

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

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MARY SAUCEDO, )  
MAUREEN P. HEARD, and )  
THOMAS FITZPATRICK, D.B.A. )

Plaintiffs, )

v. )

Civil Case. No. 1:17-cv-183-LM

WILLIAM M. GARDNER, Secretary of )  
State of the State of New Hampshire, in his )  
official capacity, and THE SECRETARY )  
OF STATE'S OFFICE OF THE STATE )  
OF NEW HAMPSHIRE, )

Defendants. )

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR  
SUMMARY JUDGMENT AS TO ALL CLAIMS**

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Plaintiffs Mary Saucedo, Maureen P. Heard, and Dr. Thomas Fitzpatrick, (collectively, “Plaintiffs”), by and through the undersigned attorneys, submit this Memorandum of Law in Support of their Motion for Summary Judgment as to All Claims challenging Revised Statutes Annotated of the State of New Hampshire (“RSA”) 659:50(III) (2017) pursuant to 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101-12213.

### **INTRODUCTION**

During the 2016 general election, New Hampshire voters cast approximately 755,850 counted ballots. Of these counted ballots, approximately 75,305 voters (or 10% of all voters) cast absentee ballots due to disability, religious observance, or absence from the jurisdiction on Election Day (e.g., being physically absent or unable to attend the polls due to employment obligations, including paid or unpaid care giving obligations). Because a voter can only vote by absentee ballot in New Hampshire if the voter is unable to vote in person for one of these reasons, many in New Hampshire’s absentee voting population are elderly, disabled, and otherwise vulnerable.<sup>1</sup>

Plaintiffs Mary Saucedo, a 95-year-old blind woman, Maureen P. Heard, a 20-year military veteran, and Thomas Fitzpatrick, a professor, all cast absentee ballots during the 2016 general election. However, election officials in these voters’ municipalities of domicile—Manchester, Derry, and New Hampton, respectively—refused to count their votes because they decided that the signatures on their absentee ballot affidavit envelopes did not match the signatures on their absentee ballot applications, pursuant to RSA 659:50(III). Election officials

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<sup>1</sup> In New Hampshire, if a voter fails to meet these criteria—absence, religious observance, or a disability—they must vote in person. Unlike New Hampshire, approximately 27 states and the District of Columbia have “no fault” absentee voting where a voter does not need an excuse to vote absentee. See National Conference of State Legislators, Absentee and Early Voting, NCSL (August, 18, 2017), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

rejected Plaintiffs' ballots unbeknownst to Plaintiffs. Officials never told Plaintiffs that they rejected their ballots. Nor does New Hampshire law provide an opportunity for Plaintiffs to show that their ballots are valid and should be counted. Plaintiffs only learned of this disenfranchisement months after the election from the American Civil Liberties Union of New Hampshire ("ACLU-NH"). By that time, nothing could be done. The State had already disenfranchised them, rendering meaningless their good faith efforts to take part in a critical democratic election.

During the November 2016 general election, an estimated 275<sup>2</sup> voters suffered this fate under RSA 659:50(III). Yet the State has presented no evidence that any of these approximately 275 disenfranchised voters were ineligible to vote. Even one disenfranchised voter—let alone hundreds—is too many. No voter should be disenfranchised simply because of his or her penmanship. Indeed, Plaintiffs' unrebutted expert testimony reveals that there are multiple reasons why a person's signature may differ on two occasions, including due to age, health, native language, and writing conditions. Moreover, when moderators decided to reject these approximately 275 absentee ballots under RSA 659:50(III), no official informed the voter. The State also did not give these voters an opportunity to cure the moderators' perceived "signature mismatch" concern. Instead, the voter must know to independently investigate the status of his or her absentee ballot by going to the Secretary of State's website, where he or she may learn whether and why the absentee ballot was rejected. However, municipal officials do not update

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<sup>2</sup> This figure was produced by the State and is derived from ElectionNet after municipal clerks input data concerning why absentee ballots were rejected after each election. This 275 figure combines the 237 rejections that were coded by municipal clerks as "Affidavit Signature Does Not Match Request" (ASDMR) and 38 rejections that were coded by municipal clerks as "Invalid Signature on Application for Absentee Ballot" (ISA). See State's Resp. to Second Set of Ints., No. 16, *Ex. A*; see also State's List Containing Names and Addresses of Voters Rejected Due to Signature Mismatch Since 2006, *Ex. B*; Scanlan Depo. 176:17-23, *Ex. C*; see also Absentee Ballot Analysis of Available Information from ElectionNet as of Friday, October 27, 2017, *Ex. JJ*. All exhibits, with the exception of the declarations of the Plaintiffs and Mary Jo Vien are attached to the Declaration of Gilles Bissonnette, Esq. in Support of Plaintiffs' Motion for Summary Judgment as to All Claims.

this website until after the election. As a result, by the time municipal officials make information on rejected absentee ballots available to voters online, it is too late. The State has rejected the cast ballot and permanently disenfranchised the voter.

RSA 659:50(III) is particularly problematic because New Hampshire already limits the use of absentee voting to the most vulnerable voters—like Plaintiff Mary Saucedo—who are disabled and unable to travel to the polling place on Election Day. Seniors and individuals with disabilities are more likely to have poor handwriting, signatures that have changed, or an inability to sign the same way twice. Yet New Hampshire law provides (i) no protections for disabled voters who are unable to (or do not) obtain effective assistance from others when voting, and (ii) no notice to a voter when a moderator believes that a signature mismatch has occurred.

Courts in Florida, Illinois, and California have rejected as unconstitutional laws similar to RSA 659:50(III).<sup>3</sup> This Court must do the same. For these reasons and the reasons below, RSA 659:50(III) violates the Fourteenth Amendment to the United States Constitution, as well as Title II of the ADA.

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<sup>3</sup> The United States District Northern District of Florida deemed unconstitutional a comparable law because of the severe burdens it imposes on the right to vote. *See Florida Democratic Party v. Detzner*, No. 4:16-cv-00607-MW-CAS, 2016 WL 6090943, at \*9 (N.D. Fla. Oct. 16, 2016) (issuing preliminary injunction against law permitting canvassing boards to reject ballots deemed “illegal” based on purportedly mismatching signatures). Similarly, a federal court in Illinois rejected a law in which election officials rejected mail-in absentee ballots if officials decided that the signature on the ballot application did not match the signature in their records. In that case, voters were notified of the ballot rejection after the fact, yet were not given the chance “to remedy the loss of vote in that election.” *See Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at \*7 (N.D. Ill. Mar. 13, 2006), *vacated as moot sub nom. Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008). Two weeks ago, the Superior Court of California in the County of San Francisco struck down a nearly identical California law on due process grounds. *See La Follette v. Padilla*, No. CPF-17-515931 (Cal. Super. Ct. Mar. 5, 2018) (striking down California law allowing election officials to reject absentee ballots based on signature mismatch because the process provided no notice or opportunity to cure), *Ex. D*; *see also Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990) (rejecting portions of an Arizona election law that did not provide for notice and a hearing prior to disqualifying the voters’ absentee ballots).

## STATEMENT OF FACTS

### **I. Plaintiff Mary Saucedo**

1. Plaintiff Mary Saucedo is a U.S. citizen and registered voter (unaffiliated with any Party), domiciled in Manchester, New Hampshire (Ward 2). She has lived in Manchester since October of 1984. *See* M. Saucedo Dep. 6:12-17, *Ex. E*. She is currently 95 years old. *Id.* at 6:9. She was born in Dover, New Hampshire in 1923 and attended the University of New Hampshire. *Id.* at 6:8-7:4.

2. Ms. Saucedo worked as a dietician, assistant chief, and chief of service at the U.S. Department of Veterans Affairs (“VA”) for approximately 25 years. *Id.* at 8:1-9:9. In 1984, Ms. Saucedo moved with her husband—Agustine Saucedo—to Manchester where she worked at the Manchester VA as “chief of service.” As chief of service, she was responsible for the VA’s personnel, training, and hiring. *Id.* at 9:2-15.

3. Ms. Saucedo retired in 1989 due to loss of her central vision because of macular degeneration. *Id.* at 9:2-9. She had hoped to work more to reach 30 years of service at the VA, but she decided to voluntarily retire because, due to her vision loss, she was not able to do her job fully. *Id.* at 11:6-10.

4. Ms. Saucedo is currently an individual with a disability for purposes of the ADA, as she is blind due to advanced macular degeneration. *See* 28 C.F.R. § 35.108(d)(2)(iii)(B) (“Blindness substantially limits seeing”). During her trial deposition on January 19, 2018, Ms. Saucedo explained that she has “no central vision.” *Id.* at 11:19-21. It was a gradual loss that became more pronounced over the past three to four years. *Id.* at 12:1-3. When questioned by her attorney, she explained that she knew her attorney was there “but I don’t see any of your features ... I just know the image is there.” *Id.* at 11:17-21. During her testimony, Ms. Saucedo

also put her hand out and explained that “I know my hand is there, but if I look right at it, I don’t see any part of my hand. If I get it over here and I’m looking straight ahead, I can pick up that it’s moving, and I’m moving my hand, but I don’t see fingernails or a ring or anything on it.” *Id.* at 12:9-14.

5. Because of her blindness, Ms. Saucedo receives help completing day-to-day tasks from her 87-year-old husband, Augustine Saucedo, including picking out clothes and writing large notes to help Ms. Saucedo manage what she needs to do each day. *Id.* at 12:15-13:4. Mr. Saucedo also has a power of attorney for his wife given her disability, and he often signs official documents for her. *Id.* at 24:10-22. By way of background, the Saucedos have been married for 52 years. *Id.* at 8:8. Mr. Saucedo was born in New Mexico in 1930 and is a 20-year veteran of the U.S. Air Force, having served from 1955 to 1975. *See* A. Saucedo Dep. at 6:17-7:13, 5:17-22, *Ex. F.* After retiring from the Air Force in 1975, Mr. Saucedo completed his college degree, and worked as a medication nurse and translator. *Id.* at 8:10-10:16.

6. To Ms. Saucedo, voting has always been an important right. The 1944 general election was “probably the first time” she voted, and she remembers her father taking her to Dover City Hall to register to vote for the first time. *See* M. Saucedo Dep. at 13:9-14:3, *Ex. E.* She testified that her father instilled in her the significance of voting. She explained: “Because to him, when I was small—in grammar school, I remember how he would take my mother and grandmother and them to vote, and it was very important to them to vote, so I realized it was very important when I was young.” *Id.* at 13:14-18. She added: “Well, . . . my father always would say—he never would try to influence you, but he would always say, be sure you vote for the best . . . candidate, and it didn’t matter what party they belonged to. And if you don’t know enough about either one, don’t vote for them—don’t make a selection.” *Id.* at 14:14-20. As a

result, since 1944, Ms. Saucedo has voted in elections as much as possible. *Id.* at 14:4-6.

7. To Mr. Saucedo, voting has also been an important right. His parents are immigrants, and he and all four of his siblings are U.S.-born citizens and military veterans. A. Saucedo Dep. at 7:14-22, 11:7-19, Ex. F. As he testified during his trial deposition: “My father—my mother and father were from another country, they were from Mexico. They never became citizens, they were registered aliens, they used to call them. And my father said, if we’re coming to America you got to—and going to be an American there are many things you have to do, which includes getting an education, going in the military, serving on jury duty, voting, and—and supporting the government in working towards the success of the democracy.” *Id.* at 11:9-19.

8. Because of her blindness, Ms. Saucedo requires assistance from Mr. Saucedo when voting. As a blind voter, Ms. Saucedo is entitled under the ADA and state law to obtain the assistance of others in completing the absentee ballot process. *See* RSA 657:7(II)(b). Due to this condition and age, she and her husband have voted by absentee ballot since approximately 2000. *See* M. Saucedo Dep. at 15:4-8, Ex. E. Mr. Saucedo would typically contact the Manchester clerk’s office to request an absentee ballot application for himself and Ms. Saucedo. As Mr. Saucedo explained during his trial deposition, when they started voting by absentee ballot, former State Senator and Mayor Ted Gatsas’s mother—who lives across the street—would request an absentee ballot application from the clerk’s office for herself and the Saucedos. Someone from the city clerk’s office would then hand deliver the application to the house. *See* A. Saucedo Dep. 13:5-21, Ex. F. This occurred on at least two occasions. *Id.* at 21:18-22:1. In more recent years, the absentee ballot application would come in through the mail. *Id.* at 14:2-4. Mr. Saucedo would then complete and sign his absentee ballot application and assist Ms.

Saucedo by completing and signing hers at her direction, and then send the applications back to the clerk's office through the mail. *See* M. Saucedo Dep. at 15:12-16:4, Ex. E. As a result of her blindness, Ms. Saucedo has problems signing her name. *Id.* at 21:8-12 (“my penmanship is not ... what it has been”).

