

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

NEW HAMPSHIRE YOUTH MOVEMENT,

Plaintiff,

v.

DAVID M. SCANLAN, in his official capacity
as New Hampshire Secretary of State,

Defendant.

Consolidated Cases
Case No. 1:24-cv-00291-SE-TSM

COALITION FOR OPEN DEMOCRACY,
LEAGUE OF WOMEN VOTERS OF NEW
HAMPSHIRE, THE FORWARD
FOUNDATION, McKENZIE NYKAMP
TAYLOR, DECEMBER RUST, MILES
BORNE, A.M., by his next friend Russell
Muirhead, and L.M., by her next friend Russell
Muirhead,

Plaintiffs,

v.

DAVID M. SCANLAN, in his official capacity
as New Hampshire Secretary of State, and
JOHN M. FORMELLA, in his official capacity
as New Hampshire Attorney General,

Defendants.

DEFENDANTS' REQUEST FOR RULINGS OF LAW

NOW COME Defendants New Hampshire Secretary of State David M. Scanlan and New Hampshire Attorney General John M. Formella, each in their official capacities (collectively, the "Defendants"), by and through counsel, the Office of the Attorney General, and respectfully request that the Court make the following Rule 52(a) rulings of law.

INTRODUCTION

Accessibility and reliability have long defined New Hampshire’s election system. Those qualities have animated a highly engaged electorate where voter participation is not the exception—it is the norm. Not surprisingly, New Hampshire consistently ranks among the nation’s leaders in voter turnout. U.S. Election Assistance Comm’n.¹ In 2024, New Hampshire ranked fourth in voter turnout at 75.4%, improving on its top-6 rankings in 2022 and 2020. *Id.* New Hampshire also exceeds the national average in active voter registration among voting-eligible residents, with 91.7% registered. *Id.*² These figures are the product of an election system that encourages full participation while maintaining ballot integrity.

Effective election systems like New Hampshire’s do not make themselves. “Substantial state regulation is a prophylactic that keeps the democratic process from disintegrating into chaos.” *Perez-Guzman v. Gracia*, 346 F.3d 229, 238 (1st Cir. 2003). Transparency is critical to the balance that a competent election scheme must strike, so every eligible voter can register and cast ballots, but only eligible voters’ ballots are counted. New Hampshire is one of a handful of states whose procedures allow for same-day registration and voting at polling locations across the state. New Hampshire pairs that open access with common sense and administratively efficient eligibility verification. Striking this balance is essential to guarantee an election system that is both welcoming and vigilant in protecting the integrity of the ballot.

Plaintiffs challenge two components of New Hampshire’s election framework as facially unconstitutional. First, Plaintiffs allege that requiring registering individuals to prove their citizenship imposes an unconstitutional burden on the right to vote. Second, Plaintiff Open

¹ EAVS Data Interactive (Turnout), available at <https://www.eac.gov/research-and-data/studies-and-reports/eavs-data-interactive> (last visited Mar. 5, 2026).

² EAVS Data Interactive (Active Registrations & CVAP).

Democracy alleges that resolving challenges to a voter's qualifications prior to ballot-casting imposes an unconstitutional burden on the right to vote. Relatedly, Open Democracy alleges that a challenged voter's right to immediate appeal in state court does not afford the challenged voter procedural due process. Plaintiffs attribute the cause of these harms to House Bill 1569's ("HB 1569") repeal of the Qualified Voter Affidavit ("QVA") and the Challenged Voter Affidavit ("CVA").

Plaintiffs cannot prevail because they did not satisfy their burden to establish the essential elements of their claims. *See Clukey v. Town of Camden*, 894 F.3d 25, 33 (1st Cir. 2018). Plaintiffs were required to offer evidence that there is no set of circumstances to which the law could be constitutionally applied. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008). The evidence establishes a plainly constitutional election scheme. Plaintiffs have not named any voting-eligible resident who will not be able to register or cast a ballot in the next election, because QVAs or CVAs have been repealed. Moreover, Plaintiffs have not accounted for state resources that mitigate, if not fully cure, any *de minimis* burden a voter may experience complying with the law. To the extent that any residual burden may exist, those burdens are far outweighed by the state's evidence of important regulatory interests.

Accordingly, Defendants respectfully request that the Court enter the following rulings of law and deny Plaintiffs the relief they seek in each of their active counts, in these consolidated cases. Defendants have simultaneously filed a Request for Findings of Fact, which contains a detailed summary of the facts presented at trial. Defendants incorporate their requested factual findings herein by reference.

ACTIVE CLAIMS SEEKING THE COURT'S RULINGS

On February 9–20, 2026, New Hampshire District Court Chief Judge Samantha D. Elliott presided over a nine-day bench trial in this consolidated action. The lone count in Youth

Movement’s operative Complaint asserts that HB 1569’s repeal of the Qualified Voter Affidavit violates the First and Fourteenth Amendments to the United States Constitution by imposing an undue burden on the right to vote. First Am. Compl., *N.H. Youth Movement v. Scanlan*, No. 1:24-cv-00291-SE-TSM, ECF No. 50, ¶¶ 76-81 (Mar. 18, 2025) (“*YM Compl.*”). Count I of the *Open Democracy* Plaintiffs’ operative Complaint is substantively identical to Youth Movement’s constitutional challenge to HB 1569’s repeal of the Qualified Voter Affidavit. First Am. Compl., *Coalition for Open Democracy, et al. v. Scanlan, et al.*, No. 1:24-cv-00312-SE-TSM, ECF No. 85, ¶¶ 92-99 (Oct. 6, 2025) (“*OD Compl.*”).

In Count II, Plaintiff Open Democracy asserts that HB 1569’s repeal of the Challenged Voter Affidavit violates the First and Fourteenth Amendments by imposing an unjustifiable burden on the right to vote. *OD Compl.* ¶¶ 100-104. In Count III, Plaintiff Open Democracy asserts that HB 1569’s repeal of the Challenged Voter Affidavit violates the Fourteenth Amendment by denying procedural due process to eligible voters. *Id.* ¶¶ 105-116. Plaintiff Open Democracy is the only Plaintiff proceeding on Counts II and III. Order, ECF No. 93 at 13 (July 29, 2025). Each Plaintiff asserts facial constitutional challenges to the foregoing claims.

