided in RSA 659:20. ***This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means.***

RSA 659:35, I (2014) (emphasis added to highlight amendment). The statute as amended is a reasonable content neutral restriction furthering the important governmental interest of ensuring the purity and integrity of our elections.

In substance what the amendment does is prevent a voter from using his or her ballot as evidence of how he or she has voted after the ballot leaves his or her possession, thereby thwarting the efforts of those who would seek to obtain votes by purchase or threatened harm or those who would seek profit by selling their vote. What the amendment does not do is prevent a voter from expressing how they voted by any other means other than by use of an official ballot. It is important to note that the 2013/14 legislation reduced the penalty from a criminal offense to a violation, which is not dependent on how a voter actually voted.

BACKGROUND

In the mid to late 1800 s schemes involving voter intimidation and coercion were an issue of concern. Exhibit A (Scanlan Depo. 17:19-22). At the time the political parties and other interested groups would prepare their own ballots. *Id.* at 18:8-9. Prior to being given to the voter the ballot would be completed with a specific slate of candidates and the ballot would have unique characteristics so it could be easily identified. *Id.* at 18:10-14 ("[P]olitical parties or unions or other groups could print their own ballots. They would be identifiable by size or the color. And it was – it was the ticket – it was the party ticket that the voter would go in and, you know, they would put it in the box. So anybody observing the process could quickly see how the person voted."). As an example the Democratic ticket could be blue and the Republican ticket could be red. *Id.* at 18:15-18. Because the specific ballots were easily identifiable party leaders and others could observe a voter at the polling place and confirm how that person voted based on the physical characteristics of the ballot the person placed in the ballot box. *Id.* at 18:18-20.

In 1891 legislation was passed which required the New Hampshire Secretary of State to prepare all ballots to be used at biennial elections and elections for state and national offices. This made it more difficult for political parties, unions and other interested groups to see how voters were actually voting. Exhibit A (Scanlan Depo. 19:7-11). During that same legislative session further legislation was passed making it illegal for a voter to "allow his ballot to be seen by any person, with the intention of lettering it be known how he is about to vote." Exhibit B, (1891 N.H. Laws Ch. 49, Sec. 29). Later in 1911, a law was enacted making it a criminal offense to offer, give or accept a bribe for the purpose of influencing the vote of any person at any election. Exhibt C (1911 N.H. Laws Ch. 99, Sec. 1).

The entire act of voting includes obtaining a ballot, marking the ballot and depositing the ballot in the ballot box or electronic counting device. Exhibit A (Scanlan Depo. 20:12-15). Prior to the enactment of the current amendment, RSA 659:35, I, regulated conduct up to the point the voter placed his ballot in the ballot box. *Id*. at 21:9-13.

The need for HB 366 was to address a concern that with the aid of modern technology, such as digital photography and social media, a marked ballot is no longer under the exclusive control of the elections officials after the ballot has been cast and can still be used as evidence of how one voted. *Id*. at 17:4-8; 23:3-10. This raised concerns with the Secretary of State's Office in that this technology could be used as a mechanism to circumvent RSA 659:35 in furtherance of a vote buying scheme or intimidation. Exhibit A (Scanlan Depo. 12:9 -13:9, 22:19-23, 23:1-10, 54:12-23).

Secretary of State Gardner testified at his deposition that the legislation further protected a voter's right of conscience guaranteed by Pt. I, Art. 4 of the New Hampshire Constitution. Exhibit D (Gardner Depo. 17:10 -18:4); *see also* NH Const. Pt. I, Art. 4. Secretary Gardner explained that the legislation works to protect voters from those who may seek their vote through intimidation. *Id*. at 18:7-10. As an example Secretary Gardner explained the circumstance behind the German annexation of Austria in 1938. *Id*. at 18:7-10. After the German troops entered Austria, a plebiscite was held seeking the concurrence of the Austrian people. *Id*. at 19:4-8. Adolf Hitler instituted election rules that allowed voters to voluntarily show their ballot as they were voting, and according to Secretary Gardner those who did not paid the price. *Id*. at 19:8-11. Stalin had a similar scheme in Poland. *Id*. at 19:10-11.