9. When the absentee ballots came in the mail from the clerk's office, Ms. Saucedo would indicate who her selection was and Mr. Saucedo would mark her ballot for her. She explained: “[Mr. Saucedo] would put [the ballot] in the envelope, and then help me get my hand in the area that I needed to sign, because I felt it was my ballot, I should sign it.” *Id.* at 16:5-19. She reiterated that she felt that she should sign the absentee ballot affidavit envelope because “[i]t's my vote.” *Id.* at 16:22. Signing the absentee ballot affidavit envelope is a difficult process for Ms. Saucedo. As her husband testified: “I put my hand over the [the document near where she needs to sign], and I tell her, when you touch my hand, sign below it.” *See* A. Saucedo Dep. at 23:16-19, Ex. F.

10. During the 2016 general election, Ms. Saucedo voted in this fashion due to her disability. She received an absentee ballot application in the mail. Because she is blind, in September 2016, she authorized Mr. Saucedo to fill out the application for her, sign her name on her behalf, and mail it to the Manchester clerk's office. *See* M. Saucedo Dep. at 16:23-18:2, Ex. E. Mr. Saucedo made a notation on the application that Ms. Saucedo was voting absentee due to disability. *See* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities (M. Saucedo's Application), at p. 142, Ex. G.

11. Ms. Saucedo then received her absentee ballot in the mail. When she filled it out in October 2016, she again needed the assistance of her husband, who helped her sign the affidavit envelope and complete the ballot due to her blindness. The affidavit text is underlined

where it states the word “blind.” *See* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities (M. Saucedo’s Affidavit Envelope), at p. 143, *Ex. G*. Mr. Saucedo then mailed the absentee ballot to the Manchester clerk’s office. *See* M. Saucedo Dep. at 16:23-18:2, *Ex. E*. Ms. Saucedo believed that her ballot was counted. *Id.* at 18:3-5.

12. On Election Day, Manchester’s Ward 2 moderator rejected Ms. Saucedo’s ballot on the ground that the signature on the absentee ballot affidavit envelope did not match the signature on the absentee ballot application under RSA 659:50(III). Ms. Saucedo was not aware that she had been disenfranchised until early 2017 when the ACLU-NH informed her of this fact. *Id.* at 19:3-7. Between casting her ballot and being notified by the ACLU-NH that her ballot was not counted, no one from the State ever told her that her ballot had been discarded. *Id.* at 18:6-12. Neither Mr. nor Ms. Saucedo has access to the Internet and therefore could not access the website to track her ballot (she was not even aware of this process). *Id.* at 18:13-22. When Ms. Saucedo was informed that her ballot was not counted, she was angry. *Id.* at 19:10.

13. As Ms. Saucedo testified during her trial deposition, she plans to vote in the future by absentee “if I’m still here.” *Id.* at 21:16-19, 23:18-24:9.

## **II. Plaintiff Maureen Heard**

14. Plaintiff Maureen Heard is on the Executive Staff of the Department of Veterans Affairs’ New England Healthcare System as its Chief Communications Officer/Public Affairs Officer. *See* M. Heard Decl. ¶ 2.

15. She is a U.S. citizen and registered voter (unaffiliated with any Party), domiciled in Derry, New Hampshire. She has lived there for over 15 years. *Id.* at ¶ 3.

16. She is a 20-year military veteran. She served in the Air Force from 1980 to 1988

as a Russian linguist and intelligence analyst. Her highest rank in the Air Force was staff sergeant. She also served in the Coast Guard from 1989 to 2001 as an operations officer and later as a public affairs officer for 14th Coast Guard District. Her highest rank in the Coast Guard was lieutenant. *Id.* at ¶ 4.

17. She is a former appointed member of the Derry Planning Board, having served in that capacity from 2008 to 2011. *Id.* at ¶ 5.

18. She voted by absentee ballot during the 2016 general election, as she was temporarily working in the District of Columbia at the time for the Department of Veterans Affairs. Prior to going to the District of Columbia, on approximately September 30, 2016, she went to the Derry clerk's office, completed and signed an absentee ballot application, and handed it to the clerk. She signed the document as if she would sign a credit card receipt, which used her first two initials "M.P." and her last name. She also is left-handed and used her left hand to sign. *Id.* at ¶ 6; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 25 (M. Heard's Application), *Ex. G*.

19. In early October 2016, Ms. Heard received an absentee ballot by mail at her temporary address in the District of Columbia. It was the only piece of mail that she received at that temporary address. While in the District of Columbia, she completed her ballot and signed the affidavit envelope using her full name because this was a formal document containing her actual ballot. She then sealed the envelope. M. Heard Decl. ¶ 7; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 26 (M. Heard's Affidavit Envelope), *Ex. G*.

20. When she was in Derry before the election, she took the sealed ballot and dropped it off by hand at the Derry clerk's office on approximately October 17, 2016. M. Heard Decl. at

¶ 8.

21. On Election Day, her ballot was rejected by Derry's moderator on the ground that her signature on the absentee ballot affidavit envelope did not match her signature on the absentee ballot application under RSA 659:50(III). This was reflected on the Secretary of State's website, which stated that "Affidavit Signature Does Not Match Request." She was not aware that she had been disenfranchised until early 2017 when she was informed of this fact by the ACLU-NH. *Id.* at ¶ 9.

22. Ms. Heard is frustrated that she was disenfranchised during this election, as she felt that the 2016 presidential election was incredibly important. Even though her ballot would not have swung the presidential election, she is infuriated that her voice was not heard during this pivotal moment. She has voted in every presidential election since 1980 because she views voting not as a right, but as a responsibility of citizenship of this nation. Her father served in the Army and taught her the value of public service and being politically engaged (which led her to obtain a political science degree and join the service). Any time she had an opportunity to vote with her children, she would bring her children to the polling place and talk to them about how important voting is. *Id.* at ¶ 10.

### **III. Plaintiff Dr. Thomas Fitzpatrick**

23. Plaintiff Dr. Thomas Fitzpatrick, is the Director of the School of Business and Management and an Associate Professor of Business at Husson University in Bangor, Maine. T. Fitzpatrick Decl. ¶ 2.

24. He is a U.S. citizen and registered voter, domiciled in New Hampton, New Hampshire. He has lived there for nearly 30 years. *Id.* at ¶ 3.

25. He attempted to vote by absentee ballot during the 2016 general election, as he

works in Bangor, Maine approximately four hours away from his New Hampton home and was working there on Election Day. Prior to the election, in October 2016, he went to the New Hampton clerk's office and obtained an absentee ballot application directly from the clerk. As New Hampton is a small town, he has known the clerk for nearly three decades. He then took the application home. He elected to take the application home (as opposed to completing it at the clerk's office) because the clerk's office is small with few, if any, places to sit. He also did not want to feel rushed completing the application while at the clerk's office. *Id.* at ¶ 4.

26. After leaving the clerk's office with the application, he completed the application, and then signed the application likely at home in New Hampton on approximately October 20, 2016. He then hand-delivered the completed application to the clerk's office on approximately October 21, 2016. *Id.* at ¶ 5; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities (T. Fitzpatrick's Application), at p. 229, *Ex. G*.

27. Mr. Fitzpatrick received his absentee ballot, he believes, by mail. He completed his ballot at home. Likely that same day—on approximately October 28, 2016—he drove to the clerk's office to drop off his ballot. In his car outside of the clerk's office, he noticed that he needed to sign the absentee ballot affidavit envelope. He recalls signing the absentee ballot affidavit envelope on the dashboard of his car outside the clerk's office before dropping it off. He signed the envelope in his car because the clerk's office in New Hampton is small and inconvenient to complete documents. He then sealed the affidavit envelope. He took the sealed ballot and dropped it off by hand at the clerk's office, as he was concerned about it being lost in the mail and he wanted to ensure that his vote was counted. T. Fitzpatrick Decl. at ¶ 6; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from

Municipalities, at p. 230 (T. Fitzpatrick's Affidavit Envelope), *Ex. G*.

28. On Election Day, Mr. Fitzpatrick's ballot was rejected by New Hampton's moderator on the ground that the signature on the absentee ballot affidavit envelope did not match the signature on the absentee ballot application under RSA 659:50(III). He was never informed by the clerk's office or by the Secretary of State's office that his ballot had been rejected. He was not aware that he had been disenfranchised and only learned of it in early 2017 when he was informed of this fact by the ACLU-NH. T. Fitzpatrick Decl. at ¶ 7.

29. Mr. Fitzpatrick is angry that his vote was not counted in the 2016 general election. Regardless of how one voted, he believes that the 2016 general election was one of the most important elections of his lifetime. To be as interested in the future of the country as he is, makes him incredibly frustrated that the State disenfranchised him because of his signature, especially when he went out of his way to hand deliver these voting documents to the clerk's office to ensure that his vote would be counted. It was such a close election in New Hampshire, including the election for United States Senator, that this event has shaken his confidence in whether his vote will be counted in the future. *Id.* at ¶ 8.

30. Due to his out-of-state employment at Husson University in Bangor, Maine, he is absent from New Hampton on certain weekdays, including during elections. This is why he voted absentee during the 2016 general election. Because he was disenfranchised during the 2016 general election, he no longer trusts the absentee ballot process while this signature mismatch law is in effect. *Id.* at ¶ 9.

#### **IV. Witness Mary Jo Vien and Her 97-Year-Old Mother Kathryn Rakowski**

31. Witness Mary Jo Vien is the owner of the Rumney Rocks Bistro in Rumney, New Hampshire. She is a U.S. citizen and registered voter. She is domiciled in New Hampton, New

Hampshire where she lives with her 97-year-old mother Kathryn Rakowski. M.J. Vien Decl. ¶ 1.

32. Ms. Vien was informed by the ACLU-NH that her mother, Kathryn Rakowski, was disenfranchised during the 2016 general election because the signature on the absentee ballot application did not match the signature on the absentee ballot affidavit envelope. Neither Ms. Vien, nor her mother, was aware of this disenfranchisement until the ACLU-NH contacted them. *Id.* at ¶ 2.

33. Ms. Vien's mother, Ms. Rakowski, was born in 1921. Her mother was always politically active and never missed voting in an election going back to the 1940s. Ms. Rakowski voted by absentee ballot in the 2016 general election because she is disabled. Given her disability and advanced age, she is unable to move freely or travel to the polls. She also has severe arthritis that makes it difficult—if not impossible—to write. She is unable to grip with her hand, which makes it hard for her to hold a fork, spoon, or pen. *Id.* at ¶ 3.

34. During the 2016 election, Ms. Vien's brother, Frank Rakowski, assisted Ms. Rakowski with the absentee ballot application while he was visiting New Hampton from Boston where he lived at the time. Given Ms. Rakowski's arthritis and inability to sign the application form herself, he signed for her at her direction. This form was completed on or about October 4, 2016. He then put the application in the mail. *Id.* at ¶ 4.

35. When Ms. Rakowski received the absentee ballot, Ms. Vien marked the ballot, at her mother's direction, with the candidates her mother chose. Ms. Rakowski was (and is) a registered Republican with very strong views about the candidates during the 2016 election. Ms. Vien then signed the affidavit envelope, at her mother's direction, because her mother is physically unable to sign due to her disability. At the time, Ms. Vien did not know that this signature would be compared to the signature on the absentee ballot application. *Id.* at ¶ 5.

36. Ms. Vien is very upset that her mother, who was a registered nurse until the age of 78, was disenfranchised. She and her brother were simply trying to help their mother exercise her right to vote. When Ms. Vien was growing up, her mother told her that it was a citizen's duty to vote, just as it was a person's duty to give blood to help others who are in need. Her mother always stayed up to date on political events and, despite her strong political views, never pressured Ms. Vien to vote a certain way or for a certain political party. When Ms. Vien was young, her mother presented her with both sides of political issues and allowed her to reach the conclusions that Ms. Vien thought were best. Ms. Vien will always admire her mother for that. *Id.* at ¶ 6.

#### **V. The Absentee Ballot Process**

37. Like all states, New Hampshire allows a voter to cast an absentee ballot. In New Hampshire, however, a voter can only vote using an absentee ballot if he or she submits a written statement—most often through the State's absentee ballot application form—declaring that he or she is unable to vote at the polling place on Election Day due to absence, religious observance, or a disability. *See* RSA 657:4 (absentee application form where voter declares that he or she is “absent on the day of the election,” “cannot appear in public on election day because of observance of a religious commitment,” or is “unable to vote in person due to a disability”); *see also* RSA 657:1 (“Any person who is absent on the day of any state election from the city, town, or unincorporated place in which he or she is registered to vote or who cannot appear in public on any election day because of his or her observance of a religious commitment or who is unable to vote there in person by reason of physical disability may vote at such elections as provided in this chapter.”); RSA 657:7(II)(a)-(b). This absentee ballot application form prepared by the Secretary of State's Office for the 2016 general election is at *Ex. I*.

38. In response to this lawsuit, the legislature enacted Senate Bill 248, which modified the absentee ballot application form in July 2017. As part of this bill, a sentence was added to the form below the signature line stating: “The applicant must sign this form to receive an absentee ballot. The signature on this form must match the signature on the affidavit envelope in which the absentee ballot is returned, or the ballot may be rejected. Any person who assists a voter with a disability in executing this form shall make a statement acknowledging the assistance on the application form to assist the moderator when comparing signatures on election day.” *See* RSA 657:4(I); *see also* Senate Bill 248 Legislative History/Scanlan Depo. Ex. 17, Part 2, at SAU459-62 (final version of bill), Ex. K. This language did not exist on the application form prior to this bill. The absentee ballot application form created in July 2017 by the Secretary of State’s Office for the 2017 city elections following enactment of Senate Bill 248 is at Ex. L. The absentee ballot application form created by the Secretary of State’s Office in January 2018 for the 2018 town elections is at Ex. M (Scanlan Depo. Ex. 5).