APPLICABLE LEGAL STANDARDS

Facial constitutional challenges require plaintiffs to demonstrate that “no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quotations and citations omitted). “A facial challenge must fail where the statute has a plainly legitimate sweep.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (quotations and citations omitted). Moreover, a court must not “go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Wash. State Grange v.*

Wash. State Republican Party, 552 U.S. 442, 449-50 (2008) (citing *United States v. Raines*, 362 U.S. 17, 22 (1960)).

Courts apply the *Anderson-Burdick* framework where a facial constitutional challenge alleges that a state law unduly burdens the right to vote. *Libertarian Party v. Gardner*, 638 F.3d 6, 14 (1st Cir. 2011); *accord Coal. for Open Democracy v. Scanlan*, 794 F. Supp. 3d 28, 48 (D.N.H. 2025). *Anderson-Burdick*'s analysis has three successive steps. *Baines v. Dunlap*, 466 F. Supp. 3d 273, 280 (D. Me. 2020) (citing *Libertarian Party of Me. v. Diamond*, 992 F.2d 365, 371 (1st Cir. 1993)). First, a court must weigh the character and magnitude of the asserted injury to voters' rights. *Id.* Second, a court must evaluate the state's interests and justifications for the challenged voting regulation. *Id.* Third, a court must weigh the legitimacy and strength of the state's interests to determine whether the restrictions are constitutionally permissible. *Id.*; *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

A sliding scale determines the applicable level of scrutiny. *Baines*, 466 F. Supp. 3d at 280 (citing *Libertarian Party of Me.*, 992 F.2d at 371).³ Election laws that impose severe burdens on the right to vote are subject to strict scrutiny, where regulations must be narrowly tailored and advance a compelling state interest. *Lyman v. Baker*, 954 F.3d 351, 376 (1st Cir. 2020) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Lesser burdens on the right to vote trigger less exacting review, where the state's important regulatory interests typically suffice to justify reasonable,

³ Defendants acknowledge that under First Circuit precedent, the Court may be bound to follow the sliding-scale approach in its *Anderson-Burdick* analysis. Defendants reserve the right, however, to advocate that the Supreme Court should adopt the approach articulated by the concurrence in *Crawford*, should such an argument be relevant to any appeal.

nondiscriminatory restrictions. *McClure v. Galvin*, 386 F.3d 36, 41 (1st Cir. 2004) (citing *Timmons*, 520 U.S. at 359).

NEW HAMPSHIRE’S RELEVANT ELECTION FRAMEWORK

The Secretary of State is a constitutional officer and New Hampshire’s chief election official. Joint Stip. of Certain Facts, ECF No. 132, ¶ 48. The Secretary sits atop a decentralized election system that assigns significant responsibilities to local election officials in each of the 234 municipalities. Among other things, the office maintains the statewide voter registration database (“SVRS”), organizes and prints ballots, ensures posting of all required signage at polling locations, recruits poll workers, trains election officials, and collects and reports election results. Tr. Day 6 a.m., 12:15-20, Day 9, 13:6-13, 14:5-12; Day 8 p.m., 109:15-110:25, 122:7-123:18. Town and city clerks intake voter registration documents, absentee ballot applications and declarations of candidacy; send out absentee ballots and deliver returned absentee ballots to the moderator; and in general maintain control and storage of all local election equipment. *See generally* RSA 652:14; 654:8. Supervisors of the checklist make final decisions on voter registration and maintain their municipalities’ voter checklist. *See generally* RSA 652:14; 654:11.

A. New Hampshire’s Affidavit System Prior to House Bill 1569

For almost 50 years, New Hampshire has required voter applicants provide documentary proof of their eligibility to vote. RSA 654:12. Prior to HB 1569, however, an applicant could choose to prove identity, age, or citizenship by executing a Qualified Voter Affidavit (“QVA”). *Id.* (amended and repealed Nov. 11, 2024). For almost 15 years, New Hampshire law has required registered voters to present photo identification to obtain a ballot. RSA 659:13. Prior to HB 1569, however, a voter could choose to prove his or her identity, or overcome a challenge to

his or her eligibility, after obtaining a ballot by executing a Challenged Voter Affidavit (“CVA”). *Id.* (amended and repealed Nov. 11, 2024).

Before HB 1569 repealed these affidavits, the law required local election officials to offer applicants, voters, and challenged voters the applicable affidavit forms. *See, e.g.*, Exhibit SS (N.H. Election Procedure Man.) at 1, 84. A voter who checks in to vote without photo identification had to execute a CVA, subject to the same attestation and photograph requirements. *See, e.g., id.* at 31-32. If any voter’s age, citizenship, or domicile eligibility was challenged after receiving a ballot, and if the supervisors of the checklist or moderator ruled that the challenge was “well-grounded,” the challenged person could vote upon executing a CVA. *See, e.g., id.* at 79-80. As with identity CVAs and registration QVAs, a challenged voter had to attest to the truthfulness of his or her affidavit. *See, e.g., id.* at 31-32.

B. Changes to New Hampshire Election Administration After House Bill 1569

House Bill 1569 repealed the affidavit system that permitted voters to self-certify their eligibility and identity through QVAs and CVAs. Ex. 1 (Final Enrolled Version of 2024 NH House Bill 1569). HB 1569 did not change the requirement that applications to vote must be accompanied by a birth certificate, passport, naturalization papers, or other reasonable documentation. *See id.* Passed on August 1, 2025, House Bill 464 changed the process in a few ways. *See* Ex. 3 (Final Enrolled Version of 2025 NH House Bill 464). First, it amended RSA 654:12 to include as proof of citizenship “proof that the applicant was previously or is currently registered to vote in a different town or ward in New Hampshire.” *Id.* Second, it authorized the Secretary of State to link to the SVRS information from the Vital Records Division and Division of Motor Vehicles specifically for the purpose of voter registration, and to make that data available to local election officials. *Id.*

The Vital Records Division subsequently created a free certified copy of a vital records option when requested by voting registrants to prove eligibility. Ex. PP. The Secretary's office connected SVRS to the Vital Records and DMV databases so SVRS users can search for records to verify certain qualifications. Tr. Day 8 a.m., 58:13-19. Additionally, the Secretary's pre-existing HAVA Elections Help Desk and the Attorney General's pre-existing Election Law Unit ("ELU") Election Law Hotline have trained staff with enhanced search capabilities available to conduct SVRS searches to assist voters in proving their eligibility to vote. Tr. Day 8 a.m., 72:17-24; Exs. UU, TT, VV-1.