Secretary Gardner went on to explain that Saddam Hussein's method of conducting an election was to have the following question on the ballot, "do you wish to keep President

Hussein – Saddam Hussein as president of the Democratic Republic of Iraq, Yes or No?" Exhibit D (Gardner Depo. 19:15-19). According to Secretary Gardner the ballot contained a code number which he believed could be traced back to the voter. *Id*. at 19:19-21.

RECENT VOTE BUYING SCHEMES

Throughout their memorandum the Plaintiffs argue that the prohibition placed on voters by HB 366 is unnecessary because there appears to be no recent history in New Hampshire where persons have been prosecuted for vote buying. Although there appears to be no documented cases of vote buying within the state, there are recent cases of vote buying from around the country. One such case occurred in Kentucky involved Naomi Johnson and Earl Young, along with two co-defendants, Michael Salyers and Jackie Jennings. *United States v. Johnson*, 2012 U.S. Dist. LEXIS 76320, [*1] (E.D. Ky. Aug. 21, 2012) (App. E, attached decision along with subsequent appellate decisions). The four were indicted for conspiracy to buy votes and vote buying in violation of 18 U.S.C. § 371, 42 U.S.C. § 1973i(c). *Id.* Michael Salyers was the leader of the conspiracy and the candidate for magistrate in Breathitt County for whom voters were paid to vote. *Id*. Salyers plead guilty to one count of conspiracy to buy votes. *Id*. [*1-2]. Jackie Jennings also plead guilty before the start of trial. *Id*. [*2].

"The vote buying occurred in and around Salyers' Grocery store in Jackson, Kentucky." *United States v. Johnson*, 2012 U.S. Dist. LEXIS 76320 [*2]. Salyers owns the building in which the store was located, and Naomi Johnson operated the store. *Id*. Salyers testified that vote buying is common in Breathitt County and people came to the store offering to sell their votes because the word on the street was that he was buying votes. *Id*.

On some occasions voters came into the store offering to sell their votes. *Id*. [*3]. On other occasions, conspirators solicited votes in exchange for money. *Id*. Salyers would arrange

to have someone to escort the voter(s) to the polling place. *Id*. The escort would then observe the voters vote. *Id*. Afterwards the escort brought the voter back to the store and confirmed to Salyers that the voter voted. *United States v. Johnson*, 2012 U.S. Dist. LEXIS 76320 (E.D. Ky. Aug. 21, 2012). Salyers would then pay the voter $20-25 for voting. *Id*.

Another case involving vote buying took place Caldwell County, North Carolina. *United States v. Shatley*, 448 F.3d 264, 265, 266 (4th Cir. N.C. 2006) (attached as App. F). During the campaign season prior to the November 2002 general election, Wayne Shatley and four others engaged in a widespread scheme to buy votes for the Republican candidate for sheriff, Gary Clark. *Id*. Shatley organized and financed the conspiracy, paying voters $25.00 each, for their votes, using $ 5,000 to $ 6,000 of his own money. *Id*. Shatley was charged with a single count of conspiracy to buy votes, in violation of 18 U.S.C. § 371, and in three counts, with actually buying votes in violation of 42 U.S.C. § 1973i(c). *Id*. He was convicted him on all counts. *Id*.

The next case involved four Democratic precinct committeemen in East St. Louis, Illinois. *United States v. Thomas*, 510 F.3d 714, 717 (7th Cir. Ill. 2007) (attached as App. G). The four were convicted of election fraud crimes for their participation in a vote-buying conspiracy during the November 2004 election. *Id*. The conspiracy involved Sheila Thomas, Jesse Lewis, Kelvin Ellis, and Charles Powell. *Id*. The evidence showed that in the course of chairing committee meetings, Powell directed committeemen to submit election-day budgets to the St. Clair County Democratic Committee for funds to pay voters in their precincts to vote for Democratic candidates during the 2004 General Election. *Id*. Thomas, Lewis and Ellis attended these meetings and participated in the vote-buying activities as directed. *Id*. Voters were paid $5.00 or $10.00 to vote for Democratic candidates. United States v. Thomas, 510 F.3d 714, 719 (7th Cir. Ill. 2007). The four were convicted on all counts. *Id*. at 721.