39. After a voter completes his absentee ballot application form where he declares that he is unable to vote in person due to absence, religious observance, or a disability, the voter is given a blank absentee ballot. This ballot may be received by mail or in person if the voter hand delivers the application to the clerk’s office. This absentee ballot is accompanied by an affidavit that is printed on the envelope in which the voter is to place the marked ballot. *See* RSA 657:7.

40. For voters who have requested an absentee ballot because they are working or absent from the city or town on Election Day, the affidavit to be signed on the envelope enclosing the marked ballot states as follows:

I do hereby certify under the penalties for voting fraud set forth below that I am a voter in the city or town of \_\_\_\_\_, New Hampshire, in ward \_\_\_\_; that I will be

unable to appear at any time during polling hours at my polling place because I will be working on election day or will be otherwise absent on election day from said city or town and will be unable to vote in person; that I have carefully read (or had read to me because I am blind) the instructions forwarded to me with the ballot herein enclosed, and that I personally marked the ballot within and sealed it in this envelope (*or had assistance in marking the ballot and sealing it in this envelope because I am blind*) . . . .

(Signature) \_\_\_\_\_

See RSA 657:7(II)(a) (emphasis added).

41. For voters who have requested an absentee ballot because they are unable to vote due to a religious observance or physical disability, the affidavit to be signed on the envelope enclosing the marked ballot states as follows:

I do hereby certify under the penalties for voting fraud set forth below that I am a voter in the city or town of \_\_\_\_\_, New Hampshire, in ward \_\_\_\_\_; that I will be observing a religious commitment which prevents me from voting in person or that *on account of physical disability I am unable to vote in person*; that I have carefully read (*or had read to me because I am blind*) the instructions forwarded to me with the ballot herein enclosed, and that I personally marked the ballot within and sealed it in this envelope (*or had assistance in marking the ballot and sealing it in this envelope because I am blind*).

(Signature) \_\_\_\_\_

See RSA 657:7(II)(b) (emphasis added).

42. As amended by the legislature through Senate Bill 248 in July 2017, this affidavit envelope now includes the following statement before the signature line: “The signature on this affidavit must match the signature on the application for an absentee ballot or the ballot may be rejected. A person assisting a blind voter or voter with a disability who needs assistance executing this affidavit shall make and sign a statement on this envelope acknowledging the assistance in order to assist the moderator when comparing signatures on election day.” See RSA 657:7(II)(b); see also Senate Bill 248 Legislative History/Scanlan Depo. Ex. 17, Part 2, at

SAU459-63 (final version of bill), Ex. K.

43. This new absentee ballot affidavit envelope used after Senate Bill 248 during the 2017 city elections and 2018 town elections is at Ex. N.

44. The voter is tasked with signing this affidavit, completing the ballot, and then placing this marked ballot in the envelope containing his or her signed affidavit. The voter then places this envelope with the affidavit and completed ballot in a larger envelope that is addressed and mailed to the local town or city clerk. *See* RSA 657:17.

#### **VI. RSA 659:50(III) and its Application**

45. On Election Day, moderators process absentee ballots at each polling place at 1:00 p.m. or earlier with proper notice. *See* RSA 659:49(I) (“Processing of previously received absentee ballots shall begin at 1:00 p.m. unless a different time, that is no earlier than 2 hours after the opening of the polls, is posted and announced in accordance with paragraph II. The processing of the absentee ballots shall not unnecessarily interfere with normal voting procedures, nor shall the polls be closed at any time for the processing of such ballots during normal polling hours. Absentee ballots which are received after the start time for processing absentee ballots and prior to 5:00 p.m. on the day of the election shall be processed as soon after receipt as possible. Under no circumstances shall absentee ballots be counted prior to the closing of the polls.”). The moderator begins counting all the votes after the polls close, including the absentee ballots that were approved at processing. *See* RSA 659:61 (“After all absentee ballots have been processed, or processed and counted, as provided in RSA 659:49-55, and after the polls have closed, the election officials . . . shall, under the supervision of the moderator, immediately begin counting the votes cast at the election.”). Municipal clerks submit the election returns to the Secretary of State’s Office by 8:00 a.m. the morning after the election

unless the Secretary of State's Office orders them to be delivered at a different time. *See* RSA 659:75.<sup>4</sup>

46. One of the many tasks moderators must perform concerning these absentee ballots is to determine whether “[t]he signature on the affidavit [envelope containing the absentee ballot] appears to be executed by the same person who signed the application” for the absentee ballot. RSA 659:50(III). In essence, this statute requires moderators to reject absentee ballots that appear, in their judgment, to contain signatures on the absentee ballot affidavit envelope that differ from the signatures on the absentee ballot application. *See id.* To facilitate this process, the clerk, upon receipt of an envelope purporting to contain a ballot, attaches the absentee ballot application to the absentee ballot affidavit envelope so the moderator can readily compare the signatures when processing absentee ballots on Election Day. *See* RSA 657:18; *see also* Scanlan Depo. 112:11-113:14 (describing process), *Ex. C*.

47. During every New Hampshire general election, the State has disenfranchised hundreds of voters—many of whom are seniors and individuals with disabilities—due to moderators' determinations that signatures differ under RSA 659:50(III).

48. During the 2012 general election, the State disenfranchised between 321 and 370 voters under this statute (which was 18.5% of 1,735 absentee ballots rejected that year using the 321 figure). *See* U.S. Election Assistance Commission, 2012 Election Administration and Voting Survey 42 (Table 33A) (September 2013), *Ex. Q*; *see also* Defs.' Resp. to Second Set of

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<sup>4</sup> *See also* N.H. const., pt. II, art. 32 (“The meetings for the choice of governor, council and senators, shall be ... governed by a moderator, who shall ... receive the votes of all the inhabitants of such towns and wards present, and qualified to vote for senators; and shall ... in said meetings, sort and count the said votes, and make a public declaration thereof, with the name of every person voted for, and the number of votes for each person; and the town or city clerk shall make a fair record of the same at large, in the town book, and shall make out a fair attested copy thereof, to be by him sealed up and directed to the secretary of state, within five days following the election, with a superscription expressing the purport thereof.”).

Ints., No. 16 and Corresponding Chart (referencing approximately 370 voters), Ex. A. The State counted approximately 68,014 absentee votes during the 2012 general election, out of 718,700 total counted ballots cast (or 9.46%). *See* 2012 Summary of Ballots Cast Prepared by Secretary of State's Office, Ex. P.

49. During the 2014 general election, the State disenfranchised approximately 145 voters under this statute (which was 18.5% of the 782 absentee ballots rejected that year). *See* U.S. Election Assistance Commission, The 2014 EAC Election Administration and Voting Survey Comprehensive Report 219 (Table 33a) (June 30, 2015), Ex. Q; *see also* State's Resp. to Second Set of Ints., No. 16 and Corresponding Chart (referencing approximately 147 voters), Ex. A. The State counted approximately 32,716 absentee votes during the 2014 general election, out of 495,453 total counted ballots cast (or 6.6%). *See* 2014 Summary of Ballots Cast Prepared by Secretary of State's Office, Ex. R.

50. During the 2016 general election, the State disenfranchised approximately 275 voters under this statute (which was 14.5% of the 1,897 absentee ballots rejected that year). *See* State's Resp. to Second Set of Ints., No. 16 and Corresponding Chart; Absentee Ballot Rejections Chart Provided by Secretary of State's Office from the 2016 General Election, Ex. A. The State counted approximately 75,305 absentee votes during the 2016 general election, out of 755,850 total counted ballots cast (or 9.96%). *See* 2016 Summary of Ballots Cast Prepared by Secretary of State's Office, Ex. S.

51. When a moderator decides to reject an absentee ballot under this statute, no government official gives the voter notice before the disenfranchisement decision is made. *See* Scanlan Depo. 113:15-22, Ex. C; *see also* State's Answer to Pls.' Am. Complaint, at p. 1 (Doc No. 28) ("The defendants admit that New Hampshire law does not contain any requirement that a

voter be notified of a moderator's rejection of the voter's absentee ballot under RSA 659:50, III . . ."). As the Secretary of State's Office explained to the House Election Law Committee, "If a ballot is rejected, the decision is announced and recorded on Election Day . . . but the voter would not be present [on] Election Day." *See also* Senate Bill 248 Legislative History/Scanlan Depo. Ex. 17, Part 2, at SAU410, Ex. K.

52. The State also does not give the voter an opportunity to confirm their identity or otherwise cure any concerns the moderator may have with this perceived "signature mismatch." *See* Scanlan Depo. 117:3-7, Ex. C; *see also* Defs.' Answer to Pls.' Am. Compl., at p. 2 (Doc. No. 28) ("The defendants admit that New Hampshire law does not contain any requirement that . . . a voter be given an opportunity to cure an absentee ballot that has been rejected for noncompliance with RSA 659:50, III.").

53. Instead, the voter is left ignorant of the fact that he or she has been disenfranchised, unless the voter knows to go to the Secretary of State's website where he or she may "determine whether the voter's absentee ballot . . . was challenged and rejected by the moderator on election day, including the reason for the challenge." RSA 657:26; *see* State of New Hampshire Absentee Ballot Search, <https://app.sos.nh.gov/Public/AbsenteeBallot.aspx>. A voter can learn about the status of his or her absentee ballot by inputting his or her name, town, and date of birth on the website's form. However, municipal officials do not update this website until after the election. Thus, by the time the voter is able to successfully learn the status of their ballot, it is too late. The voter has been permanently disenfranchised and there is nothing that can be done about it. *See* Scanlan Depo. 116:20-117:2 (acknowledging that voter can do nothing about disenfranchisement after obtaining information from the website), Ex. C. The Secretary of State's Office does not know when municipal clerks input this voter information to post on the

website. *See* Defs.’ Resp. to Second Set of Ints., No. 18 (“Information reflecting the disposition of absentee ballots is entered during and after each election under demanding schedules driven by a wide range of election laws, many with short deadlines. Most election officials finish entering absentee voter information shortly after an election. *It is not known exactly when all clerks have entered all of the absentee ballot information following each election.*”), *Ex. A.* The State also removes a voter’s absentee ballot information from this website 90 days after the election. *Id.*<sup>5</sup>

54. RSA 659:50(III) puts moderators in the position of acting as handwriting experts. However, moderators are lay people who do not undergo formal handwriting-analysis education or training. Instead, moderators are given written guidance provided by the Secretary of State in the Elections Manual as to how to conduct the signature comparison process. It states:

The test for whether the application and affidavit appear to be signed by the same person is whether this is more likely than not. Absentee ballots should be rejected because the signatures do not match only if the differences in the signatures are significant.

N.H. Dep’t of State, N.H. Election Procedure Manual: 2016-2017/Scanlan Depo. Ex. 3, at p. 38, *Ex. T.* The Election Manual further notes: “[I]t is a natural and common occurrence that a person’s signature will change over time and will have differences even when the person writes out his or her signature several times, one immediately after another.” *Id.* at p. 67. The Secretary of State’s Office provides no other guidance other than what is in the Election Procedure Manual. *See* Scanlan Depo. 76:7-20; 78:8-80:4; 94:2-7, *Ex. C.* The Attorney General’s Office also informed local election officers in advance of the 2016 general election that “[m]oderators should be aware that a person’s signature often varies depending on the circumstances, and it is often hard to tell whether two signatures were written by the same person.” *See* Oct. 31, 2016

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<sup>5</sup> The Secretary of State does not collect data on how many voters, if any, have ever accessed the website. *See* Defs.’ Resp. to Second Set of Ints., No. 19, *Ex. A.*

A.G. Memo./Scanlan Depo. Ex. 4, at p. 4, Ex. U. As Plaintiffs' expert forensic document examiner Dr. Linton Mohammed explained in his expert report, "The New Hampshire signature match requirement, and related guidance, does not set forth functional standards for determining when an absentee ballot application and envelope affidavit are not signed by the same person." See Expert Decl. of L. Mohammed/Mohammed Depo. Ex. 1, at ¶ 24, Ex. V.

55. Rejection rates also differ wildly throughout New Hampshire. Statewide during the 2016 general election, there were approximately 275 absentee ballot rejections due to signature mismatch out of approximately 1,897 absentee ballot rejections. Put another way, mismatch rejections constituted approximately 14.5% of rejected absentee ballots. The 275 absentee ballots rejected constituted approximately 0.35% of all 78,430 absentee ballots cast by voters (which includes all absentee votes counted and rejected). Many municipalities, however, had far higher rates of signature mismatches, demonstrating the lack of uniform application of these vague signature match standards. See State's Analysis of Absentee Ballots/Scanlan Depo. Ex. 12, Ex. W; Pls.' Analysis of Absentee Ballots with Percentages Added/Scanlan Depo. Ex. 13, Ex. X. See Part I.B.2 *infra*.

