THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT

SOUTHERN DISTRICT

No. 226-2022-CV-00233

603 Forward, et al.

v.

David M. Scanlan, et al.

No. 226-2022-CV-00236

Manuel Espitia, Jr., et al.

v.

David Scanlan, et al.

DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING AND RIPENESS

The defendants, David Scanlan, in his official capacity as the New Hampshire Secretary of State, and John Formella, in his official capacity as the New Hampshire Attorney General, by and through counsel, respectfully move to dismiss these consolidated cases for lack of standing and ripeness. In support thereof, the defendants state as follows:

1. On June 17, 2022, plaintiffs 603 Forward, Open Democracy Action, Louise Spencer, Edward R. Friedrich, and Jordan M. Thompson filed a suit related to Senate Bill 418 (SB 418) against the defendants.

2. On June 21, 2022, plaintiffs Manuel Espitia, Jr. and Daniel Weeks filed a suit related to SB 418 against the defendants.

3. On July 28, 2022, this Court granted defendants' assented-to motion to consolidate these two cases.

4. Standing is an issue of subject matter jurisdiction that may be raised at any time and must be decided as a threshold issue before the case may proceed. *Close v. Fisette*, 146 N.H. 480, 483 (2001) ("A challenge to subject matter jurisdiction may be raised at any time during the proceeding, including on appeal, and may not be waived.").

5. The plaintiffs in this case do not have standing for the claims they bring. As such, the State respectfully requests that its standing arguments be resolved in full prior to any further hearings in this matter.

6. "'In evaluating whether a party has standing to sue, [the court] focus[es] on whether the party suffered a legal injury against which the law was designed to protect.'" *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195 (2008) (quoting *Asmussen v. Comm'r, N.H. Dep't of Safety*, 145 N.H. 578, 587 (2000)).

7. "The requirement that a party demonstrate harm to maintain a legal challenge rests upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." *Id.* at 195-96.

8. A lack of legal harm may be shown by reference to the remedy a party seeks. *Id.* at 196. Thus, where the relief a plaintiff seeks is for the benefit of another party, the plaintiff has not suffered any legal harm against which the law was designed to protect and lacks standing. *Id.*

9. The plaintiffs seek relief in this case under RSA 491:22, the declaratory judgment statute. *See* 603 Forward et al. Compl. at ¶ 114-149; Manuel Espitia, Jr. et al. Compl. at ¶ 45.

10. RSA 491:22 imposes additional standing requirements beyond those imposed by the New Hampshire Constitution itself.

11. "In order to have standing under RSA 491:22, a party must claim 'a present legal or equitable right or title.'" *Avery v. N.H. Dep't of Educ.*, 162 N.H. 604, 607 (2011) (quoting RSA 491:22, I).

12. "'A party will not be heard to question the validity of a law, or any part of it [under RSA 491:22], unless he shows that some right of his is impaired or prejudiced thereby.'" *Id.* (quoting *Baer v. N.H. Dep't of Educ.*, 160 N.H. 727, 730 (2010)).

13. "Simply stated, a party has standing to bring a declaratory judgment action where the party alleges an impairment of a present legal or equitable right arising out of the application of the rule or statute under which the action has occurred." *Id.* (emphasis added).

14. Moreover, an individual must demonstrate more than the mere fact that she may be subject to the challenged statute at some point in the future to establish standing under RSA 491:22.

15. Rather, she must demonstrate that she actually engaged the statutory process and, as a result, her legal rights were impaired or prejudiced. *Asmussen*, 145 N.H. at 587-88.

16. Thus, in *Asmussen*, the New Hampshire Supreme Court held that five out of six intervenors demonstrated standing to sue under RSA 491:22 because: (1) they were subject to the challenged statute; and (2) they timely requested a hearing pursuant to the challenged statute. 145 N.H. at 587-88. Accordingly, the New Hampshire Supreme Court held that these five intervenors had standing to challenge the constitutionality of the statutory hearing process because their cases were "not based on the hypothetical application of the ALS statute, but presented an actual controversy between the department and the intervenors adequate to allow the court to render 'an intelligent and useful decision.'" *Id.* (quoting *Salem Coalition for Caution v. Town of Salem*, 121 N.H. 694, 696 (1981)) (emphasis added).