These cases are just three examples to demonstrate that vote buying schemes still pose a threat to the integrity of our election process. Although there is no evidence that digital photography played a role in any of the examples, it is certainly not hard to imagine such illegal activity would benefit from such technology. The use of digital photography and social media eliminates the need to have a physical person observe the voter to confirm the voters vote, thus reducing the possibility of the illegal activity will be discovered.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" only when there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Facts are "material" if they could affect the outcome of the litigation. *Id.* Summary judgment is also appropriate when a party "fails to … establish the existence of an element essential to [its] case, and on which [it] will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When issuing a permanent injunction, the Court must find that: "(1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction." *Healey v. Spencer*, 765 F.3d 65, 74 (1st Cir. Mass. 2014) (quoting *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 8 (1st Cir. P.R. 2007)).

ARGUMENT

I. RSA 659:35, I, IS NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENT INTEREST.

A content-neutral statute is constitutional as applied to a particular plaintiff if it is "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The statute is narrowly tailored because it simply prohibits one's display of one's marked ballot for the purposes of showing how he or she voted. *See* RSA 659:35, I. The statute serves the State's significant interest in thwarting one party's ability to confirm how another party has voted thereby making it impossible for a party purchasing a vote to visually confirm the vote that is being purchased. The Statute does not prohibit a voter from expressing how he has voted by any other means of communication to include a photograph of a mock ballot or a sample ballot. *Id*.

A. To The Extent RSA 659:35, I, Restricts Speech, If At All, Such Restriction Is Content Neutral, Therefore The State May Impose Reasonable Restrictions On The Time, Place And Manner Of Otherwise Protected Speech.

To the extent RSA 659:35, I, restricts speech, if at all, such restriction is content neutral, as enforcement does not require authorities to examine the content of the message, therefore the State may impose reasonable restrictions on the time, place and manner of otherwise protected speech. "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) *citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (*quotation omitted*). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an

incidental effect on some speakers or messages but not others." *Id.* A statute is content based if it requires an examination of the content of the message being conveyed to determine whether a violation has occurred. *McCullen*, 134 S. Ct. at 2531.

The Plaintiffs asks the Court to rule that RSA 659:35, I, is a content based restriction because it prohibits the revelation of specific content-namely, a marking on the ballot indicating how a voter has voted. Plaintiffs' Memorandum of Law in Support of Their Motion for Motion for Summary Judgment, P. 17. The Plaintiffs' interpretation of the RSA 659:35 is misplaced as the statute merely prohibits a voter from using his or her official ballot as evidence of how he or she is about to vote or has voted. RSA 659:35, I. A violation of the statute is dependent on a voter's conduct of displaying a marked ballot regardless of how the ballot is marked, in other words, how voter has voted and requires no substantive examination of ballot. *See id.*

As an example, two voters enter the same polling place at the same time, receive their ballots one right after the other and enter separate voting booths. Both voters vote in the Governor's race only, one votes for Candidate A, the other for Candidate B. Both voters take digital images of their ballot and subsequently publish the digital image by use of social media, in this instance both voters have violated RSA 659:35, I, regardless of the fact they voted opposite each other. *See id.* Given the same scenario, except that both voters vote for Candidate B and only one voter publishes the digital image by use of social media, only the voter who publishes the digital image is in violation of the statute. *See* RSA 659:35, I. The two forgoing scenarios clearly demonstrate that the statute is content neutral and should be reviewed under intermediate scrutiny. *See id*.

Plaintiffs argue that RSA 659:35, I, is content based because the government must examine the content of a displayed photograph of a ballot to determine the message's

favorability under the law. However, in *Hill v. Colorado*, 530 U.S. 703 (2000), a case involving a buffer zone around health care clinics, the Court noted, "[i]t is common in the law to examine the content of communication to determine the speaker's purpose," and that "[w]e have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at 721. The Court reasoned that with respect to the conduct that was the focus of the Colorado statute, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether "sidewalk counselors" engaged in "oral protests, education or counseling" rather than pure social or random conversations (which were not a violation of the law). *Id.* Even in cases in which it would be necessary to review the content of the statements made, the Court has "never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic." *Id.* at 722. The Court noted that the statute applies to all protest, to all counseling, and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support it. *See id.* at 725. Likewise, a cursory review of a ballot's markings to determine whether RSA 659:35(I) has been violated does not render the statute content based as it is not required to determine how the voter voted.

