UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Coalition for Open Democracy, League of Women Voters of New Hampshire, The Forward Foundation, McKenzie Nykamp Taylor, December Rust, Miles Borne, by his next friend Steven Borne, Alexander Muirhead, by his next friend Russell Muirhead, and Lila Muirhead, by her next friend Russell Muirhead, Plaintiffs, vs. David M. Scanlan, in his official capacity as New Hampshire Secretary of State, and John Formella, in his official capacity as New Hampshire Attorney General, Defendants.	Civil Action No. 1:24-cv-00312

PLAINTIFFS' SURREPLY TO DEFENDANTS' MOTION TO DISMISS

I. The Organizational Plaintiffs have standing to challenge HB 1569.

Defendants continue to dispute the Organizational Plaintiffs' standing by disregarding factual allegations and citing cases that ultimately support standing in this case.. The Court should reject this effort.

In their opposition, Plaintiffs urged the Court to follow binding Supreme Court and First Circuit precedent. *See FDA v. All. for Hippocratic Med. ("AHM")*, 602 U.S. 367, 394–95 (2024); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Equal Means Equal v. Ferriero*, 3 F.4th 24, 30 (1st Cir. 2021). Defendants now redirect the Court toward their interpretation of an out-of-circuit decision applying *AHM*, which they did not cite in their opening brief. *See Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165 (9th Cir. 2024). However, they critically misread *Mayes*, and even under that court's analysis, there is no question that the Organizational Plaintiffs have standing to challenge HB 1569.

In *AHM*, the Supreme Court rejected an "expansive theory" under which "all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies." 602 U.S. at 395. Subsequently, the *Mayes* court reconsidered a line of Ninth Circuit cases that relied on "th[at] sort of 'expansive theory'" by "broadly constru[ing] *Havens*" to allow organizations to "spend their way to standing based on vague claims that a policy hampers their mission." *Mayes*, 117 F.4th at 1170.[1] Per *Mayes*, *AHM* "clarified" the distinction between "frustrating an abstract organizational mission" and "direct interference with the organization's core *activities*." *Id.* at 1175. Similarly, *Mayes* distinguished between "spen[ding] resources offsetting policies that harmed . . . then-

[1] The First Circuit had rejected that "expansive theory" prior to *AHM*. *See Equal Means Equal*, 3 F.4th at 30 (rejecting theory that an organization could "adopt [a mission] so that [it] expressed an interest in the subject matter of the case, and then spend its way into having standing").

existing activities," and spending "resources on new activities *in response*" to a law. *Id.* Thus, *Mayes* held that an organization has standing when it "show[s] that a challenged governmental action directly injures the organization's pre-existing core activities and does so *apart* from the plaintiffs' response to that governmental action." *Id.* at 1170 (citing *AHM*, 602 U.S. at 395-36).

The *Mayes* plaintiffs—organizations with a "mission to encourage minority voter registration"—challenged a law directing officials to cancel outdated voter registrations. *Id.* at 1178. They alleged it might "cause voters' current registrations—rather than old, outdated registrations—to be cancelled." *Id.* The court concluded that the organizations lacked standing because the challenged law did not make it any harder to register voters and, thus, had no effect whatsoever on the plaintiffs' "pre-existing activity" of "registering voters." *Id.* at 1180. Rather, "[t]he *only harm* [in *Mayes* was] the potential diversion of resource to remind people of the far-fetched possibility that the registrar of voters may somehow mistakenly or maliciously cancel their new voting registration form if they had earlier registered elsewhere." *Id.* (emphasis added).