56. Moderators reject absentee ballots because they subjectively determine that a voter's affidavit envelope signature appears to be from a person who did not sign the application. As Plaintiffs' expert, forensic document examiner Dr. Linton Mohammed, explained in his expert report: "An individual's signatures may vary for myriad reasons, including age, health, native language, and writing conditions. Laypersons' failure to properly account for signature variability leads to erroneous inauthenticity determinations, which are particularly pronounced in populations with greater signature variability, such as elderly, disabled, ill, and non-native English signatories." See Expert Decl. of L. Mohammed/Mohammed Depo. Ex. 1, at ¶ 27, Ex.

V; *see also id.* at ¶ 36 (identifying 20 reasons an individual’s signature may vary). As a result, according to Dr. Mohammed, people with no handwriting-identification training are likely to erroneously conclude that two signatures from the same voter do not match. *Id.* at ¶¶ 27-30.

57. RSA 659:50(III) particularly has a disenfranchising effect on eligible, qualified voters who are disabled, like Plaintiff 95-year-old Mary Saucedo and 97-year-old Kathryn Rakowski. *See, e.g.*, M. Saucedo Decl.; M.J. Vien Decl. Among the absentee ballot applications collected during discovery from 15 municipalities and the Secretary of State’s Office (which conducts recounts) in which voters were disenfranchised under RSA 659:50(III), at least 33 voters disenfranchised under RSA 659:50(III) identified as disabled (having checked off the box “I am unable to vote in person due to a disability”) out of approximately 167 rejected under this statute. *See* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, Ex. G; Pls.’ Chart Re: Disabled Voters, Ex. H. Indeed, seniors and individuals with disabilities are far more likely to have poor handwriting, signatures that have changed, or to be unable to sign the same way twice. *See* Expert Decl. of L. Mohammed/Mohammed Depo. Ex. 1, at ¶¶ 27, 37, Ex. V.

#### **VII. Legislative Change to the Challenged Law—RSA 659:50(III)—Through Senate Bill 248**

58. In 2017, through an amendment to Senate Bill 248, the New Hampshire Legislature changed several provisions to direct an individual who assists a person with a disability with their absentee ballot application or their absentee ballot affidavit envelope to sign a statement acknowledging the assistance. RSA 659:50(III), in particular, now reads that an absentee ballot must be rejected if “[t]he signature on the affidavit appears to be executed by the same person who signed the application, unless the voter received assistance because the voter is blind or has a disability.” (emphasis added). This bill also amended RSA 657:17 to, among

other things, add a sentence stating: “A person assisting a blind voter or voter with disability who needs assistance executing the affidavit shall sign a statement on the affidavit envelope acknowledging the assistance.” *See also* Senate Bill 248 Legislative History/Scanlan Depo. Ex. 17, Part 2, at SAU463 (final version of bill), Ex. K. As a result, the State has since modified the absentee ballot application and absentee ballot affidavit envelope to provide a space for a third party to sign and print their name stating that they “attest that I assisted the applicant in executing this form because he/she has a disability.” *See* Absentee Ballot Application Created in July 2017, Ex. L; Absentee Ballot Application Created in January 2018/Scanlan Depo. Ex. 5, Ex. M; Post-SB248 Absentee Ballot Affidavit Envelope, Ex. N.

59. This change was introduced at the request of the Secretary of State’s Office as part of a non-germane amendment to the original bill. On May 23, 2017, the Secretary of State’s Office acknowledged during testimony before the House Election Law Committee that this amendment to Senate Bill 248 would not, if enacted, “allay” this lawsuit, but was designed to “correct an issue.” *See also* Senate Bill 248 Legislative History/Scanlan Depo. Ex. 17, Part 2, at SAU410. Deputy Secretary of State David Scanlan further confirmed at deposition that this amendment to Senate Bill 248 did not moot Plaintiffs’ case. *See* D. Scanlan Depo. 200:5-204:1 (stating that the Secretary of State’s Office statement during the House Election Law Committee was “accurate”), Ex. C.

60. Nothing in the 2017 amendments provides notice or an opportunity to cure a signature mismatch determination for voters whose ballots will be rejected by moderators where the voters (i) are not disabled or (ii) are disabled but unable to obtain (or do not obtain) effective assistance in voting (assistance that includes the assistant signing the document). *See also* Scanlan Depo. 200:11-201:3 (acknowledging that a disabled voter who did not receive assistance

would still be subjected to the signature-mismatch statute), *Ex. C*. Individuals with disabilities remain vulnerable to disenfranchisement after this amendment to Senate Bill 248. Those who complete their ballot paperwork independently but who are unable to produce two matching signatures to the moderator's satisfaction remain vulnerable to having their ballots rejected. In addition, individuals with disabilities who do receive assistance must: (1) secure and submit a statement from the person who helped them; and (2) depend upon the moderators to excuse any mismatch based upon the statement(s).<sup>6</sup> Moreover, this amendment to Senate Bill 248 ignores the reality that third parties—for example, a home healthcare aid with immigration status concerns, or a neighbor who does not want to sign official documents—may often not want to take responsibility for “vouching” for voters who may need assistance and whether they are disabled.

61. Before the House Election Law Committee on May 23, 2017, the ACLU-NH, which is counsel in this case, explained these concerns. *See* Senate Bill 248 Legislative History/Scanlan Depo. Ex. 17, Part 2, at SAU410-11, 420-21, *Ex. K*. In the minority blurb for the bill, one legislator also noted that the amendment should be rejected by the full House of Representatives because it “fails to address voters whose signatures are mismatched due to a disability and do not require or can’t obtain assistance from another person.” *Id.* at 385-86. Another legislator stated during the May 23, 2017 legislative hearing on the amendment to Senate Bill 248 that this mismatch process “should be less subjective and more objective.” *Id.* at 410.

62. On May 23, 2017, the House Election Law Committee approved the amendment

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<sup>6</sup> Even this option is not available to all voters with disabilities who vote absentee and who receive assistance. *Compare* RSA 657:7(II)(a) (option not available) and (b) (option available).

to Senate Bill 248 by a vote of 13 to 6. *Id.* at 397. On June 1, 2017, the full House approved the bill by voice vote. The full Senate concurred, and the bill was enacted, effective July 2017. *Id.* at 313.

### **STANDARD**

Summary judgment is appropriate when the record reveals “no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The evidence submitted in support of the motion must be considered in the light most favorable to the nonmoving party, drawing all reasonable inferences in its favor. *See Navarro v. Pfizer Corp.*, 261 F.3d 90, 94 (1st Cir. 2001). A party seeking summary judgment must first identify the absence of any genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A material fact “is one ‘that might affect the outcome of the suit under the governing law.’” *United States v. One Parcel of Real Prop. with Bldgs.*, 960 F.2d 200, 204 (1st Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Here, there are no material facts in dispute. Thus, the question of whether a permanent injunction should be issued is ripe for summary judgment.

### **ARGUMENT**

This Court must permanently enjoin RSA 659:50(III) for four separate and independent reasons—namely, the challenged statute violates (i) the procedural due process protections of the Fourteenth Amendment, (ii) the fundamental right to vote protected by the Fourteenth Amendment, (iii) the Equal Protection provisions of the Fourteenth Amendment, and (iv) Title II of the Americans with Disabilities Act.

#### **I. RSA 659:50(III) Violates Procedural Due Process**

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits states

from depriving “any person of . . . liberty . . . without due process of law.” There are two inquiries under this analysis: (1) whether the voter whose absentee ballot is discarded has a legally-protected interest entitling the voter to due process protection; and (2) if such an interest exists, whether a constitutionally adequate process is provided. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The challenged law fails under both these inquiries.

**A. The Legally Protected Interest: The Right to Vote**

As to the initial inquiry, it cannot be seriously disputed that a voter whose absentee ballot is discarded has a legally protected interest in being able to vote. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live”); *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990) (“Because voting is a fundamental right, the right to vote is a ‘liberty’ interest which may not be confiscated without due process.”); *United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966) (“right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause”); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (right to vote includes right to have vote counted); *La Follette v. Padilla*, No. CPF-17-515931, at p. 3 (Cal. Super. Ct. Mar. 5., 2018) (the right to vote is a fundamental right requiring due process protection), *Ex. D*. Put another way, once a state creates an absentee ballot process—especially one like New Hampshire’s that is designed to enable to vote those who are disabled and vulnerable—it must be administered “in accordance with the Constitution.” *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at \*6 (N.D. Ill. Mar. 13, 2006), *vacated as moot sub nom. Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008).

## **B. The Process Due**

The inquiry in this case focuses on the second prong of *Mathews*—namely, whether the challenged law provides a constitutionally adequate process. Here, no process is provided, let alone a constitutionally adequate process. In determining whether constitutionally-adequate process is provided, courts consider three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Mathews*, 424 U.S. at 335; *see also Zessar*, 2006 WL 642646, at \*7-9 (stating *Mathews* elements).

### **1. The Private Interest Deprived Without Notice or an Opportunity to Cure**

It cannot be seriously disputed that the individual interest here—the right to vote—is great. *See Part I.A supra*. Yet, despite this significant interest, the State provides no notice or opportunity for absentee voters subjected to disenfranchisement under the mismatch statute to contest the denial of their voting rights. *See Zessar*, 2006 U.S. WL 642646, at \*7 (“This Court finds that under the current statutory system, the election judges’ rejection—erroneous or not—wholly deprives an absentee voter of the right to vote. There is no recourse for the voter and no way to remedy the loss of that vote in that election.”). No pre-deprivation process exists under New Hampshire’s signature-mismatch regime. Even during recounts conducted by the Secretary of State’s Office, there is no apparent mechanism for reversing a moderator’s disenfranchisement decision; rejected ballots are simply excluded from the recount, notwithstanding the fact that absentee ballots can be pivotal in close elections. (Pursuant to RSA 660:5, the Secretary of

State's Office exempts absentee ballots rejected due to signature mismatch from the recount process.). See 2016 Recounts List, Ex. Y; Scanlan Depo. 220:16-221:9, Ex. C.

Pre-deprivation notice must be “reasonably calculated, under all the circumstances, to apprise” the deprived person of the deprivation, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), must include “the alleged misconduct with particularity” leading to the government’s action, *In re Gault*, 387 U.S. 1, 33 (1967), and must inform the deprived person about the means for contesting the deprivation, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1978). None of these elements has been satisfied here. None of the Plaintiffs—or the remaining approximately 272 voters disenfranchised under the challenged statute during the 2016 election—received notice before they were deprived of their voting rights. With respect to the website maintained by the Secretary of State’s Office that eventually posts the status of voters’ absentee ballots, this website, at best, only provides notice of the disenfranchisement decision after the election. And by the time clerks make information on rejected absentee ballots available to voters online (assuming the voter even has Internet access, which Plaintiff Saucedo, for example, does not), it is too late. The voter has been disenfranchised and there is nothing that can be done about it, as there is no opportunity to cure a moderator’s decision to reject an absentee ballot due to signature mismatch. As courts have held in California and Illinois, this lack of process is constitutionally deficient. See *La Follette v. Padilla*, No. CPF-17-515931 (Cal. Super. Ct. Mar. 5, 2018) (striking down California law allowing election officials to reject absentee ballots based on signature mismatch because the process provided no notice or opportunity to cure), Ex. D; *Zessar*, 2006 WL 642646, at \*9.

It is important to note that the “Notice of Requirements to Use Absentee Ballot” form—which is created by the Secretary of State’s Office, given by some municipalities to voters along

with their absentee ballots, and notes the signature mismatch statute requirements—does not provide constitutionally adequate notice.<sup>7</sup> Of course, simply informing someone of what the law is not adequate notice of an individual deprivation. *See, e.g., La Follette*, at p. 5 (holding that a written notice informing the voter to sign in his or her own handwriting is insufficient because the constitutional concern is the fact that a voter is given no notice when their signatures are deemed to mismatch), *Ex. D*. Whatever language exists on this form, New Hampshire still does not give any notice to a voter when a moderator believes that the voter’s specific signature on the absentee ballot affidavit envelope fails to match the signature on the absentee ballot application. Nor is this “Notice of Requirements to Use Absentee Ballot” form even required to be given by municipalities to absentee voters. The Secretary of State’s Office acknowledged at deposition that distribution of this Notice form is not mandatory and that there are no penalties to municipalities that fail to distribute it. *See Scanlan Depo. 214:2-9, Ex. C*. For example, in response to a subpoena from Plaintiffs’ counsel, the City of Nashua acknowledged that this Notice form “is not required to be sent to absentee voters” and that Nashua only started using this form in 2015. *See Oct. 6, 2017 Ltr. From Nashua re Pls.’ Subpoena/Scanlan Depo. Ex. 19, Ex. AA; see also Scanlan Depo. 213:14-214:1* (acknowledging that Nashua’s statement was

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<sup>7</sup> During the 2016 general election, the form had text stating that “The moderator will compare the signature on the written request for an absentee ballot to the signature on the Absentee Ballot Affidavit Envelope and your absentee ballot will be counted only if it appears that the same person signed both documents. Therefore, it is important to use the same signature on each form.” N.H. Dep’t of State, N.H. Election Procedure Manual: 2016-2017/Scanlan Depo. Ex. 3, at p. 135 (Notice of Requirements to Use Absentee Ballot), *Ex. T*. For elections occurring after Senate Bill 248 was enacted in July 2017, the Secretary of State’s Office revised the form to state:

- The signature on this affidavit must match the signature on the application for an absentee ballot. Your absentee ballot will be counted ONLY if it appears the same person signed both forms. Therefore, it is important to use the same signature on both forms.
- The two signatures are not compared when the voter receives assistance, provided the person assisting the voter completes the section of the application and affidavit that reads “I attest that I assisted the applicant in executing this form because he/she has a disability. Signature \_\_\_\_\_ Date \_\_\_\_\_.”