In his concurrence to the *Hill* judgment, Justice Souter noted that "[u]nless regulation limited to the details of a speaker's delivery result in removing a subject or viewpoint from the effective discourse *(or otherwise fails to advance a significant public interest in a way narrowly fitting to that objective*), a reasonable restriction intended to affect only the time, place, or manner of speaking is perfectly valid. *Hill v. Colorado*, 530 U.S. 703, 736 (2000) (emphasis added). "The question is simply whether the ostensible reason for regulating the circumstances is

really something about the ideas. Here, the evidence indicates that the ostensible reason is the true reason." *Id.*

Plaintiffs argue that the U.S. Supreme Court's recent decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) expressly rejected the First Circuit's decision in *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014)[1] which held that "even a statute that restricts only some expressive messages and not others may be considered content-neutral when the distinctions it draws are justified by a legitimate, non-censorial motive." *Thayer*, 755 F.3d at 68 (quoting *Hill v. Colorado*, 530 U.S. 703, 704 (2000)). However, the petitioners, by asserting that *McCullen* expressly rejected the *Thayer* rule and arguing instead that a law is content based if it requires enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred without regard to the law's justifications, misinterpret the U.S. Supreme Court's holding and reasoning in *McCullen.* Rather than expressly rejecting the *Thayer* approach which involves examining the legitimate, non-censorial government interest involved, the *McCullen* court carried out a similar analysis.

In *McCullen*, the U.S. Supreme Court held that a Massachusetts statute that required a buffer zone around abortion clinics was content neutral even though it established buffer zones only at clinics that performed abortions and although it exempted certain groups of people, like employees, from the buffer zone. Just after noting that the law will have an inevitable effect of restricting abortion-related speech more than speech on other subjects, the Court considered the Act's stated purpose to increase public safety at reproductive health care facilities, along with additional similar purposes articulated by the government's brief (public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways), and held that the law

---

[1] A petition for cert. was filed by the plaintiffs in *Thayer* on October 14, 2014 and is still pending. The matter was distributed for conference of Jan. 9, 2015. *See* http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-428.htm.

was still content-neutral. *McCullen*, 134 S. Ct. at 2531. The Court noted that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics" and to the contrary, a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers of messages but not others. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). The question in such a case is whether the law is justified without reference to the content of the regulated speech. *Id.* (quotations and citations omitted). Thus, similar to the *Thayer* approach of examining the legitimate, non-censorial government interest when determining if a law is content neutral, the Supreme Court considered the legitimate government interests involved in *McCullen.* As the First Circuit noted, "If the mere association of certain behavior with certain subjects were to amount, in itself, to a content basis for First Amendment scrutiny, the point behind content discrimination would be lost. That point is to bar the government from suppressing speech because it disapproves the message … not to give every message maximum protection no matter how or where or when it is delivered." *Thayer*, 755 F.3d at 68.

In dicta, the *McCullen* Court also noted that if the Act were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech then it would not be content neutral. *Id.* at 2531-32. But, like the Massachusetts law at issue in *McCullen*, RSA 659:35(I) does not concern the mere offense or discomfort of others who see a "ballot selfie" but rather is concerned with legitimate governmental interests including the secrecy of ballots and voter coercion, similar to the safety concerns that arouse in *McCullen* and were held content neutral. Although the *McCullen* court ultimately held that the Massachusetts statute was not narrowly tailored enough under intermediate scrutiny and thus violated free

speech guarantees, it considered the justifications behind the law in holding that it was content neutral. *McCullen*, 134 S. Ct. at 2537.