In their reply, Defendants continue to incorrectly claim the Organizational Plaintiffs here merely allege "diverted resources" that are "the consequences of Plaintiffs' voluntary responses to HB 1569." Reply at 1-2. Not so. As extensively detailed in Plaintiffs' opposition and Complaint, unlike the law in *Mayes*, HB 1569 perceptibly impairs Plaintiffs' core activities. *See* Opp'n at 7–11, ECF No. 45. For instance, HB 1569's burdensome documentary proof requirements make it substantially harder to register to vote—and outright impossible for some—which directly impairs the Organizational Plaintiffs' ability to provide longstanding voter registration assistance services to their constituencies. *Id.* As to their preexisting voter education services, Plaintiffs are not only "harmed because they will spend resources on education in response to the new law," *Mayes*, 117 F.4th at 1181. Instead, for example, Plaintiffs allege that the ambiguities, complexities, and broad

discretion introduced by HB 1569 prevent them from continuing to provide clear information on how to register to vote, thereby directly impairing their ability to provide effective assistance and education. *See* Opp'n at 9–11. And the drains on Plaintiffs' resources are not due to advocacy against or responses to HB 1569; rather, Plaintiffs must devote resources to counteract HB 1569's impediment on their preexisting services. *See Havens*, 455 U.S. at 379.[2]

Moreover, Defendants' attempts to distinguish post-*AHM* decisions that support Plaintiffs' standing are either unavailing or outright misleading. *See* Reply at 4 n.2. For example, the court in *Caicedo v. DeSantis*, No. 23-cv-2303, 2024 WL 4729160 (M.D. Fla. Nov. 8, 2024), did not deny dismissal on standing grounds because "the defendant did not object to the organization's diversion-of-resources theory," as Defendants insist. Reply at 4 n.2. The *Caicedo* defendant attacked an organization's failure to plead "from where it diverted its resources" *and* to allege "interfere[ence] with [its] core business activities." *Caicedo*, 2024 WL 4729160, at *4. But the court rejected both arguments, citing *AHM* and *Mayes*, and concluding that the state's politically motivated removal of an official "directly affect[ed] and interfere[d] with the organization's core business activities" of "voter registration, education, engagement, and election protection" by "requiring [it] to overcome an increase in voter apathy." *Id.* at *4–5. *Get Loud Arkansas v. Thurston* featured facts that are substantially similar to those alleged here; the court concluded that a rule created registration barriers (prohibiting submission of voter registration applications with digital signatures) and "severely limit[ed]" the ability of nonprofit voter registration organization "to register new voters," which conferred standing under *Havens* and *AHM*. No. 24-CV-512, 2024

[2] Defendants wrongly suggest that an organization lacks standing unless the challenged conduct *completely prevents* it from operating its core activities. *See* Reply at 2 & n.1. To counsel's knowledge, no court has ever set such a high bar for *Havens* standing, and Defendants' authorities certainly do not. *See*, *e.g.*, *Havens*, 455 U.S. at 379 (requiring only "perceptibl[e] impair[ment]"); *Mayes*, 117 F.4th at 1180 (same).

WL 4142754, at *12–13 (W.D. Ark. Sept. 9, 2024). And in *League of Women Voters of Ohio v. LaRose*, the court concluded that a state League avoids the pitfalls in *AHM* when, *inter alia*, it "is not solely an issue-advocacy organization seeking to challenge" [a law], but instead is "a voter-advocacy organization whose core mission is to educate and assist voters." 741 F. Supp. 3d 694, 707 n.3 (N.D. Ohio 2024); *see* Compl. ¶¶ 34-35 (describing LWV-NH's core mission).