17. The sixth intervenor was denied standing because "his request was denied as untimely." *Id.* at 588. He, therefore, failed to engage the statutory process at issue and could make only a hypothetical challenge to it. *Id.* Accordingly, the sixth intervenor lacked standing under RSA 491:22.

18. The individual plaintiffs here—Louise Spencer, Edward R. Friedrich, Jordan M. Thompson, Manuel Espitia Jr., and Daniel Weeks—do not have standing under *Asmussen* as they are all registered voters and will not be subject to SB 418. *See* 603 Forward et al. Compl. ¶ 15, 17, and 19; Manuel Espitia Jr. et al. Compl. ¶ 3-4.

19. Instead of being subject to the operation of SB 418, the individual plaintiffs complain that they are taxpayers in New Hampshire, are generally concerned about voter registration in New Hampshire, and are "troubled" or "concerned" by the speculated impact SB 418 may have on the timeliness of voting. *See* 603 Forward et al. Compl. ¶ 15-20; Manuel Espitia Jr. et al. Compl. ¶ 3-4.

20. The individual plaintiffs' assertions of harm from the operation of SB 418 are insufficient under *Asmussen* to confer standing on them to seek a declaratory judgment under RSA 491:22. Rather, in order to have standing under *Asmussen*, the individual plaintiffs must demonstrate that they are not only subject to SB 418—that they are (1) election day (2) first time registrants in New Hampshire (3) without a valid photo identification document—but that they have subjected themselves to the registration process or will imminently go through the process under SB 418 and have had their legal rights impaired or prejudiced thereby. Otherwise, they can make only a hypothetical challenge to the statutory process, like the sixth intervenor in *Asmussen*, and cannot show how SB 418 actually impairs or prejudices their rights. *See also Baer*, 160 N.H. at 731 (2010) ("Because the petitioners failed to demonstrate how the waiver

rules impair or prejudice their rights, the trial court properly dismissed this declaratory judgment action for lack of standing.") (emphasis added).

21. As the New Hampshire Supreme Court reiterated, to have standing under RSA 491:22, the individual plaintiffs "'must show that the facts are sufficiently complete, mature, proximate and ripe to place the party in gear with the party's adversary, and thus to warrant the grant of judicial relief.'" *Carlson v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, Inc.*, 170 N.H. 299, 303 (Sept. 21, 2017) (quoting *Duncan v. State*, 166 N.H. 630, 645 (2014)).

22. No allegations have been pled and there is no evidence to show by affidavit or offer of proof that SB 418 has or will interfere with the individual plaintiffs' right to vote in any way. *See Id.* (holding that easement holder lacked standing because there was no evidence of an interference with use or that an interference with use was likely in the future). Instead, the relief they seek is solely for the benefit of other parties, *i.e.*, allegedly harmed, unregistered qualified voters, none of whom are before this Court.

23. Additionally, the individual plaintiffs are not granted standing here based on their status as taxpayers. In 2018, New Hampshire's voters amended Part I, Article 8 of the New Hampshire Constitution permitting "taxpayer standing" even where there was no personal injury *if* plaintiffs show that the State's spending of public funds violates the law.

24. However, the individual plaintiffs are not entitled to standing under the New Hampshire Supreme Court's opinion in *Carrigan v. New Hampshire Department of Health and Human Services*, 174 N.H. 362, 262 A.3d 388 (2021). There, the plaintiff asserted standing under Part 1, Article 8 related to allegations that the Department of Health and Human Services had failed its statutory and constitutional duties based on irresponsible spending decisions. *Id.* at

390. The Court clarified that "plaintiffs with standing under Part I, Article 8 can call on the courts to determine whether a specific act or approval of spending conforms with the law." *Id.* at 395. The Court further held:

> Part I, Article 8, however, does not state that a plaintiff has standing to bring a declaratory judgment action "about spending." The provision's language applies to a specific "governmental action," and does not empower courts to audit a governmental body to determine whether its policy decisions regarding the allocation of resources are prudent or sufficient to comply with legal requirements.

