

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2014-0558

Annemarie E. Guare, et al.

v.

State of New Hampshire

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APPEAL PURSUANT TO NEW HAMPSHIRE SUPREME COURT RULE 7 FROM A  
JUDGMENT OF THE STRAFFORD SUPERIOR COURT

**APPELLEES' BRIEF**

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Fifteen minutes of oral argument requested,  
*William E. Christie, Esq. to argue*

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TEXT OF RELEVANT AUTHORITY

**N.H. Const., Part I, Art. 11 (Elections and Elective Franchises):**

All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile.

**Voter Registration Form, as amended in RSA 654:7, IV (Voter Registration; Voter Registration Form) by Senate Bill 318:**

In declaring New Hampshire as my domicile, *I am subject to the laws of the state of New Hampshire which apply to all residents*, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire's driver's license within 60 days of becoming a resident.

(emphasis added).

**RSA 654:12, V(d) (Determining Qualifications of Applicant) (Letter Requirement Imposed by Senate Bill 318):**

Within 90 days of each election, the secretary of state shall cause a list of persons executing domicile affidavits and sworn statements on the general election day voter

registration form since the prior election to be forwarded to the attorney general and the division of motor vehicles. The secretary of state shall send a letter to each such person informing him or her of a driver's obligation to obtain a New Hampshire driver's license within 60 days of becoming a New Hampshire resident. The letter shall be mailed within 60 days after the election, except that if the election is a state primary election, the letter shall be mailed 60 days after the general election, and if the election is a regularly scheduled municipal election, the letter shall be mailed by the July 1 or January 1 next following the election. The secretary of state shall mark the envelope with instructions to the United States Post Office not to forward the letter and to provide address correction information.

(emphasis added)

**RSA 654:1, I (Voter; Office Holder):**

Every inhabitant of the state, having a single established domicile for voting purposes, being a citizen of the United States, of the age provided for in Article 11 of Part First of the Constitution of New Hampshire, shall have a right at any meeting or election, to vote in the town, ward or unincorporated place in which he or she is domiciled. An inhabitant's domicile for voting purposes is that one place where a person, more than any other place, has established a physical presence and manifest an intent to maintain a single continuous presence for domestic, social and civil purposes relevant to participating in democratic self-government. A person has the right to change domicile at any time, however a mere intention to change domicile in the future does not, of itself, terminate an established domicile before the person actually moves.

(emphasis added)

**RSA 21:6 (Resident; Inhabitant):**

A resident or inhabitant or both of this state and of any city, town or other political subdivision of this state shall be a person who is domiciled or has a place of abode or both in this state and in any city, town or other political subdivision of this state, *and* who has, through all of his actions, demonstrated a current intent to designate that place or adobe as his principal place of physical presence for the indefinite future to the exclusion of all others.

(emphasis added)

## QUESTIONS PRESENTED

1. Was the Superior Court correct when it, pursuant to Part I, Article 11 of the New Hampshire Constitution, applied strict scrutiny to the subject language in the voter registration form promulgated by RSA 654:7, IV because such language imposes a severe “threat to the fundamental right to vote”?

State’s Add. 3-7.

2. Was the Superior Court correct when it, pursuant to Part I, Article 11 of the New Hampshire Constitution, permanently enjoined the subject language in the voter registration form promulgated by RSA 654:7, IV because such language is a “confusing and unreasonable description of the law”?

State’s Add. 8-10.

3. Was the Superior Court correct when it, pursuant to Part I, Article 11 of the New Hampshire Constitution, permanently enjoined the subject language in the voter registration form promulgated by RSA 654:7, IV on the ground that it is “unduly restrictive and/or unreasonable as applied to the State’s three purported interests” identified to justify the form’s language?

State’s Add. 8-10.

## STATEMENT OF THE CASE AND THE FACTS<sup>1</sup>

This case concerns a 2012 law amending New Hampshire’s voter registration form that, as two Superior Court judges have held, imposes a severe burden on the right to vote under Part I, Article 11 of the New Hampshire Constitution by, at best, confusingly suggesting—and, at worst, inaccurately requiring—that those “domiciled” in New Hampshire for voting purposes must meet the separate (and different) legal definition of “resident,” including the requirement for residents to register one’s vehicle in New Hampshire and obtain a New Hampshire’s driver’s license within sixty (60) days of registering to vote. In short, under this voter registration form

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<sup>1</sup> The State’s brief contains no recitation of the undisputed factual record considered by the Superior Court when granting Petitioners’ motion for summary judgment and denying the State’s cross-motion for summary judgment. Additionally, in its Appendix, the State does not provide this Court with the operative Second Amended Petition or full summary judgment record. In order to ensure this Court has the complete record relied upon by the Superior Court, Petitioners submit a separate two-volume appendix containing the relevant record below under Supreme Court Rule 17(1). The facts set forth herein are derived from this record, and express time frames referenced are as of the date of Petitioners’ motion for summary judgment unless otherwise stated.

language, it is suggested to voters that they must pay money to the state through motor vehicle fees in order to vote. As the Superior Court correctly concluded, such language poses a “threat to the fundamental right to vote,” is a “confusing and unreasonable description of the law,” “is not reasonably necessary to advance any interest the State has set forth,” and fails strict scrutiny review. Whether such language is confusing, legally inaccurate, or both, it is unconstitutional under Part I, Article 11, and the Superior Court’s decision should be affirmed.

### **I. Procedural History**

In June 2012, the New Hampshire Legislature, over Governor John Lynch’s veto, enacted Senate Bill 318 (“SB 318”), amending the language of the standard voter registration form to require any person, including individuals domiciled in New Hampshire who are not New Hampshire residents, to execute a declaration stating, in relevant part:

In declaring New Hampshire my domicile, *I am subject to the laws of the State of New Hampshire which apply to all residents*, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire driver’s license within 60 days of becoming a resident.

RSA 654:7, IV (as amended by 2012 Session Laws ch. 285) (emphasis added).

In September 2012, Petitioners filed a Verified Petition for Preliminary Injunction, Declaratory Injunction, and Final Injunctive Relief challenging this voter registration form language as unconstitutional. The current petitioners are, and the original petitioners were, several students enrolled in college in New Hampshire who are domiciled in New Hampshire because they live in this state, but are not legal “residents” of the state under RSA 21:6.<sup>2</sup> Under long standing New Hampshire law, a person’s eligibility to vote is determined by his or her “domicile,” not by whether the person is viewed as a “resident.” *See Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972) (three-judge court rejecting a previous attempt by New

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<sup>2</sup> The New Hampshire League of Women’s Voters and a volunteer from the organization are also named petitioners in this case.



Hampshire to restrict student voting by limiting voting eligibility to those who had an intention to remain in New Hampshire for the “indefinite future”—a standard currently imposed in determining residency). Relying on this precedent, Petitioners argued that, after several failed attempts in 2012 to impose an unconstitutional residency requirement on voting, the legislature adopted language in the voter registration form that blurred the concepts of domicile and residency and misstated the law in violation of the right to vote protected under Part 1, Article 11 of the New Hampshire Constitution. Petitioners argued that the form was inaccurate and confusing because an individual domiciled in New Hampshire (and therefore eligible to vote), but who is not a legal resident, is not required to pay money to the state by obtaining a New Hampshire driver’s license and vehicle registration as stated in the voter registration form adopted by SB 318. As a result, these confusing and untrue statements have an unconstitutional impact on whether a person domiciled in New Hampshire decides to register to vote.

Following a hearing and a submission of written information by the State, on September 24, 2012, the Superior Court (Lewis, J.) agreed, issuing a preliminary injunction striking the offending paragraph from the voter registration form. *See* Petitioners’ Appendix (“Pet. App.”) 149-58. Applying the strict scrutiny standard used by this Court in *Akins v. Sec. of State*, 154 N.H. 67 (2006), the Court labeled the offending paragraph an “inaccurate and confusing expression of the law.”<sup>3</sup> Following the filing of a Motion for Reconsideration by the State, the Superior Court held a further hearing and, on October 5, 2012, denied the Motion, except with regard to the statement on the Secretary of State’s website.