REQUESTED RULINGS OF LAW

Defendants respectfully request that the Court enter the following four rulings of law. First, New Hampshire's proof of citizenship condition for voter registration is a reasonable and nondiscriminatory condition of voter registration. To the extent that this requirement imposes a *de minimis* burden on voters, that burden is an ordinary incident of the voting process and justified by the state's interests in ensuring election integrity, public confidence in election processes, and administrative efficiency. Second, resolving a successful challenge to a voter's eligibility before the voter casts a ballot is a reasonable and nondiscriminatory procedural mechanism for enforcing voter-qualification laws. Even if this process were to impose a *de minimis* burden on voters, it is wholly mitigated by a voter's right to immediate judicial review, and the state's interests in ensuring an accurate count of eligible ballots, public confidence in election results, and orderly election administration, justifies this mechanism. Third, a voter's statutory right to immediate judicial review of a successful eligibility challenge ensures that a challenged voter will receive constitutionally sufficient procedural safeguards. Fourth, Miles Borne's claim that he will be burdened by New Hampshire's documentary proof of citizenship requirement is moot because he successfully registered to vote. His registration is proof of his

citizenship, should he re-register in the future. Fifth, Plaintiffs have not satisfied their burden to prove that the law cannot be constitutionally applied to some, so that it lacks a plainly legitimate sweep. Also, the far-reaching equitable relief that Plaintiffs request would cause confusion and is not warranted by the balance of the equities.

Should the Court decline to enter the foregoing requested rulings, Defendants respectfully request that the Court's compliance deadline take into consideration the scope of the equitable relief granted to Plaintiffs, the practical implementation demands on Defendants, and Defendants' responsibilities to the voters in the September 2026 statewide primary election.

I. Proof of Citizenship Imposes a *De Minimis* Burden that Readily Survives *Anderson-Burdick* Balancing

Time and again, the United States Supreme Court has emphasized that states must substantially regulate elections to ensure an orderly democratic process that produces fair and honest results. *See, e.g., Storer v. Brown*, 415 U.S. 724, 730 (1974). So, states have a strong interest and responsibility to regulate all phases of the electoral process, including ballot access. *See Perez-Guzman*, 346 F.3d at 238. House Bill 1569's amendments to New Hampshire election law serve this essential function. Requiring individuals to prove their citizenship with objective documentation or evidence is a constitutional condition of voter registration. The burden it imposes is not severe, since an overwhelming majority of voting-eligible New Hampshire residents have documentary proof or other legally sufficient evidence of citizenship. Moreover, New Hampshire's interests in election integrity, public confidence, and protecting the public fisc far outweigh any possible *de minimis* burden on voters. The degree of the state's interests should be scrutinized for their rational basis, but these interests are sufficiently important and compelling that New Hampshire's proof of citizenship requirement would survive *Anderson-Burdick* balancing under any level of scrutiny.

A. Requiring Individuals to Prove Citizenship When Registering to Vote Does Not Impose a Severe Burden on Voters

The Court’s *Anderson-Burdick* analysis “must start by assessing ‘the character and magnitude of the asserted injury’ to the plaintiff’s constitutionally protected rights[.]” *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996) (quoting *Anderson*, 460 U.S. at 789). The Court should only “evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule” after assessing Plaintiffs’ burdens. *Id.* (quotations omitted). The analysis proceeds one step at a time because

every provision of an election code, even those that govern the voting process as opposed to those that govern ballot access or eligibility of candidates, “inevitably affects -- at least to some degree -- the individual’s right to vote and his right to associate with others for political ends.” *Anderson*, 460 U.S. at 788.

Id. at 485.

The degree to which an election law burdens a voter is measured by the severity of the restriction on the right to vote, not the severity of the consequence if the voter does not comply. *See Gardner*, 638 F.3d at 14 (noting that whether a voting restriction is subject to strict scrutiny depends on the applicability and reasonableness of the restriction); *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1188 (9th Cir. 2021) (adopting the reasoning that if measured by consequence, all voting restrictions would be subject to strict scrutiny, which they are not). So, where voters have access to free identification, voters are merely inconvenienced. *See Crawford*, 553 U.S. at 198. In contrast, mail-in voters who must expose themselves to a pandemic by seeking out a notary and two witnesses, suffer significant burdens. *Common Cause R.I.*, 970 F.3d at 14 (reasoning that it is an unusual and substantial burden to take a “chance with your life” to vote).

“Ordinary and widespread burdens, such as those requiring nominal effort of everyone, are not severe.” *Crawford*, 553 U.S. at 205 (Scalia, J., concurring). “Burdens ... arising from

life’s vagaries ... are neither so serious nor so frequent as to raise any question about the constitutionality” of an election law that affords protections from such vagaries. *Id.* at 197. So, the Supreme Court has held that a photo-identification requirement is not a severe burden, even where “a somewhat heavier burden may be placed on a limited number of persons.” *See id.* at 199. Like photo ID in *Crawford*, New Hampshire’s proof of citizenship requirement applies evenhandedly to all registering voters, it affects only a small subset of the voting-eligible population, and it imposes a *de minimis* burden on those affected.

1. New Hampshire’s Proof of Citizenship Requirement Imposes a *De Minimis* Burden on Voting-Qualified Residents Currently Possessing Documentary Proof

New Hampshire’s proof of citizenship requirement is an ordinary and expected condition of voter registration that applies to all new voter registrations:

The supervisors of the checklist, or the town or city clerk, shall accept from the applicant any one of the following as proof of citizenship: the applicant’s birth certificate, passport, naturalization papers if the applicant is a naturalized citizen, proof that the applicant was previously or is currently registered to vote in a different town or ward in New Hampshire, or any other reasonable documentation which indicates the applicant is a United States citizen.

RSA 654:12, I(a). It does not apply to currently registered voters, nor does it apply to previously registered voters who have been removed from the voter checklist or returned to New Hampshire after relocation elsewhere. RSA 654:12, III (current); RSA 654:12, I(a) (past or current).

Focusing exclusively on documentary proof, Plaintiffs’ expert Dr. Michael Herron estimated that 98.33% of all voting-eligible New Hampshire residents possess birth certificates, passports, or naturalization papers in their current legal names (or possessed a name-verifying marriage license). Ex. 15, ¶ 176; Tr. Day 5 p.m., 15:22-25. Accordingly, Dr. Herron estimated that 1.67% do not possess one of these documents, but even that small percentage overstates the

number of people who must provide proof of citizenship after HB 1569, even if documents were the exclusive permissible form of proof. *See* Ex. 15, ¶ 176; Tr. Day 5 p.m., 15:22-25.