Likewise, in *Burson v. Freeman*, 504 U.S. 191 (1992), in which a plurality of the Court held that a Tennessee statute prohibiting the solicitation of votes and display of campaign materials within 100 feet of a polling place on election day was not content neutral because it limited only speech related to political campaigns, Justice Kennedy's concurring opinion noted that the regulation's justification is a central inquiry and that "government regulation of expressive activity is content neutral so long as it is *'justified* without reference to the content of the regulated speech.'" *Id.* at 212 (citing *Ward*, 491 U.S. at 791)(quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)(emphasis added in *Ward*). Justice Kennedy went on to note that "[d]iscerning the justification for a restriction of expression" is not always straightforward and in some cases, a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech. *Id.* at 213. But ultimately, "in time, place, and manner cases, the regulation's justification is a central inquiry." *Id.* Notably, although the law was found to be content based, it still survived strict scrutiny. The plurality ruled that this was the rare case where a law survived strict scrutiny because of the "widespread and time-tested consensus" that demonstrated "some restricted zone is necessary in order to serve the States' *compelling* interests in preventing voter intimidation and election fraud." *Id.* at 206 (emphasis added).

Justice Scalia also concurred in the *Burson* judgment, noting that "restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot." *Id.* at 214. Although Justice Scalia believed that the law at issue was content-

based, he still considered it as constitutional because it was a reasonable, viewpoint-neutral regulation of a nonpublic forum. *Id.* Therefore, in the instant case the State's legitimate, non-censorial justifications for protecting the secrecy of ballots and voters against coercion should be considered in determining that RSA 659:35(I) is content neutral.

Even if strict scrutiny applies, the State's interest in preventing voter intimidation and election fraud is a compelling interest which should survive such a high level of scrutiny. *Id.* at 206 (The Court finding that a secret ballot secured in part by a restricted zone restricted zone around the voting compartments is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.).

Finally, petitioners argue that RSA 659:35(I) is content based even if the *Thayer* approach applies because there was a specific intent to censor speech with which the State disagreed – namely, *all* speech made through the dissemination of marked ballots regardless of whether such speech was related to vote corruption. However, the record clearly indicates that the statute was adopted, and amended, to combat corruption, Exhibit A (Scanlan Depo. 12:9 - 13:9, 22:19-23, 23:1-1054:12-23), and just because the statute may impact those who are not acting as part of a fraudulent scheme, does not render the statute content based. As the *Thayer* court noted, a regulation that has "an incidental effect on some speakers or messages but not others" may still qualify as content neutral so long as the regulation is justified without reference to the content of the regulated speech. *Thayer*, 755 F.3d at 67 (citing *Ward*, 491 U.S. at 791). Petitioner's argument undercuts itself – the statute applies to *all* marked ballots regardless of the content portrayed by the markings and any incidental impact on those who are not part of a corruption scheme does not render the law content based because the State had a legitimate, non-censorial justification in implementing and amending it.

II. RSA 659:35 IS NARROWLY TAILORED

"For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 799). Unlike a content-based restriction of speech, it is not necessary that the content neutral regulation be the least restrictive or least intrusive means of serving the government's interests. *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 798). "But the government still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 799).

As stated previously in this memorandum the *McCullen* court ultimately struck down the Massachusetts statute holding that it was not narrowly tailored enough under intermediate scrutiny. *McCullen*, 134 S. Ct. at 2537. However, this case can be easily distinguished from *McCullen*, in *McCullen*, the Court found that the buffer zones although serving the State's interest at the same time imposed serious burdens on the petitioner's speech. *Id.* at 2535. Noting the impact the buffer zones had on the petitioner's ability to communicate, the Court determined that the statute went so far as to deprive the petitioners of their two primary methods of communicating with patients, conversation and leafleting. *McCullen*, 134 S. Ct. at 2536. The Court reasoned that although the 1st Amendment does not guarantee the right to a particular manner of expression, some forms such as normal conversation and leafleting on a public sidewalk were historically more closely associated to the transmission of ideas than others. *Id.*

The instant case is more closely in line with *Burson*. In *Burson*, the Court examined the history of election regulation in this country and noted it revealed a persistent battle against two evils: voter intimidation and election fraud. *Burson*, 504 U.S. at 206. The solution incorporated

by all 50 States, together with numerous other Western democracies, was a secret ballot secured in part by a restricted zone around the voting compartments. *Id*. The plurality in *Burson* found that this widespread and time-tested consensus demonstrated that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