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<sup>3</sup> The Court also ordered the Secretary of State to re-issue the voter registration form without the offending paragraph, notify every New Hampshire Town and City that the re-issued voter registration form must be used forthwith in registering new voters, and add to its website by October 1, 2012 information regarding driver licenses and car registration. The portion of the order regarding the website was rescinded on reconsideration, and, accordingly, Petitioners did not seek such relief in their subsequent 2014 motion for summary judgment and do not seek such relief here.

On October 1, 2012, this Court accepted the State's Petition for Expedited Original Jurisdiction in the Supreme Court. The State also filed an Emergency Motion for Stay, which this Court denied on October 9, 2012. On October 26, 2012, this Court denied the State's Motion for Reconsideration.

In early 2014, the parties filed cross motions for summary judgment after fully developing an evidentiary record that included, among other things, the deposition testimony of Petitioners and Secretary of State William Gardner, the legislative history of SB 318, the public statements of sponsors and supporters of the bill, and Governor Lynch's veto statement. A hearing was held on May 20, 2014 before a different judge than who issued the preliminary injunction. On July 24, 2014, the Superior Court (Tucker, J.) issued a new order that, again applying strict scrutiny under *Akins v. Sec. of State*, 154 N.H. 67 (2006), granted Petitioners' motion for summary judgment in its entirety, made the preliminary injunction permanent, and conclusively found the offending language to be "a confusing and unreasonable description of the law." This timely appeal followed.

## **II. The Petitioners**

When she became a petitioner in this matter, Petitioner Annemarie E. Guare was 19 years old and living in Durham, New Hampshire. *See* Pet. App. 206, 208 (Deposition of Annemarie E. Guare ("Guare Depo.") at 5:21-22; 16:17-21). She moved to Durham in August 2012, when she came from Maine to attend the University of New Hampshire. *See id.* at 206-208 (6:8-9; 10:4-8; 14:6-7). She was a sophomore majoring in political science. *Id.* at 207 (10:13-14; 14:6-7). Since Ms. Guare came to New Hampshire, she has lived in this state for approximately 8 months out of the year. *Id.* at 210 (24:13-16). She and her family pay approximately \$22,000 (including loans) of the nearly \$40,000 annual UNH tuition price. *Id.* at 211 (26:15-28:1). She participates in a

number of community activities in New Hampshire, and works here. *Id.* at 207, 212 (10:17-22; 32:3-16). In addition, she engages in substantial commerce in New Hampshire, including dining at restaurants. *See id.* at 210-211 (24:20-26:11). She has a Maine driver's license. *Id.* at 207 (12:3-6).

Ms. Guare does not intend to remain in New Hampshire after she graduates in December 2015, and therefore she cannot be considered a resident of New Hampshire under RSA 21:6. As she testified at deposition, she will "probably . . . take a couple years off" after graduation "and then go to law school and hopefully get a job." Pet. App. 207 (Guare Depo. at 11:16-22). She has not "really thought about" her plans for the "couple years" following her undergraduate studies. *Id.* However, she anticipates leaving New Hampshire after graduation. *Id.* (11:23-12:2).

At the time of her February 2014 deposition, Ms. Guare intended to vote in New Hampshire in the 2014 general election because she lives here, but had not yet registered to vote in this state. *Id.* at 208-09 (14:13-18; 16:13-16; 17:7-13). She finds the affidavit language promulgated by SB 318 to be confusing. *Id.* at 209, 213 (20:16-21; 38:2-39:13). As she testified, the language "confuses me because it seems to me that they're using the word domicile and resident interchangeably. I don't understand what rules would apply to me as a domicile or resident because I'm not a legal resident of New Hampshire." *Id.* at 209-10 (20:16-21).

Petitioner Cody Blesedell was 19 years old and living in Durham, New Hampshire at the time he became a petitioner in this case. *See* Pet. App. 217-220 (Deposition of Cody Blesedell ("Blesedell Depo.") at 6:7-11, 20-23). He has lived in Durham since August 2012, when he came from Massachusetts to attend the University of New Hampshire. *See id.* at 217, 219, 223 (7:17; 29:10-17; 6:7-8, 16-19). Mr. Blesedell was a sophomore interested in justice studies. *Id.* at 217-18 (10:22-23; 7:16-17). Since he came to New Hampshire, he has lived in this state for

approximately 8 months out of the year. *See id.* at 223 (29:14-17). He calls New Hampshire his “home.” *Id.* at 217 (7:7-13). He and his family pay, excluding loans that will need to be repaid, “about a third” (or approximately \$13,000) of the nearly \$40,000 annual UNH tuition price. *Id.* at 224-25 (44:7-45:7). He participates in a number of community activities in New Hampshire. *Id.* at 219 (13:15-18). He also works at UNH. *Id.* at 218-19 (11:23-13:14). In addition, he engages in substantial commerce in New Hampshire, including dining at restaurants. *See id.* 224, 227 (41:17-43:8; 57:4-12). He does not participate in recreational activities in Massachusetts. *Id.* at 218 (11:6-8). He has a Massachusetts driver’s license, and a motorcycle that is registered there. *Id.* at 219 (14:8-11, 17-22).

Mr. Blesedell does not intend to remain in New Hampshire after graduation in May 2016, and therefore he cannot be considered a resident of New Hampshire under RSA 21:6. *Id.* at 220 (18:8-14). He will likely move back to Massachusetts to “[h]opefully work in law enforcement.” *Id.* At the time of his February 2014 deposition, he intended to vote in New Hampshire in the 2014 general election because he lives in New Hampshire and considers it “home,” but had not yet registered to vote in this state. *Id.* at 219-220 (16:20-17:6; 19:3-5). He finds the amended voter registration form required by SB 318 to be confusing. *Id.* at 222 (25:15-26:17). As Mr. Blesedell testified at deposition, he is confused by the language stating “including laws requiring a driver to register a motor vehicle and apply for a New Hampshire’s driver’s license.” *Id.* (26:4-11). As he explained, “I have to abide by all the laws of the [New Hampshire] residents, but I am not sure if I have to get a driver’s license in New Hampshire and register my motorcycle here in order to vote in New Hampshire.” *Id.* (26:12-17); *see also id.* at 226 (51:9-15).

When he became a petitioner in this case, Petitioner Garret Healey was 21 years old and living in an apartment in Dover, New Hampshire where he paid rent 12 months out of the year.

Pet. App. 230, 233, 241 (Garret Healey Deposition (“Healey Depo.”) at 4:8-9; 17:12-13; 52:13-15). As of his February 2014 deposition, he had lived in New Hampshire since August 2010, when he came from Massachusetts in order to attend the University of New Hampshire. *See id.* at 230 (4:12-16). He was majoring in mathematics, and is also a musician. He expected to graduate in May 2014. *Id.* at 231-32 (14:5-8; 9:10-21). Since he came to New Hampshire, he lived in this state for approximately 8 months out of the year. *Id.* at 232, 234-35 (16:9-14; 24:23-25:3). He called New Hampshire his “home.” *Id.* at 232, 234 (16:11-14; 24:16-22). He and his family have paid some of the nearly \$40,000 annual UNH tuition price. *Id.* at 234 (22:17-23:20). He has a Massachusetts driver’s license. *Id.* at 233 (17:1-5).

As explained during his February 2014 deposition, Mr. Healey participated in a number of community activities in New Hampshire, including UNH music groups and a mathematics honor society. *Id.* at 231, 238 (9:10-21; 11:15-22; 39:4-40:23). He engaged in substantial commerce in New Hampshire, including dining at restaurants. *See id.* 239 (43:16-44:13).

As also explained during his February 2014 deposition, Mr. Healey did not intend to remain in New Hampshire indefinitely after graduation in May 2014, and therefore cannot be considered a resident of New Hampshire under RSA 21:6. *Id.* at 237 (33:21-34:1); *see also id.* (35:6-8). As he testified, he is “a little unsure” about what he will be doing after graduation. *Id.* at 232 (14:9-15). He is “considering trying to get a job related to music and trying that out for a few years. And if that doesn’t work out, [he will] start looking for math jobs. But [he is] not sure about the specifics.” *Id.* Given this uncertainty, he did not know if he would be staying in New Hampshire following graduation. *Id.* (14:16-21).