New Hampshire has 1,099,485 voting-age resident, of whom 977,118 are currently active registered voters. Ex. 15, ¶ 171 (Herron Rep. citing Census Bureau); Ex. 16, ¶ 23. So, only 122,367 unregistered voting-eligible residents could be required to prove citizenship. *See* Ex. 15, ¶ 171. Dr. Herron also estimated that 120,323 of the 122,367 potentially affected residents already possess documentary proof of citizenship. *See* Ex. 15, ¶ 176; Tr. Day 5 p.m., 15:22-25. Like the character and magnitude of the *Crawford* voters' inconvenience of presenting photo-identification, HB 1569's burden on those already in possession of documentary proof of citizenship is, at most, *de minimis*. *See Crawford*, 553 U.S. at 198.

As the only parties who are unregistered voters, Plaintiffs A.M. and L.M., underscore the negligible character and magnitude of the burden faced by those who currently possess citizenship documents. *See* Joint Stip. of Certain Facts, ECF No. 132, ¶ 15. A.M. and L.M. both have passports and birth certificates which they store in a safe at their home. *Id.* at ¶¶ 27, 28. A.M. and L.M. are also aware that passports and birth certificates are documents that satisfy voter registration requirements. *Id.* at ¶ 27. In fact, they both used those documents in the last year or so to obtain Real ID-compliant driver's licenses. *See id.* at ¶¶ 23-24, 25-26. The usual burdens of voting, such as travel to a polling place, producing identity, and waiting in line, are not severe burdens. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 669 (2021); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008). Likewise, A.M. and L.M.'s burden to present one of the documents each already possesses is, at most, a *de minimis* burden.

2. New Hampshire’s Proof of Citizenship Requirement Imposes a *De Minimis* Burden on the Small Subset of Voting-Qualified Residents Who Do Not Currently Possess Documentary Proof

Since about 120,323 unregistered voting eligible New Hampshire residents possess birth certificates, passports, or naturalization papers, the evidence reflects that an estimated 2,043 residents do not possess such documentary proof. *See* Ex. 15, ¶ 176 (estimating 1.67% non-possession of documents, not counting currently registered voters). But there is no evidence in the record that these 2,043 residents *cannot* acquire their birth certificates, passports, or naturalization papers before the next election.

Dr. Herron analyzes election day voters’ “immediate” access to documentary proof of citizenship. Ex. 15, ¶ 101. His analysis sheds no light on the character or magnitude of a burden caused by HB 1569. *See* Ex. 15, ¶ 142. Dr. Herron’s survey asked respondents about near-term document accessibility, but it did not ask whether respondents could access documents before the next election. Ex. 15, ¶ 142. Yet, “[e]very citizen is presumed to know the law[.]” *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. 255, 265 (2020) (quotations and citations omitted). An unregistered person who does not possess documentary proof but wants to vote in the next election must comply with voter registration requirements, only one of which being proof of citizenship. *See, e.g.*, RSA 654:7; RSA 654:7-a; 654:12, I(b)-(d); 654:27. All election laws invariably impose some degree of burden. *Burdick*, 504 U.S. at 433. But where a voter can mitigate a burden by planning ahead, the burden cannot be severe. *See McClure*, 386 F.3d at 42 (citing *Storer*, 415 U.S. at 730). A voter cannot claim to be disenfranchised because he or she failed to take timely steps to meet statutory deadlines or prerequisites to register or vote. *See Democratic Nat’l Comm. v. Wisc. State Legis.*, 141 S. Ct. 28, 33 (2020) (quoting *Rosario v. Rockefeller*, 410 U. S. 752, 758 (1973)).

Moreover, qualified New Hampshire residents have three options from which to choose to register, in addition to election day registration: (a) with the town or city clerk anytime 6–13 days prior to an election, depending on the date of the last pre-election meeting of the supervisors of the checklist; (b) with the supervisors of the checklist at their last pre-election meeting; and (d) by mail absentee if eligible, on or before the last pre-election meeting of the supervisors of the checklist. RSA 654:7; 654:8; 654:11; 654:27; 654:16. At absolute most, a registrant could experience a 13-day period in which he or she could not register, and even then, the individual could register to vote on election day. *Id.*; RSA 654:7-a. Burdens are severe only where they significantly impair the right to vote without affording alternative means of ballot access. *See Crawford*, 553 U.S. at 185 (finding burdens are less severe where mitigated by the election scheme). Plaintiffs cannot reasonably argue that New Hampshire does not afford registrants ample time, opportunity, or alternatives to acquire documentary proof of citizenship.

3. Qualified Voter Affidavit Use Is Not Probative of Individual Voter Motivation for, or Reliance on, Affidavits to Prove Qualifications

Plaintiffs’ expert Dr. Kenneth Mayer speculates that that “tens of thousands of voters have relied” on a Qualified Voter Affidavits to prove citizenship. Ex. 18 at 21. That 16.8% of all registrants used QVAs for citizenship, or 14,306 total, is not in dispute. *See* Ex. 18 at 21-22. But the Court should not give any weight to Dr. Mayer’s unqualified inference that each registrant *relied* on a QVA rather than simply *preferred* a QVA. This supposition is not the product of Dr. Mayer’s expertise, data applied to reliable methods, or rationally based on his perception.⁴

⁴ Plaintiffs offered Dr. Mayer as “an expert on election administration and voter confidence[.]” Tr. Day 2 a.m., 16-22. Neither Dr. Mayer’s reports nor his testimony reflects experience in behavioral psychology or behavioral economics, nor is his opinion based on disclosed survey methods that could reliably impute individual voter intent or motivations.

Relatedly, Dr. Herron concluded that between 2016 and 2024, statewide elections totaled 528,380 election day (*i.e.*, same-day registrations). Ex. 15, ¶ 107; *accord* Ex. 18 at 19 n.62 (Mayer Rep., but noting a 2,000 vote difference with EAVS data). Dr. Herron did not distinguish between *new* election day registrations and election day *re*-registrations, however. *See id.* Dr. Mayer did not offer evidence or opinions on this issue either, but he conceded that the “total will include both new registrations and registration changes[.]” Ex. 18 at 19. The Court should give no weight to Dr. Mayer’s speculation that “the total undoubtedly includes large numbers of new registrants” because he does not explain the principles or methods he employed to assert this.