In the instant case, unlike in *McCullen*, the display of a marked official ballot is not historically associated with the communication of how one voted. It has been over 120 since this State has adopted the official ballot system. Exhibit B, (1891 N.H. Laws Ch. 49, Sec. 10). Likewise, for over 120 years it has been illegal for a voter to display his marked ballot as evidence of how he was about to vote. *Id.* (1891 N.H. Laws Ch. 49, Sec. 29). It has only been since the advent of digital photography and social media in the recent past that has given rise to the use of one's ballot as a form of communication. HB 366 was introduced and enacted to ensure that the ballot remained secret thereby preventing voter intimidation, vote buying and maintaining the integrity of our election. HB 366 is narrowly tailored to pass any level of scrutiny both intermediate and strict.

III. RSA 659:35 IS NOT OVERLY BROAD

The Plaintiffs argue that "RSA 659:35,(I) is, on its face overly broad because it restricts a substantial volume of constitutionally-protected political speech." Plaintiffs' Memo at 35. Plaintiffs' overbreadth argument is misplaced. The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (U.S. 2002). However, "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." *Hill v. Colo.*, 530 U.S. 703, 730-

31 (U.S. 2000) (the Court was addressing the claim raised by the petitioners that the challenged statute was overly broad because it protected too many people in too many places). In this case similar to the case in *Hill*, to the extent RSA 659:35 restricts political speech, the question then turns to "whether it is a 'reasonable restriction on the time, place, or manner of protected speech.'" *Id.* at 730. Where conduct and not merely speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*

In *Hill*, the petitioners argued that a 1993 Colorado statute that regulated speech-related conduct within 100 feet of the entrance to any health care facility was invalid because it was "overbroad." *Id*. at 709. Their argument had two parts, first petitioners argued that the statute was too broad because it protected too many people in too many places, rather than just the patients at the facilities where confrontational speech had occurred, similarly, it burdened all speakers, rather than just persons with a history of bad conduct, second petitioners argued that the statute banned nearly all protected expression, including displays of signs, distribution of literature, and mere verbal statements. *Id.* at 730.

In the first instance the Court found that "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." *Id.* at 730-31. The court found it important that all persons entering or leaving health care facilities shared the interests served by the statute. *Id.* at 731. Distinguishing the cases cited by the petitioners as cases, where the government attempted to regulate nonprotected activity, yet because the statute was overbroad, protected speech was also implicated. *Id.* In *Hill,* the Court noted that there it was not "disputed that the regulation [affected] protected speech activity, the

question [was] thus whether it [was] a 'reasonable restriction on the time, place, or manner of protected speech.'"

In the current case, similar to the case in *Hill*, the Plaintiffs argue that RSA 659:35 is, "on its face overly broad because it restricts a substantial volume of constitutionally-protected political speech." Plaintiffs' Memo at 35. The Plaintiffs claim in this case is not that the State is attempting to regulate nonprotected activity, and as a result of RSA 659:35 being overbroad, protected speech is also implicated. All voters casting their vote share the interests served by RSA 659:35, in that all those who participate in the elections process have an interest in ensuring the integrity of the process. As was the case in *Hall*, the true question here is whether RSA 659:35 is a reasonable restriction on time, place and manner.

The *Hill* court then turned to the second part of the petitioners' overbreadth argument and determined that the challenged statute did not "ban" any signs, literature, or oral statements, the challenged statute merely regulated the places where those communications may occur. Similar to the challenged statute in *Hill*, RSA 659:35 does not "ban" a voter from communicating who he or she voted for, it merely restricts the manner used to communicate how he or she voted. RSA 659:35 simply restricts the use of any official marked ballot to convey how the voter voted. Using the examples offered by the Plaintiff's on page 36 of their memorandum of law, the Defendant offers examples of alternative means of communication available to those voters to convey their message:

> a. The newly minted voter excited about voting in her first presidential election can post any other visual materials on Facebook to include a mock ballot or a sample ballot distributed by the Secretary of State's office.[2] She can also walk out to the parking lot of the polling place and scream at the top of her lungs for who she voted. She can post a picture of herself holding a campaign sign at the polling place.