As of his February 2014 deposition, Mr. Healey was registered to vote in New Hampshire, and he voted in this state in November 2012 because he lived here at the time of the

election and “wanted to vote where [his] home was.” *Id.* at 233-34 (18:2-4; 24:16-22). He intended to vote in New Hampshire in the upcoming 2014 general election if he was still living in New Hampshire at the time of the election, though he was “not completely sure” he will be living in New Hampshire at that time. *See id.* 236 (29:20-30:23). He finds the language in the amended voter registration form required by SB 318 to be confusing. Indeed, he testified that, if the language meant that one had to be a New Hampshire resident in order to vote, then this form would directly impact him even though he has already registered to vote here because he is not a New Hampshire resident. *Id.* at 240 (47:23-48:6) (“Well, it would impact me because I don’t consider myself a resident [of New Hampshire] but I do consider myself domiciled [in New Hampshire], so it’s a little confusing. I just don’t know if I would be able to agree to that [language added to the form].”).<sup>4</sup>

Petitioner Joan Ashwell lived in Durham, New Hampshire. Pet. App. 244 (Affidavit of Joan Ashwell (“Ashwell Aff.”) ¶ 1). She is a volunteer with Petitioner New Hampshire League of Women Voters (“League”) as the Election Law Specialist. *See id.* (¶ 2). As a member of the League, Ms. Ashwell works to educate voters to ensure they have correct information, and that everyone eligible to vote is able to cast their ballot. *Id.* (¶ 7). Ms. Ashwell was uncertain as to

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<sup>4</sup> The State does not contest standing as to Petitioners Guare, Blesedell, or Healey. The State agrees that Ms. Guare, Mr. Blesedell and Mr. Healey were eligible to vote in New Hampshire because they were domiciled in this state and therefore further agree that they were not required to obtain New Hampshire driver’s licenses or register their vehicles in New Hampshire because they are not residents of this state. In any event, it is clear that they each have standing to challenge the voter registration form required by SB 318 because (i) they each are “domiciled” in New Hampshire under RSA 654:1, I, and (ii) have testified under oath that they are confused as to whether SB 318 imposes additional obligations on them to vote, including obligations that apply to New Hampshire “residents.” Each of these petitioners (i) lives in New Hampshire more than any other place, (ii) participates in community and school activities in the Durham area, and (iii) pays money to the State through UNH tuition payments. *See Every v. Supervisors of Madison Checklist*, 124 N.H. 824, 828 (1984) (where plaintiff and his wife spent approximately 220 days per year in a New Hampshire town, owned a home in that town near which they and their family attended church, participated extensively in sports activities in New Hampshire, were active members of a property owners association in the town, and had a son attending school in New Hampshire, plaintiff was “domiciled” in New Hampshire under RSA 654:1, I.). Indeed, these three petitioners clearly are “in every meaningful sense members of [the] New Hampshire political communit[y]” and therefore cannot constitutionally be prohibited from voting in this state. *See Newburger v. Peterson*, 344 F. Supp. 559, 563 (D.N.H. 1972).

whether a student should be advised to register their car or obtain a New Hampshire driver's license if they choose to cast their ballot in New Hampshire in light of the amended voter registration form required by SB 318. *Id.* (¶ 11). As she testified by affidavit, the language contained within the new voter registration form conflicts with other state laws and appears to violate established law, thus making it impossible to educate students and others with accurate information as to New Hampshire voting requirements during elections. *Id.* (¶¶ 8-11).

### III. Part I, Article 11 of the New Hampshire Constitution, as Codified at RSA 654:1

Part I, Article 11 of the New Hampshire Constitution states, in relevant part, “[a]ll elections are to be free, and every inhabitant of the state 18 years of age and upwards shall have an equal right to vote in any election.” N.H. Const. p. I. art. 11. “Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile.” *Id.*

This fundamental right is incorporated into the laws describing who is eligible to vote in New Hampshire and recognizes crucial differences in the definitions of “domicile” for voting purposes and “resident.” For example, RSA 654:1, I states:

Every inhabitant of the state, having a single established domicile for voting purposes, being a citizen of the United States, of the age provided for in Article 11 of Part First of the Constitution of New Hampshire, shall have a right at any meeting or election, to vote in the town, ward or unincorporated place in which he or she is domiciled. *An inhabitant's domicile for voting purposes is that one place where a person, more than any other place, has established a physical presence and manifest an intent to maintain a single continuous presence for domestic, social and civil purposes relevant to participating in democratic self-government.* A person has the right to change domicile at any time, however a mere intention to change domicile in the future does not, of itself, terminate an established domicile before the person actually moves.

RSA 654:1, I (emphasis added). New Hampshire law explicitly permits students attending school here to choose New Hampshire as their voting domicile. RSA 654:1, I-a. However, the definition of “resident” is different. RSA 21:6 states:

A resident or inhabitant or both of this state and of any city, town or other political subdivision of this state shall be a person who is domiciled or has a place of abode or both in this state and in any city, town or other political subdivision of this state, and who has, through all of his actions, demonstrated a current intent to designate that place or adobe as his principal place of physical presence for the indefinite future to the exclusion of all others.

RSA 21:6 (emphasis added).

As the State agrees, the law governing eligibility to vote does not require voters to be legal “residents” of the state as defined in RSA 21:6. *See* State’s Br. at 8. Unlike a “resident,” a New Hampshire voter need not have a “current intent” to maintain his “principal place of physical presence” here for the “indefinite future” in order to be considered “domiciled” in New Hampshire. *See* RSA 654:1, I; Pet. App. 201-02 (Deposition of William Gardner (“Gardner Depo.”) at 92-93).

#### **IV. The Purported Justifications of Senate Bill 318**

The legislature enacted SB 318 after several failed attempts to impose a residency requirement on voting in New Hampshire. *See, e.g.,* Pet. App. 517-526 (SB 318-FN – As Introduced (2012)) (including as “Analysis” that “[t]his bill . . . . Establishes that a claim of domicile for voting purposes shall be conclusive of residence for all legal purposes,” and modifying the voter registration form to include the offending paragraph); Pet. App. 527-29 (HB 1354 – As Introduced (2012)) (proposed amendment to RSA 654:1, I: “A person’s claim of domicile for voting purposes shall [not] be conclusive of the person’s residence for [any] all other legal [purpose] purposes.”); Pet. App. 530-533 (HB 1478 – As Introduced (2012)) (proposed amendment to RSA 654:1, to add new paragraph III: “A person who declares an address in a New Hampshire town or ward as his or her domicile for voting purposes shall be deemed to have established his or her residence for motor vehicle law purposes at that address.”). Each of these attempts to link domicile for voting purposes with residency failed, yet the



offending paragraph originally introduced as part of these attempts was included in a final bill enacted into law.

SB 318 passed over Governor Lynch's veto. In his veto message, Governor Lynch stated that the offending paragraph uses "the terms 'domicile' and 'resident' in a manner that suggests that they are interchangeable, even though these terms have different, distinct meanings and legal implications." See Pet. App. 534-36 (Governor's Veto Message Regarding SB 318). Governor Lynch also noted, "[t]he New Hampshire City and Town Clerks Association is strongly opposed to SB 318 and has urged me to veto it." *Id.* The Governor further expressed his concern that SB 318 would cause confusion among voters and the supervisors of the checklist and was violative of the constitutional right to vote. *Id.*

After this suit was filed in Superior Court, supporters of the bill claimed that the intent behind the offending language was to impose on New Hampshire voters the requirements and obligations of legal residency. As Senator Peter Bragdon explained in an editorial in the *Union Leader* on September 17, 2012, the purpose of the new language was to "inform[] individuals who move here from another state and register to vote that they are also required to obtain a New Hampshire driver's license and register their car here (if they have a driver's license or own a car)." Pet. App. 255 (Senator Peter Bragdon, "Another View: Let's stop the drive-by voting in New Hampshire," *Union Leader*, Sept. 17, 2012) (emphasis added). Senate Majority Leader Jeb Bradley also was quoted in the *Concord Monitor* as stating that "[i]f there's not the residency requirement [to voting], then what's to prevent somebody who may be on the rolls in another state from voting in another state by absentee?" See Pet. App. 259 (Molly A.K. Connors, "NHCLU suit challenges election law," *Concord Monitor*, Sept. 13, 2012) (emphasis added). Secretary Gardner, himself, told the *Concord Monitor* that "[i]f you're voting, you're not just

voting for president, you're voting for those individuals who are going to make decisions on how you're going to live. . . . It means that you register your car here, you get your driver's license here." *Id.* at 260 (emphasis added). Similarly, the then-Speaker of the House, William O'Brien—purportedly on behalf of the New Hampshire House of Representatives—sought to intervene in this lawsuit, specifically arguing that SB 318 did, in fact, require voting registrants to be deemed residents, thus mandating all voters to register their cars in New Hampshire and obtain New Hampshire driver's licenses. Pet. App. 141-48 (Emergency Motion to Intervene of N.H. House through Its Speaker). As Speaker O'Brien contended, the State's position that SB 318 "specifically does not identify [voting] registrants as residents"—which is the State's current position on appeal—"does not reflect the position of the General Court." *Id.* at 143 (¶¶ 3-4). Speaker O'Brien added: "the Superior Court [in granting the Petitioners' motion for a preliminary injunction in September 2012] erred by not construing SB 318 to expand the definition of residency." *Id.* (¶ 4).