Id.

25. The *Carrigan* Court made clear that a plaintiff relying on Part I, Article 8 to establish standing must challenge a *specific governmental spending* action: "although taxpayer standing is specifically conferred by our constitution, we do not read Part I, Article 8 to confer standing on a plaintiff who challenges governmental spending policies." *Id* at 397.

26. The plaintiffs are challenging the implementation of SB 418, not the legality of its passage. There has not yet been any specific government spending action or indeed even any spending related to SB 418. The legislation's effective date is next year. The Secretary of State has yet to issue any guidance, conduct any trainings, or publicly announce procedures regarding the implementation of the law.

27. It is not a *specific spending action* that the plaintiffs are contesting; it is the legality of a voting law. SB 418 is not an appropriation or authorization statute, and the legislation is not related to government spending. SB 418 is legislation concerning the ballot used by election day first time registrants in New Hampshire without a valid photo identification document.

28. The plaintiffs filed suit after the passage of SB 418 but before its effective date and before any implementation efforts by the Secretary of State's Office. Even if the plaintiffs'

speculative allegations about the burdens of SB 418 are to be believed, their speculation depends on an implementation that fails to address any purported harms. Essentially, the plaintiffs' complaint is based on the possibility that the Secretary of State's Office will read the law and implement it in such a way as to create as-applied injuries at a future date.

29. Part I, Article 8, read with *Carrigan*, does not grant standing to taxpayers for speculative harms on legislation that is not yet in effect, where the responsible public bodies have not yet taken action to implement the legislation, and where no spending on a specific governmental action has occurred. The plaintiffs cannot avail themselves of Part I, Article 8 standing.

30. Accordingly, Louise Spencer, Edward R. Friedrich, Jordan M. Thompson, Manuel Espitia Jr., and Daniel Weeks lack standing to bring a declaratory judgment action under RSA 491:22 on the ground that SB 418 interferes with their right to vote because the asserted interference "that [they seek] to prevent is purely speculative" or under the plaintiffs' status as taxpayers *Id.* Neither *Baer, Asmussen*, or *Carrigan* counsel a different result.

31. 603 Forward and Open Democracy Action also lack standing to maintain this action under RSA 491:22.

32. 603 Forward is a "non-profit, non-partisan organization formed under section 501(c)(4) of the Internal Revenue Code and incorporated under the laws of New Hampshire." *See* 603 Forward et al. Compl. ¶ 9. The organization is involved in policy areas such as public education reform, healthcare access, and voting rights, where it trains volunteers to "submit testimony and advocate on proposed legislation moving through the General Court; staff with the group encourage communities to take collective action; and the organization's staff helps young

people from New Hampshire run for elected office in their home communities." *Id*. 603 Forward also claims:

> SB 418 will create barriers to voting that will threaten the electoral prospects of 603 Forward's trained candidates, making it more difficult for 603 Forward's constituents to elect their preferred candidates and further their shared political purposes. The new law also harms 603 Forward's sophisticated voter education program, which focuses on empowering communities with lower voter engagement in several ways, including through voter registration.

Id.

33. 603 Forward further complains that SB 418 will require the organization to reprint voter registration materials and inform its staff of the affidavit ballot process due to the change in law from SB 418.

34. 603 Forward fails to distinguish how this "injury" of updating educational materials is different than for any other law change in the policy areas of public education, healthcare, and elections. Even more startling is 603 Forward's claim of injury related to candidates to whom it has given training. There, 603 Forward asserts an injury to the organization based on individuals running for office potentially receiving a different number of votes based on the speculation that the narrow class of individuals subject to SB 418 and qualified to vote will be denied their vote and are also likely to disproportionately favor 603 Forward's preferred candidates. Calling this claimed injury "tenuous" may be generous.