*See* 2017-18 Notice of Requirements to Use Absentee Ballot Form/Scanlan Depo. Ex. 20, *Ex. Z*. The Secretary of State’s Office recommends that municipal clerks give this form to absentee voters along with their absentee ballots. N.H. Dep’t of State, N.H. Election Procedure Manual: 2016-2017/Scanlan Depo. Ex. 3, at p. 18 (noting that “Clerks should send” this form “with the absentee ballot materials”), *Ex. T*.

accurate), Ex. C. The municipalities of Hudson, Laconia, Manchester (the State's largest City) also do not use this Notice form. *See Documents Given to Absentee Voters in Various Municipalities*, at pp. 32-38, 39-49, 50-59, Ex. BB; *see also id.* at pp. 12 (letter from Hampton Falls stating that the form is not required).

Similarly, the language added under Senate Bill 248 to the absentee ballot application and affidavit envelope informing the voter of the signature mismatch requirement does not resolve the constitutional deficiencies. *See Absentee Ballot Application Created in July 2017*, Ex. L; *Absentee Ballot Application Created in January 2018/Scanlan Depo. Ex. 5*, Ex. M; *Post-SB248 Absentee Ballot Affidavit Envelope*, Ex. N. Again, simply informing someone of what the law is, of course, not adequate notice of an individual deprivation. *See La Follette*, at p. 5, Ex. D.

## **2. Risk of Erroneous Deprivation and Probable Value of Additional Procedures**

Pre-deprivation process is critical here because, under the current system, the risk of an erroneous deprivation of a citizen's voting rights is great. This risk could be remedied through added procedures like notice and an opportunity to cure.

The signature mismatch process employed under the challenged law is fraught with error and lacks any narrow, objective standards or criteria regarding when rejecting a ballot is appropriate. As Plaintiffs' expert, Dr. Mohammed, explained in his report, "the RSA 659:50(III) requirement that lay moderators, without training or standards, reject ballots with envelope signatures they deem nongenuine will result in a significant number of erroneous ballot rejections." *See Expert Decl. of L. Mohammed/Mohammed Depo. Ex. 1*, at ¶ 30, Ex. V. He noted: "Determining whether a signature is genuine is a difficult task for even a trained FDE [Forensic Document Examiner], as signatures are written in different styles with varying levels of readability and variability. And laypersons have a significantly higher rate of error in

determining whether signatures are genuine. Laypersons are also more likely to wrongly determine that authentic signatures are not genuine than to make the opposite error. In other words, lay elections officials are more likely than trained examiners to make an incorrect signature-comparison determination and are particularly likely to incorrectly decide that the signatures do *not* ‘compare.’” *See id.* ¶ 26. He further opined: “New Hampshire [does not] require that moderators compare more than two signatures or spend a minimal amount of time in making a signature determination. These omissions are likely to lead to additional erroneous determinations. At a minimum, ten signature samples are required for an accurate signature determination to account for an individual’s signature variability, but New Hampshire only requires elections officials to compare ballot-envelope affidavit signatures to one sample. Further, elections officials are likely to have insufficient time to make accurate signature determinations.” *Id.* at ¶ 29. Dr. Mohammed explained that, upon review of the absentee ballot application and absentee ballot affidavit envelope, perceived signature mismatches could often be explained by the fact that “the Absentee Ballot Affidavit Envelope is written above a clear notice of penalties for fraudulent signatures,” which “may influence the voter to execute a more formal version of their normal signature on the Affidavit Envelope which may appear pictorially dissimilar to the signature on the Application (which may have been executed more casually).” *See* Expert Decl. of L. Mohammed/Mohammed Depo. Ex. 1, at ¶ 51, *Ex. V*. Indeed, Plaintiff Maureen Heard testified that she signed her absentee ballot affidavit envelope in a more formal way because it contained her ballot. *See* Heard Decl. ¶ 7.

There is also not a uniform application of the signature mismatch statute among towns and municipalities or election wards in New Hampshire. All of the ballot rejections due to signature mismatch statewide came from only 26% of New Hampshire’s 318 polling places. *See*

State's Analysis of Absentee Ballots/Scanlan Depo. Ex. 12, Ex. W. The remaining 74% of polling places did not reject any absentee ballots due to a signature mismatch. Statewide during the 2016 general election, there were approximately 275 absentee ballots rejected due to signature mismatch out of approximately 1,897 total absentee ballot rejections. Put another way, signature mismatch rejections constituted approximately 14.5% of rejected absentee ballots. Relative to the number of absentee ballots cast by voters (the 78,430 absentee ballots returned to municipalities by voters, whether rejected or counted), the approximately 275 absentee ballot signature-mismatch rejections constituted 0.35% of all absentee ballots submitted. Some municipalities, however, have far higher rates of signature-mismatch rejections, including:

- Portsmouth Total: 23 Signature Mismatches (32.39% of rejected absentee ballots; 1.23% of all absentee ballots cast, which is 3.5 times above the statewide average);
- Portsmouth Ward 3: 10 Signature Mismatches (66.67% of rejected absentee ballots; 5.21% of all absentee ballots cast, which is nearly 15 times above the statewide average);
- Manchester Ward 2 (where Plaintiff Mary Saucedo resides): 8 Signature Mismatches (34.78% of rejected absentee ballots; 1.56% of all absentee ballots cast, which is nearly 4.5 times above the statewide average);
- Manchester Ward 4: 6 Signature Mismatches (42.86% of rejected absentee ballots; 2.17% of all absentee ballots cast, which is 6.2 times above the statewide average)<sup>8</sup>;
- Hudson: Approximately 19<sup>9</sup> Signature Mismatches (27.94% of rejected absentee ballots; 1.68% of all absentee ballots cast, which is 4.8 times above the statewide average);
- Hampton Falls: 4 Signature Mismatches (36.36% of rejected absentee ballots; 2.25% of all absentee ballots cast, which is 6.4 times above the statewide average);

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<sup>8</sup> In one of these cases, the voter did not sign the absentee ballot application. *See* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 168-69, Ex. G.

<sup>9</sup> Hudson produced documents evidencing 18 signature mismatches. *See* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 76-112, Ex. G.

- Goffstown (District 5): 5 Signature Mismatches (50.00% of rejected absentee ballots; 2.86% of all absentee ballots cast, which is nearly 9 times above the statewide average); and
- Cornish: 2 Signature Mismatches (66.67% of rejected absentee ballots; 2.27% of all absentee ballots cast, which is over 7 times above the statewide average).

See State's Analysis of Absentee Ballots/Scanlan Depo. Ex. 12, Ex. W; Pls.' Analysis of Absentee Ballots with Percentages Added/Scanlan Depo. Ex. 13, Ex. X.

The Secretary of State's Office acknowledged at deposition that it had no explanation for these disparities and that the Office has not reviewed the number or distribution of absentee ballots rejected to determine whether municipalities are applying the signature-mismatch statute consistently. See Scanlan Depo. 177:19-22 (no investigation into disparities), 179:22-180:6 (do not regularly review number of ballots rejected), 181:18-182:1 (have not had conversations with municipalities about signature-mismatch rejections), Ex. C. The Secretary of State's Office also acknowledged that—based on the signature-mismatch rates in Portsmouth Ward 3, Manchester Wards 4 and 5, Hampton Falls, Goffstown, and Cornish—the Secretary of State's Office would want to have a follow-up conversation about how the signature-mismatch statute is being applied there. *Id.* at 179:12-21, 181:8-16. The Office also acknowledged that a signature-mismatch rate above 2% relative to all absentee ballots cast is something “we should take a look at.” *Id.* at 181:2-4. The Office went so far as to concede that a signature-mismatch rate in excess of 1% relative to all absentee ballots cast would be unacceptable. *Id.* at 197:1-198:1.

Comparisons among municipalities further demonstrate this lack of consistency. For example, let us compare the cities of Portsmouth and Keene during the 2016 Election. These cities are comparable by population, with Portsmouth having about 21,000 residents and Keene having about 23,000 residents. Yet Portsmouth had approximately 23 signature-mismatch

rejections, while Keene had only two signature-mismatch rejections. In Portsmouth, 32.39% of absentee ballots rejected were due to perceived signature mismatches, and these signature mismatches represented 1.23% of all absentee ballots cast. Meanwhile, in Keene, 4.44% of absentee ballots rejected were due to perceived signature mismatches, and these signature mismatches represented 0.18% of all absentee ballots cast. In stark contrast to Portsmouth, Concord—which is double the size of Portsmouth with a population of approximately 43,000—had no signature-mismatch rejections during the 2016 election in all of its 10 wards out of a total of 2,093 absentee ballots submitted (34 absentee ballots were rejected but for other reasons). *See* State’s Analysis of Absentee Ballots/Scanlan Depo. Ex. 12, Ex. W; Pls.’ Analysis of Absentee Ballots with Percentages Added/Scanlan Depo. Ex. 13, Ex. X.

This lack of consistency is also apparent within municipalities. For example, while Ward 3 in Portsmouth had 10 signature mismatch rejections (66.67% of all absentee ballots rejected and 5.21% of all absentee ballots cast), Ward 1 in Portsmouth had no signature mismatch rejections out of 321 absentee ballots submitted (6 were rejected but for other reasons). The Secretary of State’s Office acknowledged at deposition that Portsmouth’s Ward 3 signature-rejection rate was “excessively high” in comparison and “raise[s] a flag.” *See* Scanlan Depo. 179:14-15, 180:11-19 Ex. C. In addition, while Ward 2 in Manchester had 8 signature-mismatch rejections (34.78% of all absentee ballots rejected and 1.56% of all absentee ballots cast), Wards 3, 7, 8, 10, and 12 in Manchester had no signature-mismatch rejections out of 1,865 absentee ballots submitted. *See* State’s Analysis of Absentee Ballots/Scanlan Depo. Ex. 12, Ex. W; Pls.’ Analysis of Absentee Ballots with Percentages Added/Scanlan Depo. Ex. 13, Ex. X.

The flaws in this process are further evidenced by Deputy Secretary Scanlan’s admission that, based on the Secretary of State’s standard to be employed by moderators, the signatures of

three voters disenfranchised under the signature mismatch statute—one who resided at the New Hampshire Veteran’s Home in Tilton,<sup>10</sup> one domiciled in Merrimack (Ward 1), and another domiciled in Hudson—did actually match. *See* Scanlan Depo. 194:14-23 (referencing Scanlan Depo. Ex. 14), 196:6-10 (referencing Scanlan Depo. Ex. 15), 196:18-23 (referencing Scanlan Depo. Ex. 16), *Ex. C*. These three voters’ absentee ballot applications and absentee ballots affidavit envelopes can be found at pages 374-75 (Scanlan Depo. Ex. 14 from Tilton), 181-82 (Scanlan Depo. Ex. 15 from Merrimack Ward 1), and 105-06 (Scanlan Depo. Ex. 16 from Hudson) of the Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities located at *Ex. G*.

Given the risk of an erroneous deprivation, pre-deprivation process is critical. Post-deprivation process would still be inadequate because, even if notice was formally provided after an election to a voter who was disenfranchised (which it is not), the voter would have no ability to cure because votes are counted on the evening of the election in New Hampshire. *See* RSA 659:61; RSA 659:75. Providing formal notice days or weeks after the election would be too late, as the voter would have no opportunity to challenge or appeal the disenfranchisement decision. *See Zessar*, 2006 WL 642646, at \*9 (“This Court finds that a post-deprivation hearing provides only prospective relief in that it allows the rejected voter to correct something about her registration for future elections. The fact that Zessar and his fellow rejected absentee voters may have been deprived of their vote through a good-faith error, rather than outright fraud, does not eliminate their due process interest in preserving their right to vote. Once rejected, the ballot cannot be rehabilitated and cast after a post-deprivation hearing. The voter’s right to vote would have been irremediably denied.”).

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<sup>10</sup> In Tilton, there was a recount for the two State House of Representatives seats in Belknap County, District 4. *See* 2016 Recounts List, *Ex. Y*.

### 3. The Governmental Interest

The third factor in the *Mathews* balancing test examines the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

Here, any administrative burden in providing pre-deprivation process is minimal, especially when compared to the benefits it would provide absentee voters in ensuring that their votes are not erroneously rejected. Indeed, "[g]enerally, pre-deprivation process is necessary to satisfy due process." See *Godin v. Machiasport Sch. Dep't Bd. of Dirs.*, 831 F. Supp. 2d 380, 389 (D. Me. 2011) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("We have described the root requirement of the Due Process clause as being that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.")); *Memphis*, 436 U.S. at 19 (city must provide notice and an opportunity to be heard prior to termination of utilities).