Notwithstanding the public statements of sponsors and supporters of the bill, the State, when litigating this matter at the preliminary injunction stage, repeatedly contended that the amended voter registration form language "does not require any voter to register their vehicle in this State and obtain a New Hampshire driver's license in order to vote" and "does not require the voter to swear or affirm that they are a resident." *See* Pet. App. 131, 136 (State's Prelim. Hearing Mem. at 2, 7); Pet. App. at 199, 202-03 (Gardner Depo. at 66, 95-97). While the State continues to embrace this interpretation, *see* State's Br. at 9, the State also adopted an entirely new rationale to justify the law after the preliminary injunction issued. Under this new, *post-hoc* justification, the language in the voter registration form was now necessary to comply with the

Help America Vote Act of 2002 (“HAVA”).<sup>5</sup> This was the case even though (i) HAVA was not referenced in any of the 2012 legislative history of SB 318 or by Governor Lynch in his veto message, (ii) nothing in HAVA actually requires this language in the voter registration form, and (iii) there is no contention (because it would be incorrect) that New Hampshire has not been in compliance with HAVA since 2007 after this registration form language was removed by statute.

In explaining this HAVA justification in discovery, Secretary Gardner contended, among other things, that the offending paragraph was necessary to avoid confusion when “Line 9” was added to the Voter Registration Form in 2003. Pet. App. 193 (Gardner Depo. at 30-31). Line 9 requires a person registering to vote to disclose his/her driver’s license number and state of issuance. *See* Pet. App. 248 (SB 318-FN at page 2); Pet. App. 193 (Gardner Depo. at 30-31). Because Line 9 might require a person to consult an out of state driver’s license when registering to vote, Secretary Gardner believed the offending paragraph was necessary. Pet. App. 193, 516 (Gardner Depo. at 30-35). However, Line 6 of the Form requires a person registering to vote to disclose the “Place last registered to vote.” *See* Pet. App. 248 (SB 318-FN at page 2). Although this question has been in the form since the 1970s and might also require consulting an out of state driver’s license, at no time has the State asserted that the offending paragraph was required to clarify the information requested by Line 6. Pet. App. 194-95 (Gardner Depo. at 37-43).

Moreover, Secretary Gardner has conducted no studies regarding whether the offending paragraph would be more or less confusing for potential voters. *Id.* at 196 (50-52). Secretary Gardner could not cite to a single example of a voter actually confused by Line 9. Nor was there any evidence that the registration form, without the offending paragraph, caused any confusion during the 2012 election—the single largest same day registration in the State’s history with

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<sup>5</sup> Indeed, the State’s preliminary hearing memorandum filed in opposition to Petitioners’ initial preliminary injunction request makes absolutely no reference to HAVA as a justification for the amendment to the voter registration form. *See* Pet. App. 130-140 (State’s Prelim. Hearing Memo.).

approximately 99,000 voters going through the process—or in prior or subsequent years when it was absent (prior to 2003, and from 2007 to the present). In short, there was no evidence in the record that New Hampshire domiciliaries are generally confused about the requirements of being a resident in this state, thereby requiring that these requirements be made clear in, of all places, the affidavit language of a voter registration form that nonresidents may execute in order to vote in New Hampshire.

### SUMMARY OF ARGUMENT

This case concerns a 2012 law amending New Hampshire’s voter registration form—SB 318—that imposes a severe burden on the right to vote under Part I, Article 11 of the New Hampshire Constitution by, at best, confusingly suggesting—and, at worst, inaccurately requiring—that those “domiciled” in New Hampshire for voting purposes must meet the separate (and different) legal definition of “resident.”

New Hampshire law permits all inhabitants with a voting domicile to vote in New Hampshire. RSA 654:1, I. A voting domicile is “that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence....” *Id.* New Hampshire law explicitly permits students attending school here to choose New Hampshire as their voting domicile. RSA 654:1, I-a. However, the legal definition of “resident” is different from the definition of “domicile.” A “resident” is a person “who is domiciled or has a place of abode or both” in New Hampshire” *and* “who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place or physical presence *for the indefinite future* to the exclusion of all others.” RSA 21:6 (emphasis added).

The law governing eligibility to vote does not require voters to be “residents” of the state as defined in RSA 21:6; rather, the parties agree that being domiciled in New Hampshire entitles a citizen to vote. *See* State’s Br. at 8, 9. As accurately explained by the Superior Court:

Simply put, a citizen must be a domiciliary but not necessarily a resident of New Hampshire in order to vote here. The basic difference between the two is that a resident has manifested an intent to remain in New Hampshire for the indefinite future, while a domiciliary does not necessarily intend to remain in New Hampshire indefinitely. When a person becomes a resident of New Hampshire, the person must, among other things, obtain a New Hampshire driver’s license and vehicle registration. *See* RSA 261:45; RSA 263:35 (2004). These requirements do not apply to those solely domiciled in New Hampshire.

State’s Add. at 6.

As recognized by the Superior Court, the difference between resident and domicile “is most illustrated by three of the petitioners in this case who are currently enrolled in the University of New Hampshire.” *Id.* Each of the student petitioners holds an out-of-state driver’s license, but spends more time in New Hampshire than any other state. *Id.* at 6-7. None of the student petitioners expressed an intent to stay in New Hampshire after graduation, but testified they wished to vote in New Hampshire while enrolled in school because they live in this state. *Id.* at 7. Each of the student petitioners is domiciled in New Hampshire, but none are residents. *Id.* The State does not dispute that the student petitioners are entitled to vote in New Hampshire. The parties also agree that the language in the voter registration form does not change the definition of domicile for voting purposes and, therefore, does not change who is eligible to vote in New Hampshire. *Id.* As a result, the State concedes that the student petitioners are not required to register their motor vehicle or obtain a New Hampshire driver’s license because they are not legal residents as defined under RSA 21:6.

At the summary judgment stage, the State attempted to justify the offending language on three grounds: (1) an interest in helping New Hampshire comply with the Help America Vote

Act of 2002 (“HAVA”); (2) an interest in ensuring payment of all applicable fees and taxes; and (3) an interest in avoiding confusion among voters with out-of-state-driver’s licenses.<sup>6</sup> *Id.* at 8. In support of its position, the State claimed that the language merely informed voters of substantive laws contained in other statutes and notified domiciled persons registering to vote that, if at some unspecified future date, they became residents, they would be subject to the state’s residency laws including the requirement to obtain a New Hampshire driver’s license and register their vehicle within 60 days of becoming a resident. *Id.* at 7, 9. The State raises this same interpretation on appeal. *See* State’s Br. at 7.

The State’s reading continues to ignore the registration form’s plain text and the obvious confusion it creates in, contrary to New Hampshire law, conflating domicile and residency criteria. The form’s language states conclusively and broadly that, “[i]n declaring New Hampshire as my domicile, I am subject to the laws of the state of New Hampshire which apply to all resident ....” (emphasis added). The impression created by this language on registrants who are not legal technicians—whether deliberate by the legislature or the product of imprecise drafting—is obvious: to vote, one must comply with all rules in New Hampshire applying to residents, including motor vehicle obligations. Petitioners themselves testified that they found the form confusing because it uses the words domicile and resident interchangeably and suggests they would have to obtain a New Hampshire driver’s license and vehicle registration if they registered to vote. This testimony is not in dispute.