II. The Individual Plaintiffs have standing to challenge HB 1569.

Defendants' reply largely re-raises unavailing arguments against individual standing. As Plaintiffs have made abundantly clear, HB 1569 inflicts individualized, concrete injuries redressable by this Court. *See* Opp'n at 14-18. Defendants maintain their strained effort to infuse tenuousness into Plaintiffs Taylor's and Rust's allegations by rewriting the well-pleaded facts. *Compare, e.g.*, Reply at 6 (suggesting that "[t]he Court must . . . speculate . . . *if* Ms. Taylor still has not 'formally updated her U.S. passport'"), *with* Compl. ¶ 48 ("She has not yet formally updated her U.S. passport."). Further, Defendants muse about "good faith" presumptions for election officials but fail to respond to allegations that voters re-registering in a different municipality are nevertheless "routinely required to prove or attest to their citizenship," Compl. ¶¶ 83–84. And they entirely neglect to address official guidance *from Defendant Scanlan* instructing officials to require such registrants "to provide you with proof of citizenship," Opp'n at 15 (quoting Ex. A). Defendants also continue to argue that Plaintiffs Borne and the Muirheads lack a "personal and individual" injury, despite openly admitting that they are among those who, under HB 1569, "must prove citizenship" by presenting specific documentation to register. *See* Reply at 7; *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009) (requiring an individual "to produce photo identification" to participate in the electoral process "is an injury sufficient for standing").

III. Plaintiffs state claims upon which relief may be granted.

Defendants' Rule 12(b)(6) arguments belie a fundamental misunderstanding of the burdens weighed in an *Anderson-Burdick* analysis and the allegations necessary to plead a right-to-vote claim. Defendants double down on the bizarre notion that Plaintiffs fail to state a claim because they invoke the burdens HB 1569 imposes on other voters (who they deem "nonparties") rather than exclusively relying on their own personal burdens. Reply at 9; *see* Mem. in Supp. of Mot. to Dismiss at 30-31, ECF No. 35-1. While *for standing purposes*, a plaintiff must "answer [the] basic question: What's it to you?," *AHM*, 602 U.S. at 379, on *the merits* of a right-to-vote claim, courts must consider the burdens of "the statute's broad application to all . . . voters," including whether it imposes "excessively burdensome requirements" on any class of voters. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008); *see Fish v. Kobach*, 957 F.3d 1105, 1127 (10th Cir. 2020).

Plaintiffs have plausibly alleged that HB 1569 places significant burdens on citizens' right to vote that are not justified by the state's interests. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); Opp'n at 19–20 (detailing allegations of significant burdens). Whether Defendants can ultimately demonstrate that those burdens are in fact justified "requires [them] to come forward with proof." *Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000). "That clinches the matter. The fact-specific nature of the [*Anderson-Burdick*] inquiry obviates a resolution of this case on the basis of the complaint alone." *Id.* (citation omitted).

Defendants' remaining 12(b)(6) arguments are refuted in Plaintiffs' opposition.

IV. Conclusion

For the reasons herein and in the opposition, the Court should deny the motion to dismiss.

Respectfully submitted on this March 14, 2025,

COALITION FOR OPEN DEMOCRACY, LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE, THE FORWARD FOUNDATION, MCKENZIE NYKAMP TAYLOR, DECEMBER RUST, MILES BORNE, BY HIS NEXT FRIEND STEVEN BORNE, ALEXANDER MUIRHEAD, BY HIS NEXT FRIEND RUSSELL MUIRHEAD, AND LILA MUIRHEAD, BY HER NEXT FRIEND RUSSELL MUIRHEAD

By and through their attorneys,

/s/ Henry R. Klementowicz

Henry R. Klementowicz (N.H. Bar No. 21177)
Gilles R. Bissonnette (N.H. Bar No. 265393)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION
18 Low Avenue
Concord, NH 03301
(603) 333-2201
henry@aclu-nh.org
gilles@aclu-nh.org

Jacob van Leer
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, D.C. 20005
(202) 715-0815
jvanleer@aclu.org

Ming Cheung
Clayton Pierce
Sophia Lin Lakin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
mcheung@aclu.org
cpierce@aclu.org
slakin@aclu.org

Geoffrey M. Atkins
John T. Montgomery
Desiree M. Pelletier
ROPES & GRAY LLP
Prudential Tower, 800 Boylston Street
Boston, MA 02199
(617) 951-7000
Geoffrey.Atkins@ropesgray.com
John.Montgomery@ropesgray.com

Desiree.Pelletier@ropesgray.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2025, a copy of the foregoing document was served upon counsel for Plaintiff via electronic mail.

/s/ Henry Klementowicz

Henry R. Klementowicz