4. Other Legally Sufficient Proof of Citizenship Mitigates the *De Minimis* Burden Imposed on Voting-Qualified Residents Who Do Not Currently Possess Documentary Proof

Plaintiffs assert that New Hampshire law does not sufficiently mitigate the burden that proof of citizenship imposes on registering voters. *See, e.g.*, Pls.’ Opp’n to Defs.’ Mot. Summ. J., ECF No. 103 at 6 n.4. The evidence does not support this claim because New Hampshire law provides at least four options to mitigate the burden of acquiring documents to prove citizenship. First, evidence that a registrant currently is, or once was, registered to vote in a different town or ward in New Hampshire, proves citizenship. RSA 654:12, I(a). Prior registration data is available in the SVRS to assist registrants prove voter eligibility. RSA 654:12, VI. If polling places find difficulty accessing the SVRS, local election officials have been instructed to contact either the Secretary of State’s HAVA Elections Help Desk or the Attorney General’s Election Law Hotline, where state officials will run SVRS inquiries for them. Tr. Day 6 p.m., 13:5-9; Day 8 p.m., 86:19-25.

Miles Borne is an instructive case study for this mitigating feature of the law. Mr. Borne is the only Plaintiff in these lawsuits who is a current New Hampshire voter. *See* Joint Stip. of

Certain Facts, ECF No. 132, ¶ 11. Should he move to another New Hampshire town, he need not prove his citizenship—that much is obvious. But Mr. Borne is enrolled at Middlebury College. *See id.* at 13. Hypothetically, if he changed his domicile and registered to vote in Vermont, and moved back to New Hampshire a decade later, proof of his citizenship would already exist in his prior New Hampshire registration as documented in the SVRS.

Second, the state is obligated to assist registering voters through the New Hampshire Vital Records Information Network (“NHVRIN”). RSA 654:12, VI. With records of New Hampshire births, adoptions, marriages, civil unions, divorces, civil dissolutions, and name change orders, registering voters without documentary proof have this resource from which to prove citizenship and resolve name discrepancies. Tr. Day 6 p.m., 12:7-8, 12:10-15. The NHVRIN is available through the SVRS, and the Secretary of State’s HAVA Elections Help Desk and the Attorney General’s Election Law Hotline stand ready to run queries where technology or security access may limit local election officials. Tr. Day 6 p.m., 13:5-9; Day 8 p.m., 86:19-25. Miles Borne is worth highlighting again here. Mr. Borne was born in Portsmouth, New Hampshire. *See* Joint Stip. of Certain Facts, ECF No. 132, ¶ 12. Proof of his citizenship may be found through an SVRS search of the NHVRIN for his birth record.

Third, the state is obligated to assist registering voters through the New Hampshire Division of Motor Vehicles (“DMV”) database. RSA 654:12, VI; Tr. Day 6 p.m., 11:21-22; Day 8 a.m., 60:4-9. Anyone who applies for a Real ID-compliant New Hampshire identification or driver’s license must prove citizenship, so registrants with Real ID-compliant identification need not re-prove citizenship to vote. Tr. Day 6 p.m., 11:22-12:3; Day 8 a.m., 60:18-61:1. As with SVRS and NHVRIN non-documentary proof, the Secretary of State’s HAVA Elections Help Desk and the Attorney General’s Election Law Hotline stand ready to run queries where

technology or security access may limit local election officials. Tr. Day 6 p.m., 13:5-9; Day 8 p.m., 86:19-25. While neither A.M. nor L.M. require DMV data to prove their citizenship because they both possess birth certificates and passports, either could do so. Both have New Hampshire DMV-issued Real ID-compliant driver's licenses. Joint Stip. of Certain Facts, ECF No. 132, ¶¶ 24-25. So, if their documents were to vanish from their parents' safe, or if either found it more convenient than presenting documents, A.M. and L.M. could prove citizenship through the DMV without personal effort or expense.

Fourth, a registrant may prove citizenship with any other reasonable documentation indicating that he or she is a citizen. RSA 654:12, I(a). This is an open-ended and flexible standard intended to meet each voter's particular needs. Tr. Day 6 p.m., 7:9-14. The Secretary of State and Attorney General's offices have provided guidance to local election officials since HB 1569 and HB 464's effective dates, regarding that which should suffice to establish citizenship. Tr. Day 6 p.m., 6:14-23. As a result, local officials have accepted digital photos of birth certificates and expired passports to provide registrants with flexibility where they do not have readily accessible citizenship documents. Tr. Day 6 p.m., 7:13-18, 7:19.

5. Rational Basis Review Should Govern the Court's Application of the *Anderson-Burdick* Framework to New Hampshire's Proof of Citizenship Requirement

New Hampshire's proof of citizenship requirement should be subject to rational basis review. Voting regulations that impose severe burdens are subject to heightened scrutiny, minimally burdensome restrictions are subject to rational-basis review, and intermediate burdens receive a flexible analysis that weighs the state's interests and the means of pursuing state interests against the restriction's burdens. *Baines*, 466 F. Supp. 3d at 280. In other words, the degree of scrutiny to which the Court should apply the *Anderson-Burdick* framework directly

corresponds to the severity of the burdens experienced by voters. *See Timmons*, 520 U.S. at 358-59.

The right to vote is fundamental, but state election laws are rarely subject to strict scrutiny. *See Burdick*, 504 U.S. at 433. Burdens are severe only where they significantly impair the right to vote without affording alternative means of ballot access. *See Crawford*, 553 U.S. at 185 (finding burdens are less severe where mitigated by the election scheme); *Burdick*, 504 U.S. at 436 (finding burdens are not severe where they can be mitigated through planning).

New Hampshire's proof of citizenship requirement applies equally to all registering voters. RSA 654:7, II. Registrants can produce a birth certificate, passport, or naturalization papers. RSA 654:12, I(a). Plaintiffs offer no evidence that any of the estimated 1.67% of voting-eligible New Hampshire residents—approximately 2,000 people—cannot acquire their documentation prior to the next election. But as explained above, New Hampshire law also mitigates the burden imposed on the few who lack documentary proof. The state has a statutory obligation to verify registrants' citizenship without the registrant producing a birth certificate, passport, or naturalization papers, through the SVRS, NHVRIN, and DMV database, and registrants may offer any document of their choosing that indicates that the registrant is an American citizen. Registering voters' burden is slight, so the *Anderson-Burdick* balancing test should be deferential to the state's interests and justifications for requiring proof of citizenship. *See Timmons*, 520 U.S. 359.