In evaluating the government's interest in providing notice and opportunity to cure before a final disenfranchisement decision is made, there is no evidence to suggest that a pre-deprivation process would be exceedingly difficult to administer or that there is an extraordinary situation justifying the denial of pre-deprivation process. The Secretary of State's Office acknowledged that it has never studied the feasibility of providing any form of due process to these voters to prevent their erroneous disenfranchisement. See Scanlan Depo. 220:7-15, *Ex. C*. With respect to the several hundred voters disenfranchised in a given presidential election due to signature mismatch, the State, with minimal burden, could attempt to contact each voter—including by a simple telephone call—on or prior to Election Day and ascertain whether that

voter signed the absentee ballot affidavit envelope. *See Zessar*, 2006 WL 642646, at \*9 (providing process, even if it “would pose some additional administrative and fiscal burden on the election authorities” would not create burdens “so great as to overwhelm plaintiff’s interest in protecting his vote”). Many other states that have signature mismatch statutes provide some form of process to voters, including an opportunity to cure.<sup>11</sup> And the laws in States that have failed to provide process—California and Florida, for example—have recently been struck down. *See Florida Democratic Party v. Detzner*, No. 4:16-cv-00607-MW-CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016); *La Follette v. Padilla*, No. CPF-17-515931 (Cal. Super. Ct. Mar. 5, 2018), *Ex. D*; *see also Zessar*, 2006 WL 642646 (striking down prior Illinois regime that failed to provide due process).

Finally, any interest claimed by the State in using the signature mismatch statute to prevent fraud—specifically, fraud that may occur where a person signing either the absentee ballot application or the absentee ballot affidavit envelope is not the same person who signed the other corresponding document—does not justify failing to provide pre-deprivation process. At

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<sup>11</sup> *See, e.g.*, Mass. Gen. Laws Ann.. 54 § 94 (Massachusetts statute stating that, where there is a perceived mismatch among other defects, the clerk “shall notify, as soon as possible, each voter whose ballot was rejected that such ballot has been rejected. Said notice shall be on a form prescribed by the state secretary and provided by the clerk. Unless the clerk determines that there is clearly insufficient time for the voter to return another ballot, the clerk shall then proceed as if the voter had requested a substitute ballot . . . .”); 10 Ill. Comp. Stat. 5/19-8(g-5) (current Illinois statute stating that: “If a vote by mail ballot is rejected by the election judge or official for any reason, the election authority shall, within 2 days after the rejection but in all cases before the close of the period for counting provisional ballots, notify the vote by mail voter that his or her ballot was rejected. The notice shall inform the voter of the reason or reasons the ballot was rejected and shall state that the voter may appear before the election authority, on or before the 14th day after the election, to show cause as to why the ballot should not be rejected . . . .”); 25 Pa. Cons. Stat. § 3146.8(e) (Pennsylvania statute stating that absentee ballots that have been challenged “shall be returned to the county board with the returns of the local election district where they shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges and notice shall be given where possible to all absentee electors thus challenged and to every attorney, watcher or candidate who made such challenge. The time for the hearing shall not be later than seven (7) days after the date of said challenge . . . .”); Or. Rev. Stat. § 254.431(2)(a) (Oregon statute stating that if a ballot is challenged because the signature on the ballot does not match the signature in the voter’s registration record, the county clerk must mail a notice to the elector (on a standard form developed by the Oregon Secretary of State), and the elector must then provide evidence that the ballot is valid “not later than the 14th calendar day after the date of the election”).

the outset, the State has provided no evidence that any of the ballots rejected under the signature mismatch statute for any election—including the 321 to 370 rejected votes in 2012, the 145 rejected votes in 2014, or the approximately 275 rejected votes in 2016—were the product of attempted voter impersonation. *See* Scanlan Depo. 192:19-193:14 (admitting that, for the 275 ballots rejected due to signature mismatch during the 2016 election, there was no indication that these voters were ineligible to vote other than the perception that the signatures did not match), Ex. C. Nor has the State shown that the only two reported cases of absentee ballot voter impersonation ever in New Hampshire were uncovered using the mismatch statute. (Approximately a half-million absentee ballots have been cast in New Hampshire general elections since 1996). *See* Part II.B.1, *infra*.

And even if an election integrity rationale had a nexus to the signature mismatch statute, the goal of preventing fraud does not justify the elimination of due process, just as the goal of preventing crime does not justify the elimination of criminal trials. Here, process is, in fact, necessary to ensure that the mismatch process currently employed is not culling out qualified voters who have, in fact, validly cast their absentee ballot, to the detriment of election integrity. To the extent any due process is administratively inconvenient, that cannot justify disenfranchising voters under a system that is fraught with error. *See* *Detzner*, 2016 WL 6090943, at \*7 (administrative inconvenience “cannot justify stripping Florida voters of their fundamental right to vote and to have their votes counted”); *see also* *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) (“The district court failed to recognize, much less address, the problem of sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing.”) (reversing district court’s denial of preliminary injunction).

For these reasons, the challenged statute violates procedural due process.

## **II. RSA 659:50(III) Violates the Fundamental 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.”). Thus, strict scrutiny is applied to severe restrictions on the right to vote and a more deferential review is reserved for regulations that impose no or merely incidental burdens. *See Burdick*, 504 U.S. at 434. The cases that fall in between are “subject to ad hoc balancing,” such that “a 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 law requiring circulators of petitions for third-party ballot access to be accompanied by State residents as witnesses).

At one end of that sliding scale, where voting rights are subjected to “severe” restrictions, 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).<sup>12</sup> *Anderson-Burdick*, however,

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<sup>12</sup> 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

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. 187, 191 (2008) (internal quotation marks omitted). 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).

#### **A. Strict Scrutiny Applies**

RSA 659:50(III) is subject to strict scrutiny, as it places a severe burden on the fundamental right to vote by irreversibly disenfranchising hundreds of absentee voters each election cycle.

During the 2016 general election, approximately 275 voters, including Plaintiffs, were disenfranchised. Plaintiffs were deprived of their right to vote—a burden of the most severe character—by having their absentee ballots secretly rejected pursuant to RSA 659:50(III) because of their penmanship, or their inability to sign their own name. Even with the legislature’s changes to the law in 2017 through Senate Bill 248, voters are never told when they are to be disenfranchised, and are not given an opportunity to cure the alleged disparity in

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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”).

signatures. Even after an election, unless they access the Secretary of State’s website, they will simply never know that they have been disenfranchised. Here, a complete deprivation of the constitutional right to vote—without notice or an opportunity to cure a perceived signature mismatch, and without an opportunity to appeal the moderator’s determination—constitutes a severe burden on the right to vote, especially when it implicates people who are disabled and who have no option but to vote absentee. The same result was reached with respect to a similar law by a federal court in Florida. *See Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at \*6 (N.D. Fla. Oct. 16, 2016) (“During this election cycle, millions of voters across the state will march happily to their mailbox and attempt to exercise their fundamental right to vote by mailing their vote-by-mail ballot. After the election, thousands of those same voters—through no fault of their own and without any notice or opportunity to cure—will learn that their vote was not counted. If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does.”).

This law severely burdens vulnerable individuals. Because a voter can only vote by absentee ballot in New Hampshire if the voter is unable to vote in person due to, in part, absence or a disability, many in New Hampshire’s absentee voting population are elderly, disabled, and otherwise vulnerable. Based on the absentee ballot applications collected during discovery from 15 municipalities and the Secretary of State’s Office (which conducts recounts) in which voters were disenfranchised under RSA 659:50(III), approximately 33 disenfranchised voters were disabled (having checked off the box “I am unable to vote in person due to a disability”) out of approximately 167 rejected ballots that were produced to Plaintiffs. *See Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, Ex. G;*

Pls.’ Chart Re: Disabled Voters, Ex. H. Indeed, the State disenfranchised the following individuals, many of whom reside in rehabilitation centers and nursing homes during the 2016 general election<sup>13</sup>:

- One voter domiciled at Laconia Rehabilitation Center, which is located at 175 Blueberry Lane in Laconia (Ward 1). *See* <http://www.genesisihcc.com/Laconia>; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 348-49, Ex. G. This disenfranchisement is especially meaningful given that the Senate District 7 race—which covers Laconia—was decided by only 17 votes and was subjected to a recount. *See* 2016 Recounts List, Ex. Y.<sup>14</sup>
- One voter domiciled at the New Hampshire Veterans Home, which is located at 139 Winter Street in Tilton. *See* <https://www.nh.gov/veterans/>; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 374-75, Ex. G. In Tilton, there was a recount for the two State House of Representatives seats in Belknap County, District 4 (the race between the second and third vote getter was decided by 17 votes). *See* 2016 Recounts List, Ex. Y. The Secretary of State’s Office acknowledged at deposition that this voter was disenfranchised in error. *See* Scanlan Depo. 194:14-23 (referencing Scanlan Depo. Ex. 14), Ex. C.
- One voter domiciled at Benchmark Senior Living at Nashua Crossing, which is located at 674 West Hollis Street in Nashua (Ward 5). *See* <https://www.benchmarkseniorliving.com/senior-living/nh/nashua/benchmark-senior-living-at-nashua-crossings/>; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 367-68 Ex. G. In this ward in Nashua, there was a recount for the three State House of Representatives seats in Hillsborough County, District 32. *See* 2016 Recounts List, Ex. Y.
- One voter domiciled at Betty’s Housing, which is at 75 Longmeadow Lane in Portsmouth (Ward 3). This facility provides low-income housing for the physically handicapped. *See* <http://www.bettysdream.org/page1.html>; Absentee

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<sup>13</sup> This list includes the address of each voter, while omitting the voter’s name and the reasons the specific voter voted absentee. As this Court noted on October 27, 2017 and January 18, 2018, a voter’s name and address are not confidential information. *See* Doc Nos. 32 (at pp. 7-8) and 42 (p. 2); *see also* RSA 654:31-a. Moreover, the fact that a specific voter’s absentee ballot was rejected under the challenged mismatch statute is not confidential. As the Court explained: “[P]aintiffs have provided evidence to show that the reason that a voter’s absentee ballot is rejected is announced at the polling location and, therefore, cannot be deemed to be confidential information.” *See* Doc Nos. 32 (at pp. 7-8); *see also* RSA 659:50 (“the moderator shall publicly announce the name of the absentee voter”).

<sup>14</sup> Allie Morris, “After Recount, Andrew Hosmer Concedes State Senate Race to Harold French,” *Concord Monitor*, Nov. 21, 2016, *available at* <http://www.concordmonitor.com/Andrew-hosmer-concedes-district-7-state-senate-recount-to-harold-french-6294299>, Ex. CC.

Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 272-73, Ex. G.

- One voter domiciled at Great Bay Residential Facility, which is at 413 LaFayette Road in Portsmouth (Ward 4). This is an affordable rental housing community. *See* <http://www.rentalhousingdeals.com/NH/Portsmouth/GREAT-BAY-RESIDENTIAL-FACILITY-II>; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 281-82, Ex. G.
- One 94-year-old voter domiciled at Edgewood Center, which is at 928 South Street in Portsmouth (Ward 5). This is a rehabilitation center/nursing home. This voter passed away following the election. *See* <http://www.edgewoodcentre.com/about-us>; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, including obituary at p. 289-91, Ex. G.
- One voter domiciled at Mount Carmel Rehabilitation and Nursing Center, which is at 235 Myrtle Street in Manchester (Ward 2). *See* <http://www.mtcarmelrehabcenter.org/>; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 156-57, Ex. G.
- One voter domiciled at “The Huntington at Nashua,” which is a retirement community located at 55 Kent Lane in Nashua (Ward 8). *See* <http://silverstoneliving.org/the-huntington-at-nashua/>; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 218-19, Ex. G.
- One voter domiciled at Aurora Senior Living, which is located at 20 Chester Road in Derry (Ward 3). *See* <http://auroraderry.com/>; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 35-36, Ex. G.
- One 95-year-old voter domiciled at the “Webster at Rye” assisted living facility, which is located at 795 Washington Road in Rye. This voter passed away following the election. *See* <http://websteratrye.com/>; Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, including obituary at p. 301-04, Ex. G.
- Other voters disenfranchised during the 2016 general election included an 89-year-old military veteran from Alton who served in the Korean War, an 83-year-old grandmother from Portsmouth, and a 92-year-old grandmother from Portsmouth. These three voters died after the 2016 election. *See* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, at p. 4-6, 269-71, 274-76, including obituaries Ex. G.

When looking at this sample of voters disenfranchised under the challenged statute, the severity of the burdens imposed by the challenged law is apparent.

**B. The Challenged Law Fails Under Any Form of Scrutiny**

The challenged fails any form of scrutiny, let alone strict scrutiny. Because the burdens it imposes are severe, RSA 659:50(III) must be “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434. The State cannot establish either element of this analysis, or a rational basis for denying voters notice and an opportunity to cure a perceived signature mismatch.