The Superior Court agreed and correctly rejected the State’s interpretation for three reasons. First, because the language on the voter registration form could cause a domiciliary to choose not to register to vote—thereby creating a “threat to the fundamental right to vote”—the Court correctly applied a strict scrutiny level of review under *Akins v. Sec. of State*, 154 N.H. 67

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<sup>6</sup> As discussed, *infra*, the legislative history did not cite or consider any of these interests when passing SB 318.

(2006). State’s Add. at 7. Second, in applying strict scrutiny review, the Court correctly rejected the State’s textual arguments and instead adopted Petitioners’ view that the form was an inaccurate and confusing statement of the law:

A critical component missing from the subject language is any explanation that domicile and residency are not the same. The language is susceptible of being read quite reasonably to mean that by registering to vote, the person must obtain a New Hampshire driver’s license and vehicle registration. That reasonable implication of the subject language is a misstatement of the law. Most voters are not legal technicians and should not need to be in order to understand the registration form. The court finds that the statute is a confusing and unreasonable description of the law.

*Id.* at 9 (emphasis added). Finally, the Court correctly held the form was “unduly restrictive and /or unreasonable as applied to the State’s three purported interests.” *Id.* at 9. As the Court explained, the language is not necessary to ensure payment of requires fees and taxes, is not required by HAVA and “adds to rather than detracts from the confusion regarding voters with out-of-state driver’s licenses.” *Id.* at 9-10.

Each of the Court’s findings was supported by an undisputed factual record and was fully consistent with prior precedent establishing the eligibility and right to vote in the State of New Hampshire. Accordingly, the order below should be affirmed.

## ARGUMENT

### I. Standard of Review

It is the role of the New Hampshire Supreme Court to interpret the State Constitution and to resolve disputes arising under it. *Atkins v. Sec’y of State*, 154 N.H. 67, 70 (2006) (citation omitted). Whether a statute is unconstitutional is a question of law, reviewed *de novo*. *Id.* The Court will presume the statute to be constitutional but may declare it invalid upon inescapable grounds. *Id.*

The right to vote is fundamental under both the Federal and State Constitutions. *E.g.*, *Newburger v. Peterson*, 344 F. Supp. 559, 560 (D.N.H. 1972 (three-judge court)); *Akins*, 154 at 71 (“[T]he right to vote is fundamental”); N.H. Const. Pt. I, Art. 11. When an election law imposes “‘severe’ restrictions” on voters’ rights, the regulation must withstand strict scrutiny to be constitutional.” *Atkins*, 154 N.H. at 72 (quotation omitted). Such regulations must “be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.” *Id.* at 73 (quotation omitted).

When reviewing the Superior Court’s summary judgment ruling, the Supreme Court considers the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. *Rivera v. Liberty Mut. Fire Ins. Co.*, 163 N.H. 603, 606 (2012). A grant of summary judgment should be affirmed where no genuine issue of material fact is present, and the moving party is entitled to judgment as a matter of law. *Id.* The Superior Court’s application of the law to the facts is reviewed *de novo*. *Id.*

**II. The Superior Court Correctly Applied Strict Scrutiny Because The Voter Registration Form Confusingly Conflates Domicile and Residency Principles, Thereby Imposing a Severe Burden on the Right to Vote.**

The right to vote is fundamental under both the Federal and State Constitutions, and the statute at issue subjects that right to severe restrictions by dissuading otherwise eligible voters from registering to vote. *See e.g.*, *Newburger*, 344 F. Supp. 559 at 560; *Akins*, 154 N.H. at 71; N.H. Const. Pt. I, Art. 11. The State contends that the Court may apply a rational basis test when considering the constitutionality of the form because its language “is entirely consistent with New Hampshire law” and therefore is “reasonable and nondiscriminatory.” *See* State’s Br. at 6. The Superior Court correctly rejected this argument, holding that the language imposes a “severe” burden that triggers strict scrutiny review.



In *Atkins*, this Court reaffirmed that the right to vote is fundamental under Part I, Article 11 of the New Hampshire Constitution. 154 N.H. at 71 (citing *McGraw v. Exeter Region Coop. Sch. Dist.*, 145 N.H. 709, 713 (2001)); State’s Add. 4. “[G]enerally, when governmental action impinges upon a fundamental right, such matters are entitled to review under strict judicial scrutiny.” *Atkins*, 154 N.H. at 71 (citing *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 472 (1997)); State’s Add. 4. Simply because the right to vote is enshrined in Part I, Article 11 as “fundamental does not mean that any impingement upon that right triggers strict scrutiny.” *Atkins*, 154 at 71. Adopting principles of federal law, the *Atkins* Court held “when the election law at issue subjects the plaintiff’s rights to ‘severe’ restrictions, the regulation must withstand strict scrutiny to be constitutional.” *Id.* at 72 (citing *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992)); State’s Add. 4. “When the election law imposes only ‘reasonable, nondiscriminatory restrictions’ on the plaintiff’s rights, then ‘the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Atkins*, 154 at 72 (quoting *Burdick*, 504 U.S. at 434).

In *Atkins*, the plaintiffs challenged a law regulating ordering of candidates for elective office on the ballot. *Id.* at 68. Under the law as it then existed, candidates of the party that received the highest vote totals combined in the prior election were listed first within each box as it appeared on the ballot. *Id.* Candidates were then arranged alphabetically by surname within each party. *Id.* Citing evidence regarding the advantage the so-called primacy effect can give candidates listed higher on the ballot over candidate listed lower on the ballot, this Court applied strict scrutiny and determined:

The ordering of parties on a ballot based upon votes in the prior election and the alphabetization of candidates are not ‘reasonable, nondiscriminatory restrictions,’ because these restrictions discriminate against candidates running in minority parties and against candidates whose surnames do not begin with letters located near the beginning of the alphabet.

*Id.* at 73.

In this matter, the Superior Court held that strict scrutiny was appropriate because the “threat to the fundamental right to vote here is at least as acute as the danger that alphabetically listing of candidates had on the right to be elected in *Atkins*.” State’s Add. 7. In reaching this threshold determination, the Court undertook a succinct analysis that relied upon both the statutory scheme and the undisputed factual record. Specifically, the Court noted the parties agree “that a citizen need not be a resident of New Hampshire in order to vote in this state” and “that being a domiciliary of New Hampshire entitles a citizen to vote here.” State’s Add. 5. Accordingly, “a citizen must be a domiciliary but not necessarily a resident of New Hampshire to vote here.” *Id.* at 6. The Court also understood the differences between domicile and resident and the impact these differences have on a citizen’s legal status:

The basic difference between the two is that a resident has manifested an intent to remain in New Hampshire for the indefinite future, while a domiciliary does not necessarily intend to remain in New Hampshire indefinitely. When a person becomes a resident of New Hampshire, the person must, among other things, obtain a New Hampshire driver’s license and vehicle registration. *See* RSA 261:45; RSA 263:35 (2004). These requirements do not apply to those solely domiciled in New Hampshire.

*Id.* The Court then correctly determined that the each of petitioners are domiciled in New Hampshire but are not legal residents: they are enrolled at the University of New Hampshire, have out of state driver’s licenses, spend more time in New Hampshire than any other state, and do not intend to remain in New Hampshire after graduation, but intend to vote in New Hampshire while domiciled here, etc. *Id.* at 6-7. As a result, the petitioners were entitled to vote in New Hampshire elections. *Id.* at 7.

As the Court noted, the parties also agreed that the offending language does not change the definition of domicile for voting purposes. Nevertheless, the Court explained that, even if the State’s position that the language was “informational as it only informs the voter of substantive

laws contained in other statutes” was correct, the language could still be viewed as “misleading, confusing, or untrue.” The Court explained:

Still, misleading, confusing, or untrue statements of the law on the registration form may have a significant impact on whether a domiciliary decides to register to vote in the first instance. If, by reading the information on the form a domiciliary chooses not to register to vote, the form has directly caused a citizen to forego a fundamental right. The threat to the fundamental right to vote here is at least as acute as the danger that alphabetical listing of candidates had on the right to be elected in *Atkins*.