B. New Hampshire's Important and Compelling Interests Justify the Requirement that Individuals Prove Their Citizenship When Registering

Decades of United States Supreme Court and First Circuit precedent establishes that New Hampshire has an interest in ensuring that only voting-eligible residents register to vote. *See, e.g., Crawford*, 553 U.S. at 196 (“There is no question about the legitimacy or importance of the

State’s interest in counting only the votes of eligible voters.”). New Hampshire’s election laws are necessary prophylactics to ensure an orderly democratic process and they serve that interest. *Perez-Guzman*, 346 F.3d at 238 (“Substantial state regulation is a prophylactic that keeps the democratic process from disintegrating into chaos.”). All phases of the electoral process need prophylactic support and protection, including ballot access. *Id.* (“Consequently, there is a strong state interest in regulating all phases of the electoral process, including ballot access.”) (citing *Storer*, 415 U.S. at 730; *Libertarian Party of Me.*, 992 F.2d at 370). New Hampshire’s important regulatory interests in election integrity, voter confidence, and protecting the public fisc are sufficient to justify its reasonable, nondiscriminatory proof of citizenship requirement. *Anderson*, 460 U.S. at 789.

1. New Hampshire’s Interest in Ensuring Election Integrity Justifies Its Proof of Citizenship Requirement

New Hampshire “indisputably has a compelling interest in preserving the integrity of its election process.” *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (internal quotation marks omitted). Indeed, a “state is entitled to take a ‘belt-and-suspenders’ approach and put in place multiple mechanisms for ensuring the integrity of its electoral processes.” *Perez-Guzman*, 346 F.3d at 246. New Hampshire has a “strong and entirely legitimate” interest in combatting fraud, of course. *Brnovich*, 594 U.S. at 672. But New Hampshire also has an interest in preventing the risk and suspicion of fraud, misadministration, voter confusion, voter registration inaccuracies, and other threats to the electoral process. *See, e.g., Doe v. Reed*, 561 U.S. 186, 233 (2010); *Crawford*, 553 U.S. at 191; *VoteAmerica v. Raffensperger*, 696 F. Supp. 3d 1217, 1233 (N.D. Ga. 2023); *Bellitto v. Snipes*, 935 F.3d 1192, 1198 (11th Cir. 2019).

To survive scrutiny, Defendants need not prove that actual voter fraud existed in New Hampshire prior to HB1569, much less that it was widespread. *See Brnovich*, 594 U.S. at 686

(“And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.”). In fact, Defendants need not prove that any contributor to election integrity existed before passing a law to protect the democratic process. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (rejecting argument that the state must prove “actual voter confusion” because such proof would require a state “to sustain some level of damage before the legislature could take corrective action[.]”).

Nevertheless, Defendants offered uncontroverted evidence of complaints, investigations, and conclusions regarding wrongful voting, fraud, and Qualified Voter Affidavit system errors and abuse at trial. Former ELU Chief O’Donnell testified that Between 2016 and 2025, the Attorney General’s office investigated 202 matters alleging various types of wrongful voting, nine of which involved suspected noncitizens. Tr. Day 6 p.m., 61:20-62:2, 62:7-15. The ELU concluded that there were 49 instances of wrongful voting during that time, and seven of the suspected noncitizens were, in fact, noncitizens who registered to vote a total of nine times. Tr. Day 6 a.m., 41:5-10, 73:15-19, 90:13-91:4. It found that the seven noncitizens registered to vote a total of nine times, they voted in 23 total elections, and at least two erroneously or fraudulently executed QVAs. Tr. Day 6 a.m., 73:15-19, 90:22-91:4. There is one pending prosecution of an alleged noncitizen voting not included in the foregoing tallies: *State v. Naseef Bryan*. Tr. Day 6 a.m., 66:6-11, 23. Mr. Bryan is facing three felony complaints for voting in the November 2023 Manchester city election, the January 2024 presidential primary election, and the November 2024 state general election despite not being a United States citizen. Tr. Day 6 a.m., 66:17-21.

2. New Hampshire's Interest in Ensuring Voter Confidence Justifies Its Proof of Citizenship Requirement

Election integrity is a fundamental state interest not only because it secures fair and honest election outcomes—it sustains public confidence in the electoral process. *Purcell*, 549 U.S. at 4. Public confidence, in turn, reinforces electoral integrity by encouraging voter participation in the democracy process. *See Crawford*, 553 U.S. at 197. New Hampshire has an important interest in “orderly administration and accurate recordkeeping ... [to identify] all voters participating in the election process.” *Id.* at 196. The relationship between election integrity and voter confidence is “practically self-evidently true[.]” *Feldman v. Arizona Sec’y of State’s Off.*, 843 F.3d 366, 391 (9th Cir. 2016) (noting that laws designed to prevent voter fraud also naturally instill public confidence) (citations omitted).

Secretary of State Scanlan testified that voter confidence reflects the average voter’s faith the elections are conducted in a fair and impartial manner; that the results that are delivered at the end of the night accurately reflect the outcome of the election; and that the participants in that election process are qualified to participate. Tr. Day 9, 7:19-8:1. The Secretary formed the Special Committee on Voter Confidence to investigate what could be done to make voters more confident in New Hampshire’s elections. Tr. Day 9, 5:18-21, 6:1-5. The Committee held about a dozen hearings across the state, hearing about 47 hours of testimony from 400 individuals, including the general public. Tr. Day 9, 4-9, 8:22-23; Tr. Day 1 a.m. Zink 62:18-21. Among other things, the Committee found that

[a]s a result of misinformation and other factors regarding the safety and accuracy of our electoral process, there has been an erosion of confidence in elections here and nationally recently. Polls show the percentage of those expressing confidence, while still a clear majority, is lower than in the past.

Ex. R at SOS-FT-1179229. The Secretary testified that the Committee made recommendations to increase voter confidence, primarily through education and transparency. Tr. Day 9, 11:9-22.

For example, the Committee noted that the ELU’s investigations of “complaints about election law infractions and needs to be transparent.” Ex. R at SOS-FT-1179228. It also recommended that “[t]raining should emphasize strict adherence to requirements for proper filing of forms, transparency, access, and other voter confidence-building requirements.” Ex. R at SOS-FT-1179230.