35. Open Democracy Action is also a non-profit, non-partisan organization formed under section 501(c)(4) of the Internal Revenue Code. *See* 603 Forward et al. Compl. ¶ 11. The organization's "mission is to bring about and safeguard political equality for the people of New Hampshire, which its founders believe will only happen through an open, accountable, and trusted democratic government 'of, by, and for the people.'" *Id*. In part, it states that it does this through informing prospective voters about voter registration rules, including some individuals

who may fall within the narrow class subject to SB 418—(1) election day (2) first time registrants in New Hampshire (3) without a valid photo identification document. *Id*. ¶ 12.

36. Open Democracy Action makes the conclusory statement that it will have to divert resources from mission critical endeavors to explain the SB 418's "burdensome" requirements to potential voters, and the speculative statement that Open Democracy Action's constituents will have to face longer lines at the polls. *Id*. ¶ 13-14.

37. "[T]o bring a declaratory judgment action, a party is required to meet the standard articulated in RSA 491:22." *Baer*, 160 N.H. at 731.

38. The Court "do[es] not have the authority to circumvent this statutory requirement." *Id.*

39. RSA 491:22 requires 603 Forward and Open Democracy Action to demonstrate that "some legal right of [theirs] is impaired or prejudiced" by SB 418. *Avery*, 162 N.H. at 608.

40. This statutory requirement demands that 603 Forward and Open Democracy Action show more than mere injury to maintain their complaints. *Id.*

41. They are unable to make this showing.

42. 603 Forward and Open Democracy Action do not vote. They do not register to vote. They do not register qualified voters to vote. Their constitutional rights are not at stake in this litigation. They have no legal right to be free of having to routinely manage resources to change or increase their volunteer or educational efforts.

43. They also do not have standing to assert the constitutional rights of others, including their members or individuals with whom they may come into contact related to voting, under the plain language of RSA 491:22. *See Benson v. N.H. Ins. Guar. Ass'n*, 151 N.H. 590, 593 (2004) (explaining the Medical Society lacked standing under RSA 491:22 "as a matter of law"

to maintain a declaratory judgment action on behalf of its members because the Medical Society itself had not asserted a legal or equitable right).

44. The statutory language of RSA 491:22 makes no mention of associational standing, and this Court cannot import language into RSA 491:22 permitting associational standing without rewriting the statute. *See, e.g., Balke v. City of Manchester*, 150 N.H. 69, 73 (2003) ("We will not rewrite the statute; that is the province of the legislature.").

45. Moreover, a review of the relief 603 Forward and Open Democracy Action are seeking reveals the lack of any harm to them: all the causes of action in the complaint seek relief for individuals who are not before this Court. *Libertarian Party of N.H.*, 158 N.H. at 196. 603 Forward and Open Democracy Action's claims are therefore derivative in nature, do not belong to them, and cannot be maintained by them under RSA 491:22.

46. Under such circumstances, 603 Forward and Open Democracy Action lack standing.

47. The plaintiffs in this case are attempting to transform RSA 491:22 into a mechanism for the resolution of hypothetical issues and the airing of generalized grievances.

48. Indeed, the plaintiffs' complaints or affidavits all admit that none of them are in the narrow class of individuals who may register to vote under SB 418—(1) election day (2) first time registrants in New Hampshire (3) without a valid photo identification document—or offer anything other than speculation that they might come into contact with individuals in that narrow class, and that speculated disenfranchisement of qualified voters will reflect back on the plaintiffs so as to injure them.

49. As such, the plaintiffs fail to satisfy the standing principles the New Hampshire Supreme Court has established under RSA 491:22:

> The claims raised in any declaratory judgment action must be definite and concrete touching the legal relations of parties having adverse interests. The action cannot be based on a hypothetical set of facts, and it cannot constitute a request for advice as to future cases. Furthermore, the controversy must be of a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character.

Baer, 160 N.H. at 731 (quoting *Asmussen*, 145 N.H. at 587) (emphasis added).