*Id.*

As the Court correctly explained, the legally inaccurate implication of this registration form language is that voters must comply with all residency rules, including the obligation to obtain a New Hampshire driver’s license and register a motor vehicle in New Hampshire. There could be no more “severe” restriction on a voter’s right than one that prevents him or her, by requiring payment, from even registering to vote. *See Atkins*, 154 N.H. at 71-73 (holding that severe restrictions on voters’ rights are subject to strict scrutiny). Application of strict scrutiny review is also required by the ruling of the three-judge panel in *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972). As the *Newburger* Court explained in striking down as unconstitutional a state law that required a residency “permanent or indefinite intention to stay” standard in order to register to vote: “[W]e cannot see that a requirement of permanent or indefinite intention to stay in one place is relevant to responsible citizenship. Or, to state it legally, the state has not shown that the indefinite intention requirement is necessary to serve a compelling interest.” 344 F. Supp. at 563. Indeed, such a requirement “forces persons”—like Petitioners in this case—“who are in every meaningful sense members of New Hampshire political communities to vote in communities elsewhere which they have long departed and with whose affairs they are no longer concerned, if indeed the former community still recognizes the right.” *Id.* The State’s brief ignores *Newburger* entirely.

The un rebutted factual record also fully supports the Superior Court’s conclusion that the language will be viewed as “misleading, confusing, or untrue,” thereby imposing a severe burden on the right to vote. Each of the Petitioners testified they were confused by the language on the form. Pet. App. 209, 213 (Guare Depo. at 20:16-21; 38:2-39:13); 222, 226 (Blesedell Depo. at 26:4-17; 51:9-15); 240 (Healey Depo. at 47:23-48:6). As Petitioners all explained, they would be uncomfortable swearing to the form with this language because they simply do not understand the language. Pet. App. 213 (Guare Depo. at 51:9-15); 226 (Blesedell Depo. at 51:9-15); 240 (Healey Depo. at 38:3-6). Similarly, the League of Woman Voters presented evidence that the form interfered with educating voters and advising students and other registrants whether they were required to register their car or obtain a New Hampshire driver’s license if they registered to vote in New Hampshire. Pet. App. 244 (Ashwell Aff. ¶¶ 8-11). All of this evidence of voter confusion was unchallenged by the State below.

Additionally, testimony and statements of state actors revealed additional confusion regarding the impact of the language on the voter registration form—confusion which creates a chill on the right to vote. Contrary to the position taken by the State in this litigation, sponsors and supporters of the bill have made repeated public statements that the law imposes a residency requirements on voters. Pet. App. 255 (Senator Peter Bragdon *Union Leader* article); 259 (Sen. Bragdon quotation in *Concord Monitor* article); 141-48 (Emergency Motion to Intervene of N.H. House through Its Speaker). The Secretary of State made similar public comments. Pet. App. 260 (Secretary Gardner quotation in *Concord Monitor* article). Although Secretary Gardner ultimately testified that a person registering to vote needed to be domiciled in New Hampshire and need not be a resident, *see* Pet. App. 201-22 (Gardner Depo. at 92-93), he initially made public statements and initially testified that to establish domicile for voting purposes, one needed

to be a New Hampshire resident. *Id.* 199-200 (Gardner Depo. at 67:6-9; 67:20-68:5; 68:23-69:1); 260 (Molly A.K. Connors, “NHCLU suit challenges election law,” *Concord Monitor*, Sept. 13, 2012). In addition to the un rebutted testimony of Petitioners, there can be no greater evidence of the confusion caused by the offending paragraph and the impact on the right to vote, than the fact that the Secretary of State, the Attorney General’s Office, and the politicians in the legislature cannot even agree as to what the language in the voter registration form even means. Because such confusion will undoubtedly create a chilling effect on the right to vote and deter eligible voters, the registration form language places a severe burden on the right to vote triggering strict scrutiny.

**III. Regardless of the Standard Applied, the Superior Court Correctly Struck Down the Language in the Voter Registration Form Because the State Has No Interest, Let Alone a Compelling One, In Misleading and Confusing Voters.**

To comply with strict judicial scrutiny, the governmental restriction must be “justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose.” *Atkins*, 154 N.H. at 73 (quoting *Follansbee v. Plymouth Dist. Ct.*, 151 N.H. 365, 367 (2004)). The State’s justification must be “neither unduly restrictive nor unreasonable.” *In re Christopher K*, 155 N.H. 219, 226 (2007) (quoting *Seabrook Police Assoc. v. Town of Seabrook*, 138 N.H. 177, 179 (1993)). The latter prong of the state test “is similar to the federal narrowly tailored requirement.” *In re Christopher K*, 155 N.H. at 226.

Petitioners do not dispute that the State has a general interest in informing individuals about the criteria required to vote. However, the State does not have an interest—let alone a compelling interest—in providing inaccurate and confusing information that has the effect of dissuading domiciliaries from exercising the fundamental right to vote. As the Superior Court explained in holding that SB 318 failed strict scrutiny:

A critical component missing from the subject language is any explanation that domicile and residency are not the same. The language is susceptible of being read quite reasonably to mean that by registering to vote, the person must obtain a New Hampshire driver's license and vehicle registration. That reasonable implication of the subject language is a misstatement of the law. Most voters are not legal technicians and should not need to be in order to understand the registration form. The court finds that the statute is a confusing and unreasonable description of the law.

State's Add. 9 (emphasis added). As explained below, the Superior Court was correct.

**A. The Language Unreasonably And Inaccurately Describes The Law**

As the Superior Court correctly held, the affirmation in the offending paragraph is an unreasonable and inaccurate statement of the law. The State contends that the offending paragraph is not inaccurate because it does not actually impose residency obligations on voters and instead merely informs domiciled persons registering to vote that, if at some unspecified future date they became residents, they would be subject to the state's residency laws, including the requirement to obtain a New Hampshire driver's license and register their vehicle within 60 days of becoming a resident. State's Add. at 7, 9; State's Br. at 6. This reading, however, continues to ignore the registration form's plain text which, contrary to New Hampshire law, conflates domicile and residency criteria. The form's language states conclusively and broadly that, "[i]n declaring New Hampshire as my domicile, I am subject to the laws of the state of New Hampshire which apply to all residents ...." (emphasis added). The impression created by this language on registrants who are not experts in statutory interpretation or the nuances of New Hampshire law—whether deliberate by the legislature or the product of imprecise drafting—is obvious: to vote, one must comply with all rules in New Hampshire applying to residents, including motor vehicle obligations. Such a suggestion would be, as all sides agree, contrary to state law.

Indeed, as the Court explained in *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972), the use of legal residency as a voting criteria would disenfranchise eligible voters:

[Under an “indefinite intention to remain” residency requirement], New Hampshire excludes from the franchise a student candid enough to say that he intends to move on after graduation, a newly-arrived executive with a firm intention to retire to his Florida cottage at age 65, a hospital intern or resident with a career plan that gives him two or three years in New Hampshire, a construction worker on a long but time-limited job, an industrial or government trainee working up a precise career ladder, a research contractor on a project with a deadline, a city manager hired for a term, a military person on a term of duty, a hospital patient with a hoped-for goal of discharge. On the other hand, those persons who are less precise in their planning or less confident that their plans will be realized at a time certain are allowed to vote. It is impossible for us to see how such people would possess any greater knowledge, intelligence, commitment, or responsibility than those with more precise time schedules.

*Id.* at 563. SB 318’s equating of “domicile” with legal residency rules is just as unconstitutional today as it was over four decades ago when the *Newburger* Court examined such a voting criteria using a strict scrutiny standard.

In an effort to save language for its clear inaccuracy, the State grasps onto the form’s subsequent language, which states “*including* laws requiring a driver to register a motor vehicle and apply for a New Hampshire driver’s license within 60 days *of becoming a resident.*” See State’s Br. at 6. But this added phrase neither alleviates the form’s confusion nor cure its legal inaccuracy for two reasons. First, this added language continues to conflate the definition of domicile and residency. Second, this “including ... becoming a resident” language is simply listed as an illustrative example and does nothing to textually limit the breadth and scope of the form’s preceding declaration that, in order to vote, a voter must swear that they are “subject to the laws of the state of New Hampshire which apply to all residents.”