3. New Hampshire’s Interest in Ensuring Effective and Efficient Election Administration Justifies Its Proof of Citizenship Requirement

New Hampshire has important interests in efficient election administration and reducing its administrative burdens. *See Ariz. Democratic Party*, 18 F.4th at 1181; *Eakin v. Adams Cty. Bd. of Elections*, 149 F.4th 291, 318 (3d Cir. 2025). The interest in efficient election administration includes protecting the public fisc from unnecessary or ineffective expenditures. *See Sam Party of N.Y. v. Kosinski*, 987 F.3d 267, 271 (2d Cir. 2021). Where a state has limited resources, wasteful activities divert resources from effective election integrity efforts and undermine public confidence. *See Mays*, 951 F.3d at 787.

QVAs used for identity on election day was a source of substantial resource burden for the state. Elections Director Patricia Piecuch testified that the Secretary’s office ran affidavit usage reports from the SVRS and contacted clerks to ensure that the clerks were retaining the original QVA forms. Tr. Day 8 a.m., 37:11-13. The Secretary’s office also confirmed SVRS-accuracy with the clerks (*e.g.*, six affidavits in the SVRS and six physical affidavits retained) and that the affidavits were associated with the correct voters (*e.g.*, six affidavits were used by the same six voters identified in the SVRS). Tr. Day 8 a.m., 37:11-19. Director Piecuch also testified that the Secretary’s office coordinated with local officials to correct key-in errors, which did occur. Tr. Day 8 a.m., 37:20-24.

The Secretary's office then sent letters to voters who used a QVA. Tr. Day 8 a.m., 38:2-7. The letter included a postcard asking the affiant to acknowledge that he or she did, in fact, vote that day. Tr. Day 8 a.m., 38:2-7. Director Piecuch and Deputy O'Donnell explained that if a voter did not confirm his or her identity by postcard, telephone, or e-mail, the Secretary conducted further independent research, including follow-up communications with local election officials. Tr. Day 6 a.m., 111:20-112:1; Tr. Day 8 a.m., 38:8-12. Deputy O'Donnell also testified that New Hampshire law did not require affiants to verify their voter qualifications after the fact. Tr. Day 6 a.m., 116:21-117:6. So, the Secretary's office referred unverified affiants to the Attorney General's Office. Exs. T-X. The Attorney General's Office then took additional steps to verify voters. Tr. Day 6 a.m., 112:1-4.

Deputy O'Donnell and ELU Chief Investigator Tracy testified that verifying CVAs included comparing CVA and DMV photos, and contacting affiants directly. Tr. Day 6 a.m., 113:1-6. The former ELU Chief testified that the Attorney General's office does not have the resources to conduct QVA and CVA verifications simultaneously with other statutory duties. Tr. Day 6 a.m., 113:13-19, 114:3-10. Since 2017, the ELU spent about 1,100 hours verifying QVA, CVA, and domicile affidavits combined. Tr. Day 7 p.m., 54:14-21. Notably, the Attorney General's office has not yet received referrals from the Secretary for QVAs or CVAs executed in elections between 2022 and 2024. Tr. Day 6 a.m., 113:20-25.

C. New Hampshire's Proof of Citizenship Requirement Is a Measured and Constitutional Exercise of the State's Duty to Protect the Franchise

New Hampshire's proof of citizenship requirement serves the state's important regulatory interests by improving election integrity, bolstering public confidence in election processes, and enhancing administrative efficiency. These interests are manifest, cannot be reasonably

questioned, and suffice to establish the constitutionality of HB 1569 and HB 464's provisions and repeal of the Qualified Voter Affidavit.

These are also compelling state interests and the mechanism chosen is narrowly tailored to achieve those interests. New Hampshire affords registrants many avenues through which registrants may prove their citizenship. Plaintiffs only focus on one, documentary proof, but there are other legally sufficient resources available. Moreover, this is a facial constitutional challenge. Plaintiffs have not satisfied their burden to show that there is no set of circumstances in which the proof of citizenship requirement could be applied constitutionally.

Accordingly, New Hampshire has lawfully implemented an election regulation that remedies prior deficiencies in the Qualified Voter Affidavit system, and addresses potential future problems from arising. *See Crawford*, 553 U.S. at 196; *Burson*, 504 U.S. at 209.

II. Resolving Voter Eligibility Before a Ballot Is Cast Imposes a *De Minimis* Burden and Readily Survives *Anderson-Burdick* Balancing

Resolving a successful challenge to a voter's eligibility before the voter casts a ballot is a reasonable and nondiscriminatory procedural mechanism for enforcing voter-qualification laws. Voters are not burdened by it because instances of challenges are infrequent and voters have a right to immediate appeal to the New Hampshire superior court. But even if this process imposed a *de minimis* burden on voters, it is justified by the state's interests in ensuring an accurate count of eligible ballots, public confidence in election results, and orderly election administration.

A. The Record Reflects No Instance of a Successfully Challenged Voter Using a Challenged Voter Affidavit to Cast a Ballot

New Hampshire's process for resolving challenges to voters' qualifications is an important mechanism for administering elections. Plaintiff Open Democracy asserts that HB 1569's repeal of the Challenged Voter Affidavit burdened voters by removing an option that

permitted a successfully challenged voter to cast a ballot, notwithstanding the successful challenge. *See OD Compl.* ¶¶ 100-104. Plaintiff has not satisfied its burden to produce evidence of the character or magnitude of this purported burden.

At trial, former Election Law Unit Chief (now Deputy Secretary of State) Brendan O'Donnell testified that he is not aware of any successful challenge to a voter's qualifications on citizenship grounds. Tr. Day 6 a.m., 101:3-12. Indeed, he was not aware of any successful challenge to a voter's qualifications. Tr. Day 6 a.m., 101:23-24, 103:9-12. Since neither the witnesses nor the trial exhibits identify a successful voter challenge, the record does not contain evidence that any voter ever used a CVA to vote when challenged. Tr. Day 2 a.m., 103:17-22.

Like Deputy O'Donnell, Plaintiff's expert Dr. Mayer testified that he is not aware of any successfully challenged voters who relied on CVAs to vote. Tr. Day 2 a.m., 103:17-21. He concluded that voter challenges were uncommon. Tr. Day 2 a.m., 103:21-22. Dr. Mayer also testified that should a voter's citizenship be successfully challenged in the future, he believed that the voter would again produce proof of citizenship to survive the challenge. Tr. Day 2 a.m., 102:6-12. But that is not accurate, as a matter of law. Evidence of prior registration—which is manifest where a voter's eligibility is challenged—is proof of citizenship. RSA 654:12, I(a). There is simply no identifiable burden from HB 1569's CVA repeal to characterize and measure under *Anderson-Burdick*.