50. Thus, for all the above reasons, the complaints in this case must be dismissed for lack of standing.

51. Additionally, the realities of the pre-effective date and pre-implementation stage of SB 418 highlight the fact that the plaintiffs' claims are not ripe for adjudication. The Supreme Court of New Hampshire held in *University System of New Hampshire Board of Trustees v. Dorfsman*, 168 N.H. 450 (2015):

> Although we have not adopted a formal test for ripeness, we have found persuasive the two-pronged analysis used by other jurisdictions that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue. With respect to the first prong of the analysis, fitness for judicial review, a claim is fit for decision when: (1) the issues raised are primarily legal; (2) they do not require further factual development; and (3) the challenged action is final. The second prong of the ripeness test requires that the contested action impose an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage.

Id at 455 (internal citations omitted).

52. As it relates to the first prong and as discussed above regarding standing, the plaintiffs filed suit after the passage of SB 418 but before its effective date and before any implementation efforts by the Secretary of State's Office. Even if the plaintiffs' speculative allegations about the burdens of SB 418 are to be believed, their speculation depends on an implementation that fails to address any purported harms. Essentially, the plaintiffs' complaint is based on the possibility that the Secretary of State's Office will read the law and implement it in such a way as to create concrete as-applied injuries at a future date.

53. The plaintiffs' claims fail prong one's component (1) as they rely on unsubstantiated factual claims about the operation of SB 418, not merely its legal operation. The injuries alleged might only occur if the implementing agencies choose an interpretation of the law that manifests those harms—a presumption of bad faith by the implementing authorities.

54. The plaintiffs' claims fail prong one's component (2) as the facts establishing a concrete injury cannot yet be determined due the complaints being filed pre-effective date and pre-implementation.

55. The plaintiffs' claims fail prong one's component (3) as the challenged act, presumably the operation of SB 418 on the first election after its effective date, is not final. Indeed, there is no action yet relative to SB 418 from either of the defendants.

56. The plaintiff's actions here also fail under prong two. As discussed, relative to standing, the contested action (the operation of SB 418) imposes a *de minimus* impact on the plaintiffs that is neither direct nor immediate. For the individual plaintiffs, they feel no impact since they are not subject to SB 418 as they are registered voters. For the organizations, they complain of having to update their educational materials and training in light of SB 418, an action that would appear to apply to any change in law in the policy areas in which they conduct activities, whether they oppose or support the legislation at issue.

57. The United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), described the interaction of standing and how a claimed injury must relate to the legally protected interest:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the

independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.

Id. at 560-61 (cleaned up, internal citations omitted).

58. This articulation of the standing analysis is compelling in the present case. There is no legally protected interest guarding against having to update one's educational materials. There is no legally protected interest guarding against a lower success rate for an organization's preferred electoral candidates. Instead, the plaintiffs are arguing that speculated tangential impacts related to potential impositions on third parties not before the Court from not-yet-implemented legislation are in fact actual concrete injuries that can be redressed by this Court.

59. The actions identified in the complaints—both for the individual plaintiffs and the organizational plaintiffs—are not ripe for adjudication and should be dismissed.

60. Resolution of the standing and ripeness issues is important to the defendants who play a critical role in running the State's elections and in ensuring that local election officials and qualified voters understand the election laws of this State. In the defendants' view, it is therefore critical that the issue of plaintiffs' standing be thoroughly considered and ruled upon before any further proceedings are undertaken in this case.

WHEREFORE, the defendants respectfully request that this honorable Court enter an order:

A. Resolving this joint motion to dismiss for lack of standing and ripeness before any further proceedings in these consolidated cases occur;

B. Dismissing these consolidated cases for lack of standing and ripeness; and

C. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

DAVID SCANLAN,
SECRETARY OF STATE and

JOHN FORMELLA,
ATTORNEY GENERAL

By their attorneys,

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August 26, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted by electronic filing, to all counsel of record.

August 26, 2022

/s/ *Myles Matteson*
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