#### **B. The Language Confusingly Describes The Law**

Even if the State is correct that the language does not change the law and is merely informational, the offending paragraph is, at the very least, confusing. As explained above, it

creates the appearance to a reasonable person that a voter is (unconstitutionally) required to meet the definition of a “resident” in order to register to vote. Petitioners themselves testified that they found the form confusing because it uses the words domicile and resident interchangeably and seems to suggest they would have to obtain a New Hampshire driver’s license and vehicle registration if they registered to vote. Again, this testimony is undisputed.

Further highlighting the confusion inherent with the form's language, the legislative intent in changing this language was, contrary to the interpretation proffered by the State here, to unconstitutionally require those domiciled in New Hampshire to comply with residency rules as a condition of exercising their fundamental right to vote. For example, as set forth in the 2012 legislative history, bills were introduced in both the Senate and the House with the purpose of making a claim of domicile for voting purposes “conclusive” of residence for all other purposes. *See, e.g.*, Pet. App. 517-526 (SB 318-FN – As Introduced (2012) (including as “Analysis” that “[t]his bill . . . . Establishes that a claim of domicile for voting purposes shall be conclusive of residence for all legal purposes,” and modifying the voter registration form to include the offending paragraph)); Pet. App. 527-529 (HB 1354 – As Introduced (2012) (proposed amendment to RSA 654:1, I: “A person’s claim of domicile for voting purposes shall [~~not~~] be conclusive of the person’s residence for [~~any~~] all other legal [~~purpose~~] purposes.”); Pet. App. 530-33 (HB 1478 – As Introduced (2012) (proposed amendment to RSA 654:1, to add new paragraph III: “A person who declares an address in a New Hampshire town or ward as his or her domicile for voting purposes shall be deemed to have established his or her residence for motor vehicle law purposes at that address.”). Each of these attempts to link domicile for voting purposes with residency failed, yet the offending paragraph originally introduced as part of these attempts was included in a final bill enacted into law. As Governor Lynch explained in his veto



message, SB 318 uses “the terms ‘domicile’ and ‘resident’ in a manner that suggests that they are interchangeable, even though these terms have different, distinct meanings and legal implications” See Pet. App. 534-36 (Governor’s Veto Message Regarding SB 318). He added that SB 318 would cause confusion among voters and the supervisors of the checklist and was violative of the constitutional right to vote. *Id.*

If there is any further doubt as to the true intent of SB 318, it is put to rest by the public statements of the sponsors and supporters of the bill. As Senator Peter Bragdon explained in an editorial in the *Union Leader* on September 17, 2012, the purpose of the language was to “inform[] individuals who move here from another state and register to vote that they are also required to obtain a New Hampshire driver’s license and register their car here (if they have a driver’s license or own a car).” Pet. App. 255 (Senator Peter Bragdon *Union Leader* article). Senate Majority Leader Jeb Bradley also was quoted in the *Concord Monitor* as stating that “[i]f there’s not the residency requirement [to voting], then what’s to prevent somebody who may be on the rolls in another state from voting in another state by absentee?” *Id.* at 259 (Sen. Bragdon quotation in *Concord Monitor* article). In the same article, Secretary of State Gardner told the *Concord Monitor* that “[i]f you’re voting, you’re not just voting for president, you’re voting for those individuals who are going to make decisions on how you’re going to live. . . . It means that you register your car here, you get your driver’s license here.” *Id.* at 260 (emphasis added); see also Pet. App. 141-48 (Emergency Motion to Intervene of N.H. House through Its Speaker expressing same legislative intent).

Again, if the State and various political actors who were instrumental in passing SB 318 cannot agree on the scope and meaning of the offending paragraph, then how is a voter, who is not a legal technician, expected to not only understand this language on the voter registration

form, but swear under oath that he or she is qualified to vote? This is the definition of confusion, and this is why, as the Superior Court correctly held, the offending paragraph represents a “confusing and unreasonable description of the law.” And even if this language is designed to—albeit in a confusing and misleading fashion—notify actual resident voters of motor vehicle residency obligations, the State has not provided any justification, let alone an adequate one, for why such notification must occur in, of all places, the affidavit language of a voter registration form that nonresidents are required to execute in order to vote in New Hampshire.

**IV. Applying Strict Scrutiny, The Superior Court Was Correct That None of the State’s Proffered Interests Justify the Law**

At summary judgment, the State proffered three justifications for the law: (1) an interest in helping New Hampshire comply with HAVA; (2) an interest in ensuring payment of all applicable fees and taxes; and (3) an interest in avoiding confusion among voters with an out-of-state driver’s license. State’s Add. 8. On appeal, the State has addressed the first proffered justification concerning HAVA, *see* State’s Br. at 14, thereby waiving the remaining two purported justifications raised below. *See Aubert v. Aubert*, 129 N.H. 422, 428 (1987) (“Arguments not briefed are waived on appeal.”).

At the outset, it should be noted that the legislative history and evidentiary record make clear that none of the legislative players cited these three justifications when the bill was under consideration in 2012. Under strict scrutiny, the State cannot defend the law based upon mere “conceivable,” *post-hoc* rationalizations set forth in a legal brief, or with reference to testimony regarding different legislation that preceded SB 318 by almost a decade; rather, the State must rely on the actual purpose espoused by the legislature when SB 318 was considered in 2012. *Community Resources for Justice, Inc. v. City of Manchester*, 154 N.H. 748, 762 (2007) (in applying strict scrutiny, “the government may not rely upon justifications that are hypothesized

or ‘invented *post hoc* in response to litigation,’ nor upon ‘overbroad generalizations.’”). Thus, because strict scrutiny applies—not rational basis review—the State’s telling contention that this Court need not inquire into the legislature’s actual purposes, and may instead “accept any legitimate interest articulated by the State’s representatives in litigation,” is incorrect. *See* State’s Br. at 11 (citing rational basis cases). For this reason alone, the State’s *post hoc* justifications for the law should be rejected and the Superior Court’s decision should be affirmed. In any event, the Superior Court evaluated each of the three justification proffered by the State, and concluded that “the subject language is unduly restrictive and/or unreasonable as applied to the State’s three purported interests.” State’s Add. 9. As the Court explained, the language was not required by HAVA, was not necessary to ensure payment of required fees and taxes, and “adds to rather than detracts from the confusion regarding voters with out-of-state driver’s licenses.” *Id.* at 9-10. Each of the Superior Court’s findings is fully supported by the record in this matter.

**A. The Language Is Not Necessary To Comply With HAVA**

The State relies on certain accepts of HAVA and the legislative history of HB 627, a statute that was passed in 2003—nine (9) years before the law at issue. Although this argument was first presented as an afterthought, it has since evolved into the State’s main argument, and Secretary Gardner exclusively relied upon it in deposition to justify the offending paragraph. However, the State has not and cannot claim that HAVA was even considered by the legislature when passing SB 318 in 2012. Of course, these 2003 documents offered by the State do not elucidate the legislature’s purpose for enacting Senate Bill 318, some nine years later. Thus, the State has offered no competent evidence as to the State’s actual purpose in enacting the offending paragraph in 2012.

In any event, the nine-year-old sources upon which the State has relied fail to support its argument. HAVA was passed to, *inter alia*, ensure that voters could register to vote without needing to show identification, if they had already identified themselves to a state or federal agency. This is achieved by HAVA requiring that the “database of the state motor vehicle authority” be made available to the official managing the statewide voter registration list, so that a registrant’s driver’s license number can be matched with this database, if they have a “current and valid driver’s license” number. 42 U.S.C. § 15483(a)(5)(A)(i)(I) & (a)(5)(B)(i). If a registrant does not have a valid license driver’s license number, he or she may provide the last four digits of his/her social security number on the voter registration form, and if he or she does not have either number, then the state is required to give him or her a unique identifier. *Id.* § 15483(a)(5)(A)(i)(II), (a)(5)(A)(ii), (b). HAVA cannot be read to require that non-resident New Hampshire voters who are licensed to drive obtain a New Hampshire driver’s license.

With regard to the 2003 legislative history of House Bill 627, the testimony makes clear that this bill made two separate and distinct sets of changes to state law: changes to bring it into compliance with HAVA, and changes to state residency and domicile laws. *See* Pet. App. 261-65 (Apr. 30, 2003 Memo from AAG Bud Fitch). Furthermore, the testimony notes that a “person can use . . . a driver’s license from another state to prove his or her identity.” *Id.* 264 (Page 3). This phrase would not have been used if the intention was to remove the ability of persons to register to vote in New Hampshire while holding an out of state driver’s license. Finally, the testimony includes a concern of the Committee that House Bill 627 should “not be so restrictive [as] to discourage voter registration, especially among college students.” Pet. App. 266-269.