[2] A sample ballot for the 2014 Republican State Primary Election for the Town of Lancaster appears in Exhibit G of this memorandum.

b. Plaintiff Andrew Langlois could have published on Facebook a photograph of a marked mock ballot or a sample ballot distributed by the Secretary of State's office reflecting that that he wrote in the name of his recently deceased dog as his Republican selection for U.S. Senate to protest against the Senate candidates listed on the Republican ballot.

c. Plaintiff's Rideout and Ross could have published on Facebook a photograph of a marked mock ballot or a sample ballot found on the Secretary of State's through the election season reflecting that that they voted for themselves thereby demonstrating enthusiasm in their candidacy;

d. Plaintiff's Rideout and Ross could have published on social media a photograph of almost any visual material criticizing RSA 659:35, I, as in their opinion a violation of fundamental free speech rights;

e. Similar to the voter in example a the newly minted American citizen who is excited about voting in his first American can post any other visual materials on Instagram to include a mock ballot or a sample ballot distributed by the Secretary of State's office.

f. The newspaper editor can present an encased photograph of almost any other image that would convey that voted for the Senator other than a photograph og the editor's official marked ballot. The editor could present a picture of himself holding a campaign sign at the polling place supporting the Senator's run for office.

g. The husband who wants to remind his wife who he voted for days, months or years after the election, as a demonstration of pride for supporting that candidate, can do so by any other means of communication other than the display of his official marked ballot.

Where conduct and not merely speech is involved, the overbreadth of RSA 659:35 must not only be real, but also substantial as well, and must be judged in relation to the statute's plainly legitimate sweep. *Hill,* 530 U.S.at 732. In each of these examples there are countless means of communication by which the voter may convey the same message.

IV. HOW A SPECIFIC VOTER VOTED IS NOT A MATTER OF PUBLIC CONCERN

Relying on *Florida Star v. B.J.F*, 491 U.S. 524 (1989), the Plaintiff's make an argument in passing that because speech concerning an election is a matter of public concern strict scrutiny applies. Plaintiffs' Memo. at 24. The argument that how a voter specifically votes is a matter of public concern is not supported by New Hampshire law. When a voter receives his ballot he or she is required to proceed immediately to a voting booth to mark the ballot. RSA 659:15. The moderator is not allowed to let more voters within the guardrail as there are available booths. RSA 659:15. Lastly, RSA 659:35 and its statutory predecessors have prevented voters from displaying their ballots with the intention of letting it be known how they are about to vote for over 120 years.

V. PLAINTIFFS CANNOT SHOW IRREPERABLE HARM, NOR DOES THE BALANCE OF EQUITIES FAVOR THE PLAINTIFFS AND THE PUBLIC WILL NOT BE SERVED BY GRANTING A PERMANENT INJUNCTION.

As stated throughout this memorandum, RSA 659:35, as amended by HB 366, merely prohibits the display of a voter's marked ballot as evidence of how he or she has voted. There are countless other forms of communication available to voters to covey this same message. *Supra.*

CONCLUSION

For the foregoing reasons, this Court should grant summary Judgment in favor of the Secretary of State.

Respectfully submitted,

WILLIAM M. GARDNER,
Secretary of State of the State of
New Hampshire, in his official capacity,

By and through his counsel,

JOSEPH A. FOSTER
Attorney General

Dated: February 27, 2015

/s/ Stephen G. LaBonte
Anne M. Edwards (NH Bar # 6826)
Associate Attorney General
Stephen G. LaBonte (NH Bar # 16178)
Assistant Attorney General
N.H. Department of Justice
33 Capitol Street
Concord, NH 03301
603-271-3650

Certificate of Service

I hereby certify that a copy of the foregoing was electronically served by ECF this 27th day of April 2015 to:

William E. Christie
Shaheen & Gordon, P.A.
107 Storrs Street
P.O. Box 2703
Concord, NH 03302

Gilles R. Bissonnette
NH Civil Liberties Union
18 Low Avenue
Concord, NH 03301

/s/ Stephen G. LaBonte
Stephen G. LaBonte

1201092