**1. Lack of Any Governmental Interest, Let Alone a Compelling One**

At the outset, there is no legitimate government interest—let alone a compelling one—to deny voters notice and an opportunity to cure in instances of a perceived signature mismatch.

Preventing voter fraud—specifically, fraud that may occur where a person signing either the absentee ballot application or the absentee ballot affidavit envelope is not the same person who signed the other corresponding document—is not a compelling governmental interest served by RSA 659:50(III). Deputy Secretary Scanlan has admitted that there is no widespread voter fraud in New Hampshire. *See* Dave Solomon and Dan Tuohy, “NH Election Officials Dispute Trump Tweet on Voter Fraud,” *Union Leader*, Nov. 28, 2016 (noting no signs of widespread voter fraud on Election Day), *Ex. DD*. During the October 26, 2017 hearing in this case, the State also conceded the lack of widespread fraud concerning absentee ballots. *See* Oct. 26, 2017 Trans. at 17:24-18:2 (admitting “widespread fraud ... has never been seen in New Hampshire with respect to absentee ballots”). The State has provided no evidence that *any* of the absentee ballots *ever* rejected by moderators due to signature “mismatch”—such as the 321 to 370 rejected votes in 2012, the 145 rejected votes in 2014, or the approximately 275 rejected

votes in 2016—were the result of voter impersonation or fraud. *See* Scanlan Depo. 192:19-193:14 (admitting that, for the 275 ballots rejected due to signature mismatch during the 2016 election, there was no indication that these voters were ineligible to vote other than the perception that the signatures did not match), Ex. C. Deputy Secretary Scanlan testified that his office did not investigate whether any of these votes rejected under the mismatch statute were cast by ineligible voters. *Id.* He added that New Hampshire has taken no tangible steps to determine whether absentee voter fraud occurs in New Hampshire. *See id.* at 159:17-20. The Secretary of State’s Office also does not recall referring any voter rejected under the signature mismatch statute for investigation or prosecution. *See* Defs.’ Resp. to First Set of Ints., No. 12, Ex. EE.<sup>15</sup>

In light of the absence of fraud in New Hampshire, the State has attempted to rely on (i) allegations of absentee ballot voter fraud in other states, and (ii) how the challenged statute has been on the books since at least 1925 to justify the signature match requirement and the lack of process it provides. The State’s attempt to rely on fraud allegations in other states is to no avail. *See Rideout v. Gardner*, 838 F.3d 65, 73 (1st Cir. 2016) (“A few recent instances of vote buying in other states do not substantiate New Hampshire’s asserted interest in targeting vote buying

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<sup>15</sup> The State identified—out of an approximately half-million absentee votes cast since 1996—only two verified cases of voter impersonation by absentee ballot occurring in New Hampshire *ever*. *See* Scanlan Depo. 150:16-21 (acknowledging that, aside from two instances, the Secretary of State’s Office could identify no other instances of impersonation occurring through the absentee ballot process), Ex. C. And these two incidents (one from the 2012 election and the other from the 2016 election) were detected through mechanisms other than New Hampshire’s “signature mismatch” regime. *See* Kumpu Case File from 2012 Election, at SAU99 (double voting during the 2012 general election was flagged by municipal supervisor of the checklist after the election), Ex. FF; Attorney General’s January 14, 2014 Press Release concerning Janine and Adam Kumpu/Scanlan Depo. Ex. 10 from Kumpu File, Ex. GG; Blanche Case File from 2016 Election, at SAU177 (wife signing deceased husband’s absentee ballot affidavit envelope during the 2016 election was detected before the election by the town clerk), Ex. HH; Attorney General’s February 24, 2017 Letter regarding Elaine Blanche/Scanlan Depo. Ex. 9 from Blanche File, Ex. II. Deputy Secretary Scanlan acknowledged at deposition that he did not have evidence that these two cases were uncovered through the signature-mismatch process. *See* Scanlan Depo. 147:6-17, 148:18-149:10 (acknowledging that Blanche incident not uncovered through the signature mismatch process), 150:5-8 (stating that it was “not clear” whether the Kumpu incident was uncovered through the signature mismatch process), Ex. C.

through banning the publication of ballot selfies.”). And the State’s reliance on the statute’s existence since at least 1925, *see* Scanlan Depo. 119:11-120:2, 128:5-130:1, Ex. C, is tantamount to stating that the law is justified because “this is the way we have always done things.” Mere historical inertia is not a constitutional defense. Simply put, given the absence of any evidence that the mismatch statute has, in any fashion, prevented fraud, fraud cannot be viewed as an adequate justification here under any form of scrutiny. At best, the State’s fraud justification is “compelling in the abstract.” However, as the First Circuit has opined in the context of First Amendment intermediate scrutiny, “the assertion of abstract interests” are not sufficient. *Rideout*, 838 F.3d at 72. While the State is concerned about a fraudulent vote diluting the vote of a qualified voter, *see* Scanlan Depo. 191:19-23, Ex. C, such an abstract interest cannot justify disenfranchising qualified voters like the Plaintiffs, which does not promote election integrity or voters’ confidence in the election system.<sup>16</sup>

## 2. Lack of Tailoring

Even if the government has an interest in screening out fraud, the signature-mismatch requirement under RSA 659:50(III) is still unconstitutional due to lack of tailoring. New Hampshire’s regime unlawfully disenfranchises voters because it (i) provides no notice to these mismatched-signature voters that they will be or have been disfranchised, and (ii) provides no opportunity to cure or to appeal from a moderator’s determination. The burdens for qualified voters swept up within this statutory scheme are not only severe, they are insurmountable. Voters are disenfranchised with no process whatsoever. The end result is that qualified voters who are not committing any form of fraud are and will be disenfranchised. Of course, notice and

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<sup>16</sup> The fact that other states have signature mismatch statutes is to no avail. Mismatch laws in states that fail to provide due process (like in California and Florida) have been recently struck down because they do not provide notice and an opportunity to cure. And the several other states that do have a mismatch statute do provide process and an opportunity to cure. *See supra* note 11.

an opportunity to cure would be a far more narrowly tailored approach that would protect these qualified voters' rights. Simply put, any governmental interest in deterring fraud is not remotely served by the challenged statute's complete failure to provide process that would protect qualified voters.

The evidence in this case establishes this lack of tailoring. Given the absence of fraud in New Hampshire, innocent factors are far more likely to cause a perceived signature mismatch than unlawfulness. As Plaintiffs' expert Dr. Mohammed has explained, these include age, health, native language, and writing conditions, among other reasons. *See* Expert Decl. of L. Mohammed/Mohammed Depo. Ex. 1, at ¶¶ 27, 36, *Ex. V*. To this extent, this Court should reach the same conclusion rendered by a Florida federal court striking down a similar signature-mismatch law on tailoring grounds. There, the Court concluded that: "There is simply no evidence that these mismatched-signature ballots were submitted fraudulently. Rather, the record shows that innocent factors—such as body position, writing surface, and noise—affect the accuracy of one's signature." *See Fla. Democratic Party*, 2016 WL 6090943, at \*7. Any state interest in screening out fraudulent votes is not served by disenfranchising lawful voters for penmanship.

Indeed, in the face of the State's inability to show that any absentee ballots rejected under the signature-mismatch statute were actually fraudulent, the Plaintiffs have established that they are qualified voters who were improperly disenfranchised under the signature mismatch statute during the 2016 general election alone, as is Kathryn Rakowski. The Secretary of State's Office has also admitted that three voters who were rejected under the signature mismatch statute—including one residing in the New Hampshire Veterans Home—actually did have matching

signatures according to the Secretary of State's Office's own standards.<sup>17</sup>

The signature match requirement, and Defendants' denial of an opportunity to cure a perceived mismatch, would not pass constitutional muster even if this Court were to apply a more deferential level of review, such as rational basis review, because the law does not serve fraud prevention. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (“[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.”). A state may not impose unjustified voting restrictions simply by claiming that a purpose of the law is to prevent voter fraud. Election laws are not exempt from careful scrutiny simply because “the state identifies interests that courts have found compelling in other cases.” *Fulani*, 973 F.2d at 1544 (Even if “the state identifies interests that courts have found compelling in other cases,” a burdensome requirement may not be upheld if “it fails to explain the relationship between these interests and the classification in question.”); *see id.*, 973 F.2d at 1546 (“The problem is that the state has plucked these interests from other cases without attempting to explain how they justify the discriminatory classification here at issue.”); *see e.g. Veasey v. Abbott*, 830 F.3d 216, 248 n.39 (5th Cir. 2016) (declining to read into *Crawford* the principle that the State may burden voters “so long as it articulates ‘preventing voter fraud’ as one purpose of a restrictive law”). There is no evidence that the signature match requirement has, even once, served to identify or prevent illegal voting. It therefore fails the *Anderson-Burdick* test even on rational basis review.

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<sup>17</sup> *See* Scanlan Depo. 194:14-23 (referencing Scanlan Depo. Ex. 14), 196:6-10 (referencing Scanlan Depo. Ex. 15), 196:18-23 (referencing Scanlan Depo. Ex. 16), *Ex. C*. These three voters' absentee ballot applications and absentee ballots affidavit envelopes can be found at pages 374-75 (Scanlan Depo. Ex. 14 from Tilton), 181-82 (Scanlan Depo. Ex. 15 from Merrimack Ward 1), 105-06 (Scanlan Depo. Ex. 16 from Hudson) of the Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, *Ex. G*.

### III. RSA 659:50(III) Violates Equal Protection

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits states from depriving “any person within its jurisdiction the equal protection of the laws.” “[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104–05 (2000). The Fourteenth Amendment’s equal protection clause guarantees not only “the initial allocation of the franchise”—that is, the right to vote—but also “the manner of its exercise.” *Id.*; see *Wright v. North Carolina*, 787 F.3d 256, 259 (4th Cir. 2015); *Ne. Ohio Coalition for the Homeless v. .*, 696 F.3d 580, 598 (6th Cir. 2012). “This principle ensures that every voter, no matter what district he or she lives in, will have an equal say in electing a representative.” *Daly v. Hunt*, 93 F.3d 1212, 1216 (4th Cir. 1996). Although *Bush* was necessarily “limited to the present circumstances,” *Bush*, 531 U.S. at 109, courts have found its analysis applicable in later challenges to voting systems. See, e.g., *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008); *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002) (holding that plaintiffs had stated an equal protection claim where they alleged that votes in some counties were statistically less likely to be counted than votes in other counties); *Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones*, 213 F. Supp. 2d 1106, 1108–10 (C.D. Cal. 2001) (holding that defendants were not entitled to judgment on the pleadings where plaintiffs alleged that some counties adopted more reliable voting procedures than others in violation of equal protection).

RSA 659:50(III) violates the Fourteenth Amendment's equal protection provisions because the statute is not being—and cannot be—uniformly and consistently applied in New Hampshire. This lack of uniformity is explained in more detail in Part I.B.2 *supra*, which addresses how the challenged statute's lack of process risks an erroneous deprivation of the right to vote. *See* State's Analysis of Absentee Ballots/Scanlan Depo. Ex. 12, Ex. W; Pls.' Analysis of Absentee Ballots with Percentages Added/Scanlan Depo. Ex. 13, Ex. X. Based on the data produced by the State, an absentee ballot is more likely to be counted in some jurisdictions and rejected in others. This leads to arbitrary results where there is greater likelihood in some places that one's vote will not be counted on the same terms as the vote of someone in another location. *See Bush*, 531 U.S. 98 (voting recount violated equal protection where Florida had not shown that its recount procedures include the necessary safeguards, thus allowing for arbitrary results).

#### **IV. RSA 659:50(III) Violates Title II of the Americans with Disabilities Act of 1990**

Title II of the Americans with Disabilities Act guarantees to qualified individuals with disabilities an equal opportunity to access the benefits of the services, programs, or activities of a public entity, and protects such individuals from disability discrimination. 42 U.S.C. § 12132; 28 C.F.R. Part 36. “Disability discrimination claims under Title II may arise in different contexts, which are disparate treatment, discrimination due to the effect of a facially neutral policy, and failure to accommodate a known disability to allow access to a public service.” *Dabilis v. Hillsborough Cty.*, No. 14-CV-371-JD, 2017 WL 1101070, at \*4 (D.N.H. Mar. 23, 2017) (citing *Nunes v. Mass. Dep't of Correction*, 766 F.3d 136, 144–45 (1st Cir. 2014)). “Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.” *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996); *see also id.* at 1484 (“Although Hawaii's

quarantine requirement applies equally to all persons entering the state with a dog, its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others.”); accord U.S. Dep’t of Justice Title II Technical Assistance Manual (“TAM”), <https://www.ada.gov/taman2.html>, at II-3.3000 Equality in participation/benefits (“The foundation of many of the specific requirements in the Department’s regulations is the principle that individuals with disabilities must be provided an equally effective opportunity to participate in or benefit from a public entity’s aids, benefits, and services.”).<sup>18</sup>

Thus, in providing aids, benefits, or services, a public entity may not “[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others,” nor provide qualified individuals with disabilities “an aid, benefit, or service that is not as effective in affording equal opportunity” to gain the same result or benefit as provided to others. 28 C.F.R. § 35.130(b)(1)(ii)-(iii). A public entity may not “utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(3)(i). Nor may a public entity “impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.” 28 C.F.R. § 35.130(b)(8). The rules prohibit “both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny

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<sup>18</sup> TAM at II-3.3000 (“ILLUSTRATION 1: A deaf individual does not receive an equal opportunity to benefit from attending a city council meeting if he or she does not have access to what is said. ILLUSTRATION 2: An individual who uses a wheelchair will not have an equal opportunity to participate in a program if applications must be filed in a second-floor office of a building without an elevator, because he or she would not be able to reach the office. ILLUSTRATION 3: Use of printed information alone is not ‘equally effective’ for individuals with vision impairments who cannot read written material.”).

individuals with disabilities an effective opportunity to participate.” U.S. Dep’t of Justice, 28 C.F.R. Pt. 35, App. B at 688 (2015).