Nevertheless, the State contends that the offending paragraph was required to comply with four requirements of HAVA:

- That the State implement a single centralized voter registration list;
- That this list be coordinated with other agency databases within the State;
- That officials in charge of elections and motor vehicles “enter into an agreement to match information” between databases “to the extent required to enable each such authority to verify the accuracy of the information provided on applications for voter registration”; and
- That voter registration forms include the applicant’s driver’s license number, or if none, the last four digits of the applicant’s social security number.

*See State’s Br.* at 12-13.

The State has not (because it cannot) explain how the inclusion of the offending paragraph in the voter registration form is required to implement any of these provisions. The first three HAVA provisions referenced make no prescriptions regarding the contents of state voter registration forms, and so cannot be read to require that the offending paragraph be placed in New Hampshire’s voter registration form. HAVA’s requirement that the states have the ability to engage in matching between the voter registration form and motor vehicle databases does not remotely require the language in the offending paragraph. Indeed, under HAVA, New Hampshire law, and the United States Constitution, one need not even have a New Hampshire driver’s license in order to vote in New Hampshire<sup>7</sup> and, thus, it strains credulity to understand why, as the State contends, HAVA somehow requires this “notification” language. Simply put, HAVA’s requirement that states have the ability to engage in matching between the voter registration and motor vehicle databases cannot be read, even indirectly, to mandate that the State require those registering to vote in New Hampshire who have out-of-state driver’s licenses or motor vehicle registrations to (i) obtain New Hampshire driver’s licenses or (ii) be notified of the requirement to do so if they become New Hampshire residents.<sup>8</sup>

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<sup>7</sup> For example, non-resident New Hampshire voters who are domiciled here for voting purposes, but licensed to drive elsewhere, need not obtain a New Hampshire’s driver’s license and will, therefore, be including information from their out of state driver’s license in completing Line 9 of the New Hampshire voter registration form.

<sup>8</sup> The State as relies on its Election Procedure Manual and RSA 654:12, which provide that a New Hampshire driver’s license and/or vehicle registration can be used as evidence that an individual is domiciled in New

While the fourth HAVA provision referenced does contain a mandate concerning the contents of state voter registration forms, this provision was satisfied by New Hampshire's addition of line 9 to the form starting in 2003. Appropriately, this line simply requests the information the state is required by HAVA to obtain. It asks for the would-be registrant's driver's license number, "STATE (If not NH)," and provides, "IF NO VALID DRIVER'S LICENSE, PROVIDE THE LAST FOUR DIGITS OF YOUR SOCIAL SECURITY NUMBER." *See* Pet. App. 214 (Guare Depo. at Ex. 1, New Hampshire Voter Registration Form (Aug. 2012)). Indeed, in asking for "STATE (If not NH)," line 9 specifically contemplates that one completing the Voter Registration Form might have an out of state driver's license. The State has offered no reason—because it cannot—why this provision should also be read to require the placement of the offending paragraph on the Voter Registration Form.

Finally, the State correctly notes that such language has been absent from the voter registration form since July 1, 2007, except for the brief interlude between the effective date of Senate Bill 318, August 26, 2012, and the implementation of the Preliminary Injunction Order in this case, shortly following the Order's issuance on September 24, 2012. *See* State's Br. at 13. However, the State has not contended—again, because it cannot—that New Hampshire has failed to be in compliance with HAVA from 2007 to the present. Indeed, as Secretary Gardner testified at deposition, approximately 99,000 people registered to vote on election day in 2012 using a registration form that omitted the offending paragraph—the largest same-day registration in New Hampshire history. Pet. App. 197 (Gardner Depo. at 57). The State offers no evidence

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Hampshire, reflecting a shared "statutory link" that the State has an interest in highlighting. Petitioners do not dispute that possession of a New Hampshire driver's license and/or vehicle registration may constitute an objective manifestation of intent to be domiciled here. But such documents, while sufficient, are not *necessary or required* to establish domicile status. Under state law, there are individuals who are domiciled in New Hampshire but who properly possess out of state driver's licenses and/or vehicle registrations. It is those individuals, including Petitioners and those similarly situated, whose rights are impacted by the offending paragraph. For them, the supposed "statutory link" is not applicable.

that the absence of the offending paragraph has hindered the efficient administration of elections or interfered with the State's ability to maintain a statewide centralized voter registration database, or that the federal government has alleged, much less concluded, that the State is out of compliance with HAVA now that the offending paragraph is no longer in the form.

**B. The Language Is Not Necessary To Ensure Payment Of Applicable Taxes**

Though the State has waived this justification on appeal, the Superior Court correctly held that “the subject language is no necessary to ensure the payment of required fees and taxes. In fact, if the subject language has the effect of making voting domiciliaries believe they must register their motor vehicles, the subject language may actually cause the collection of more fees than the State would otherwise be entitled to receive.” State’s Add. 9-10. Moreover, both the federal and state constitutions explicitly require that no one be denied the right to vote on the basis of non-payment of taxes. *See* N.H. Const. Pt. 1, Art. 11; U.S. Const., Am. XXIV, § 1. Such an interest cannot be pursued through the voter registration process. Additionally, as the Superior Court held in 2012, these interests “are not at all served by the paragraph at issue” and the language adopted “impermissibly imping[es] upon voting rights.” Pet. App. 154.

**C. The Language Is Not Necessary To Avoid Confusion Among Voters With Out-of-State Driver’s Licenses.**

Finally, though the State has also waived this justification on appeal, the Superior Court correctly held that “the subject language adds to rather than detracts from the confusion regarding voters with out-of-state driver’s licenses.” State’s Add. 10. The unrebutted record in the case established the extent to which the offending paragraph causes (and would cause) confusion and would chill students and other mobile domiciliaries from registering to vote and voting in New Hampshire. *Id.*

The offending paragraph tells prospective voters that they are subject to residency laws, even though non-resident domiciliaries are not subject to such laws. Although Secretary Gardner ultimately testified that a person registering to vote needed to be domiciled in New Hampshire, *see* Pet. App. 201-22 (Gardner Depo. at 92-93), he initially testified that one needed to be a New Hampshire resident to establish domicile for voting purposes. Pet. App. 199-200 (Gardner Depo. at 67:6-9; 67:20-68:5; 68:23-69:1). There can be no greater evidence of the confusion caused by the offending paragraph than the misstatement of the law by the Secretary of State when attempting to justify the language at issue. If the language confuses the Secretary of State's Office, it is clearly confusing to non-resident domiciliaries who are registering to vote in the State of New Hampshire.

The form therefore places false burdens on certain voters in an effort to discourage them from exercising their fundamental right to vote. As the State has conceded, the law modifying the form did not alter the definition of "domicile for voting purposes" in any relevant manner, or "resident" at all, and those domiciliaries who are not residents need not register their cars in New Hampshire or obtain New Hampshire driver's licenses. And, following the September 2012 preliminary injunction order, the new voter registration form has been used without incident in all New Hampshire cities and towns, including through the November 2012, March 2013, November 2013, March 2014, and November 2014 election cycles. Conversely, a reversal of the Superior Court's Orders would restore inaccurate statements of the law to those forms. It would bring about confusion as to the requirements for registering to vote, and would threaten the ability of Petitioners and other mobile domiciliaries to exercise their fundamental right to vote.



## **CONCLUSION**

Because the voter registration form language cannot survive strict scrutiny, this language should be permanently enjoined and the Superior Court's order should be affirmed in its entirety.

## **ORAL ARGUMENT**

The Petitioners request a 15-minute oral argument. Attorney William E. Christie will present oral argument in the case.

Respectfully submitted,

Annemarie Guare, et al.

By Their Attorneys:

Dated: February 20, 2015



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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing Appellees' Brief have been mailed this 20<sup>th</sup> day of February, 2015, to Anne Edwards, Esquire and Stephen LaBonte, Esquire, Civil Bureau, NH Department of Justice, 33 Capitol Street, Concord, NH 03301-6397 and filed with the Clerk in accordance with Rule 26 (2), (3) and (4).



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