The existence of a state law does not provide a defense to a claim of disability discrimination under Title II of the ADA. *Crowder*, 81 F.3d at 1485 (holding, in an ADA case involving a state law aimed at preventing the spread of rabies, that although “courts will not second-guess the public health and safety decisions of state legislatures, . . . when Congress has passed antidiscrimination laws such as the ADA which require reasonable modifications to public health and safety policies, it is incumbent upon the courts to ensure that the mandate of federal law is achieved”); *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016) (“[T]he suggestion that “the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination . . . cannot be correct. . . . The Supreme Court has held that the ADA’s Title II . . . trumps state regulations that conflict with its requirements.”).<sup>19</sup>

Applying these standards, federal courts have struck down state voting procedures that fail to provide equal access to individuals with disabilities. *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016) (“On the facts before us, we conclude that plaintiffs’ proposed use of the online ballot marking tool is a reasonable modification to Maryland’s absentee voting policies and procedures.”); *Ray v. Franklin Cty. Bd. of Elections*, No. 2:08-CV-1086, 2008 WL

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<sup>19</sup> See also *Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 163 (2d Cir. 2013) (“If all state laws were insulated from Title II’s reasonable modification requirement solely because they were state laws . . . the ADA would be powerless to work any reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and no matter how minimal the costs of doing so.”); *Barber ex rel. Barber v. Col. Dep’t of Revenue*, 562 F.3d 1222, 1232-33 (10th Cir. 2009) (noting that although there was no conflict between state law and the Rehabilitation Act in the case at hand, because “[r]eliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause”); cf. *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) (“[The city defendant] believes that it is compelled to follow the directive from the state, but the Supremacy Clause of the Constitution requires a different order of priority. A discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law.”) (emphases in original).

4966759, at \*6 (S.D. Ohio Nov. 17, 2008) (“Plaintiff and other disabled persons who are confined to their homes and cannot travel to their respective County Board of Elections to correct the deficiencies in their absentee ballots, shall be given reasonable accommodations to do so.”); *Mooneyhan v. Husted*, No. 3:12-CV-379, 2012 WL 5834232, at \*\*4-6 (S.D. Ohio Nov. 16, 2012) (finding that accommodation requested by disabled hospitalized plaintiff was necessary to ensure that Plaintiff had an equal opportunity to exercise her right to vote and it would not have fundamentally altered the nature of the voting process, and granting TRO).<sup>20</sup>

The signature-matching requirement challenged in this matter violates the ADA. This is because individuals with disabilities are more likely to experience variations in their signatures due to their disabilities, and are more likely to use assistance in completing forms. The experience of Plaintiff Mary Saucedo illustrates these problems. Ms. Saucedo was born in 1923 (she is 95) and has been voting since the 1940s when she turned 21. *See* M. Saucedo Depo. 6:8-9, 13:7-13, Ex. E. In the late 1980s, Ms. Saucedo began losing her vision due to macular degeneration. *Id.* at 9:7-9. She has no central vision and relies upon her husband Augustine “Gus” Saucedo to perform various daily tasks. *Id.* at 11:19-12:18. To sign her name, she needs to be manually guided to the spot on the page where she needs to sign. *Id.* at 16:10-16; A. Saucedo Dep. at 16:6-22, Ex. F. Sometimes Mr. Saucedo signs for her because Ms. Saucedo’s signature is not very legible. A. Saucedo Dep. at 16:10-12 (“Well, she tries, but she can’t see well enough so she misses the lines, and it’s not very legible.”), 22:23-23:4, Ex. F; *see also* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities (M.

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<sup>20</sup> *See also Hindel v. Husted*, 875 F.3d 344, 348–49 (6th Cir. 2017) (“[A] state procedural requirement may not excuse a substantive ADA violation. [*Lamone*, 813 F.3d] at 508 (‘The Supreme Court has held that the ADA’s Title II, at least in certain circumstances, represents a valid exercise of 14th Amendment powers, and as such it trumps state regulations that conflict with its requirements.’). ‘Requiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does.’”) (reversing district court’s judgment on the pleadings granted to state defendants on appeal by blind voters) (citation omitted).

Saucedo's Affidavit Envelope showing her shaky signature), at p. 143, Ex. G. Ms. Saucedo regularly votes using an absentee ballot. M. Saucedo Dep. at 15:6-11, Ex. E. She has relied upon her husband to help her complete the application for the absentee ballot, and to vote on the ballot itself. *Id.* at 15:18-16:22; A. Saucedo Dep. at 14:10-16:12, Ex. F. Ms. Saucedo was disenfranchised in the 2016 election by the signature-matching requirement. She received no notice that her ballot was rejected.

Plaintiffs' forensic document examiner and expert Dr. Mohammed further testified that individuals with disabilities, elderly individuals, and individuals who are ill are more likely to have variability in their signatures, and thereby are more likely to be incorrectly excluded by signature-matching schemes such as the one employed by Defendants here. *See* Expert Decl. of L. Mohammed/Mohammed Depo. Ex. 1, at ¶¶ 27, 37, 42, 46-50, Ex. V. Dr. Mohammed explained:

An individual's signatures may vary for myriad reasons, including age, health, native language, and writing conditions. Laypersons' failure to properly account for signature variability leads to erroneous inauthenticity determinations, which are particularly pronounced in populations with greater signature variability, such as elderly, disabled, ill, and non-native English signatories . . . .

[T]he signatures of poorly educated writers, writers for whom English is a second language, elderly writers, disabled writers (discussed in more detail below), and ill writers are more likely to exhibit wide ranges of variation . . . .

[L]aypersons are all the more likely to incorrectly find authentic signatures of poorly educated writers, writers for whom English is a second language, elderly writers, disabled writers, and ill writers to be non-genuine.

*Id.* at ¶¶ 27, 37, 42; *see also id.* at ¶ 36 (listing "myriad reasons" that the same individual's signatures may visually appear different, including changes in the health condition of writer, changes in the physical condition of writer, changes in the mental condition or state of the writer, influence of medications, variation in neuro-muscular coordination, and stress).

Plaintiffs have identified a pattern of disabled voters being disenfranchised based on moderators' determinations that signatures do not match. For example, one woman gave her address as 55 Kent Lane, site of The Huntington at Nashua, a senior living facility. *See* <http://www.silverstoneliving.org/the-huntington-at-nashua>. Plaintiffs' forensic document examiner, Dr. Mohammed, inspected her absentee ballot application and affidavit envelope, and observed that both signatures exhibit tremor and lack of pen control. He found: "The formation of the uppercase "G" in [her last name], at first glance, could be viewed as pictorially dissimilar in both documents. The pictorial dissimilarity may be due simply to normal natural variation in [the voter's] signature style, or due to a disability. However, with only two signatures for inter-comparison, there is no way to tell definitively if the dissimilarity is due to variation (one writer), or a difference (two different writers)." Mohammed Decl. at ¶ 48. Kathryn Rakowski is another disabled voter who was disenfranchised by the signature-matching requirement. *See* M.J. Vien Decl.

Through discovery, Plaintiffs also found that a substantial number of ballots from absentee voters with disabilities were rejected through the signature-match requirement. Based on the absentee ballot applications collected during discovery from 15 municipalities and the Secretary of State's Office (which conducts recounts) in which voters were disenfranchised under RSA 659:50(III), Plaintiffs identified 33 disenfranchised voters with disabilities (out of approximately 167 rejected under this statute) who attempted to vote absentee based on disability but who were rejected based on the signature-matching requirement. Put another way, 20% of these absentee ballots rejected under the signature mismatch statute were from individuals voting due to a disability. *See* Absentee Ballot Applications and Absentee Ballot Affidavit Envelopes Collected from Municipalities, *Ex. G*; Pls.' Chart Re: Disabled Voters, *Ex. H*. A description of

these voters can be found in Part II.A, *supra*.

In 2017, the Legislature made changes to the State's signature-matching process. As amended, RSA 659:50(III) now directs the moderator to check that "[t]he signature on the affidavit appears to be executed by the same person who signed the application, *unless the voter received assistance because the voter is blind or has a disability[.]*" (emphasis added). The new language exempts from the signature match requirement a voter who submits an absentee ballot application or affidavit envelope that indicates that she or he received assistance in completing based on disability (and that includes an attestation from the assistant). The amended law does not exempt a person with a disability who votes absentee and who does not receive effective assistance in completing the ballot based on disability. *See* D. Scanlan Depo. at 200:11-17 ("Q. Does the exemption from the signature match requirement apply to a disabled voter who does not receive assistance in signing the ballots? A. It would only apply if the person doing the assisting signed the affidavit. So the answer is if a disabled voter did not have assistance, the answer is, the statute would not apply to them."), *Ex. C*. Thus, any time a disabled voter executes the affidavit on the ballot envelope without assistance, they are subject to the signature-matching requirement. This means that people with disabilities including Plaintiff Saucedo continue to be at risk for being improperly disenfranchised without notice based on disability-related variations in their signatures, and/or differences created by receiving assistance in completing the application for an absentee ballot.<sup>21</sup>

For these reasons, the challenged law violates the ADA.

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<sup>21</sup> Plaintiff Mary Saucedo can and does execute certain documents herself, and she also receives assistance from her husband in completing documents. She is vulnerable to being disenfranchised in the future should she execute her affidavit without assistance.

## V. Plaintiffs' Are Entitled to a Permanent Injunction

In determining whether to grant 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. 2014) (quoting *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 8 (1st Cir. 2007)). The first factor—success on the merits—predominates in this determination. *See Sindicato Puertorriqueno de Trabajadores v. Fortuno* 699 F.3d 1, 10 (1st Cir. 2012) (“In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis.”). Each criterion is satisfied here.

As explained above, Plaintiffs prevail on the merits. As to the second element, Plaintiffs and members of the public will be irreparably harmed in the absence of a permanent injunction, especially where the State seeks to continue to enforce the law. Any loss of constitutional rights is presumed to be an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Asociación de Educación Privada de Puerto Rico*, 490 F.3d at 21 (applying *Elrod* to irreparable harm component of permanent injunction analysis). Indeed, courts routinely deem restrictions on fundamental voting rights irreparable injury. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *see, e.g., Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). This is because “once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law.” *League of Women Voters of N.C.*, 769 F.3d at 247. If the State is permitted to continue enforcing the law, Plaintiffs and

others who are similarly situated will continue to have their constitutional rights and statutory rights under the ADA violated.

As to the third element, Plaintiffs' hardships if the injunction is not granted outweigh the State's interests if the injunction is granted. Absent relief from this Court, Plaintiffs will continue to have their constitutional and statutory rights violated. As Plaintiff Thomas Fitzpatrick testified, he is "absent from New Hampton on certain weekdays, including during elections," which requires him to vote by absentee ballot. T. Fitzpatrick Decl. ¶ 9. The same is true of Mary Saucedo, who plans to vote by absentee ballot in the future. *See* M. Saucedo Dep. at 23:15-17, *Ex. E*. Thus, the challenged law is imposing and will continue to impose irreparable harm on Plaintiffs. In contrast, the State will not suffer any hardship if the injunction is granted, especially where it still has the ability to investigate and prosecute vote fraud in New Hampshire. Thus, the balance of hardships weighs in favor of Plaintiffs.

Finally, the granting of a permanent injunction will benefit the public interest. It is in the public's interest to protect constitutional rights. *See Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988) ("obviously, should the statute be unconstitutional, the public interest would be adversely affected by denial of [] an injunction.").<sup>22</sup> Granting a permanent injunction in favor of Plaintiffs would protect sacred voting rights principles, as well as significant statutory rights under the ADA. Thus, the public interest is best served by the granting of the injunction.

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<sup>22</sup> By definition, "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." *Husted*, 697 F.3d at 437; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (The public has a "strong interest in exercising the fundamental political right to vote." (citations omitted)); *League of Women Voters of N.C.*, 769 F.3d at 248 ("The election laws in North Carolina prior to House Bill 589's enactment encouraged participation by qualified voters. But the challenged House Bill 589 provisions stripped them away. The public interest thus weighs heavily in Plaintiffs' favor."). And "upholding constitutional rights serves the public interest." *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

Respectfully submitted,

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By and through their attorneys affiliated with the  
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**CERTIFICATE OF SERVICE**

I, Gilles Bissonnette, hereby certify that a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

*/s/ Gilles Bissonnette* \_\_\_\_\_  
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