Dr. Mayer also speculated that repeal of the Challenged Voter Affidavit could “increase[] the likelihood that this now becomes part of strategies to challenge voters and make it difficult for people to vote.” Tr. Day 2 a.m., 106:9-11. The Court should afford Dr. Mayer's statement no weight, because he did not apply principles or methods to support it. In fact, Dr. Mayer contradicted this opinion later in his testimony. He speculated that the absence of CVAs may

result in baseless partisan voter challenges, but Dr. Mayer conceded that unlike his experience in Georgia, Wisconsin, and Texas, New Hampshire does not permit mass voter challenges. Tr. Day 2 a.m., 107:2-4. Moreover, this is a facial challenge to the constitutionality of New Hampshire's challenged-voter process. As such, the Court cannot "not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases" such as those suggested by Dr. Mayer. See *Wash. State Grange*, 552 U.S. at 449-50 (citing *Raines*, 362 U.S. at 22).

Dr. Mayer also testified that a local election official's decision regarding whether a challenge is "more likely than not" well-grounded, is subjective and will be administered inconsistently across the state. Tr. Day 2 a.m., 106:4-7. "More likely than not," however, is an established legal standard. See *Sonoiki*, 37 F.4th at 708 (explaining standards such as "more likely than not" and "more likely true than not true" are versions of a preponderance of the evidence standard). And because the state superior court will hear appeals from aggrieved voters, a court will resolve questions regarding legal standards and the court will ensure a uniform application of the statutory standard. See *Sauer*, 206 U.S. at 546-47 (describing the appellate scope and purpose of the Supreme Court).

New Hampshire's voter challenge process should be subject to rational basis review. Burdens are severe and subject to strict scrutiny where they significantly impair the right to vote without affording alternative means of ballot access. See *Crawford*, 553 U.S. at 185 (finding burdens are less severe where mitigated by the election scheme); *Burdick*, 504 U.S. at 436 (finding burdens are not severe where they can be mitigated through planning). Plaintiffs have not identified the character or magnitude of any burden caused by the voter challenge system, so the burdens cannot be severe. But even if the system imposes more than a *de minimis* burden, the alternative of immediate judicial review fully mitigates the burden because a falsely accused

voter will vote on election day. Given the effect of alternative ballot access through the court, the *Anderson-Burdick* balancing test should be deferential to the state's interests and justifications for its challenged-voter process. *See Timmons*, 520 U.S. at 359.

B. New Hampshire's Important and Compelling Interests Justify the Mechanisms that Ensure Only Eligible Voters Cast Ballots

New Hampshire has three important and compelling interests in permitting qualified challengers to formally challenge a voter's qualifications and to make it subject to immediate judicial review. This statutory scheme ensures that election results count only eligible ballots, the public is confident in the accuracy of election results, and that election administration is orderly and efficient.

"There is no question about the legitimacy or importance of the State's interest in counting *only* the votes of eligible voters." *Crawford*, 553 U.S. at 196 (emphasis added). Before HB 1569, if a moderator or supervisor of the checklist determined that a challenge to a voter's eligibility was well-grounded, the voter would be permitted to vote if the voter executed a Challenge Voter Affidavit. Tr. Day 6 a.m., 100:12-21. So, the CVA scheme allowed voters to cast ballots despite that a local election official believed that the voter was more likely than not ineligible. This system had significant implications for election integrity. Once cast, ballots cannot be excised or discounted from the election results. Tr. Day 6 a.m., 93:5-12.

New Hampshire has a compelling interest in election integrity, even where there is no evidence that successfully challenged voters previously distorted election results through their use of CVAs. *See Perez-Guzman*, 346 F.3d at 246; *Burson*, 504 U.S. at 209. Ensuring that this does not occur in the future also serves the state's interest in bolstering public confidence in elections through an orderly elections process and recordkeeping, and transparency and accuracy in election results. *See Crawford*, 553 U.S. at 197.

New Hampshire also has an important interest in efficiency, minimizing administrative burdens, and protecting the public fisc from waste. *See Purcell*, 549 U.S. at 4. Although Plaintiff does not assert that CVA-repeal is unconstitutional because voters relied on CVAs to prove identity when checking in to vote, that is how CVAs were used and that is the source of the substantial resource burden experienced by the state. Tr. Day 6 a.m., 109:15-19. And the administrative costs were enormous. For example, Elections Director Patricia Piecuch testified that the Secretary's office ran affidavit usage reports from the SVRS and contacted clerks to ensure that the clerks were retaining the original CVA forms. Tr. Day 8 a.m., 37:11-13. The Secretary's office also confirmed SVRS-accuracy with the clerks (*e.g.*, six affidavits in the SVRS and six physical affidavits retained) and that the affidavits were associated with the correct voters (*e.g.*, six affidavits were used by the same six voters identified in the SVRS). Tr. Day 8 a.m., 37:11-19. Director Piecuch also testified that the Secretary's office coordinated with local officials to correct key-in errors, which did occur. Tr. Day 8 a.m., 37:20-24.

The Secretary's office then sent letters to voters who used a CVA. Tr. Day 8 a.m., 38:2-7. The letter included a postcard asking the affiant to acknowledge that he or she did, in fact, vote that day. Tr. Day 8 a.m., 38:2-7. Director Piecuch and Deputy O'Donnell explained that if a voter did not confirm his or her identity by postcard, telephone, or e-mail, the Secretary conducted further independent research, including follow-up communications with local election officials. Tr. Day 6 a.m., 111:20-112:1; Tr. Day 8 a.m., 38:8-12. Deputy O'Donnell also testified that New Hampshire law did not require affiants to verify their voter qualifications after the fact. Tr. Day 6 a.m., 116:21-117:6. So, the Secretary's office referred unverified affiants to the Attorney General's Office. Exs. T–X. The Attorney General's Office then which took additional steps to verify voters. Tr. Day 6 a.m., 112:1-4. Deputy O'Donnell and ELU Chief

Investigator Tracy testified that verifying CVAs included comparing CVA and DMV photos, and contacting affiants directly. Tr. Day 6 a.m., 113:1-6. Since 2017, the ELU spent about 1,100 hours verifying QVA, CVA, and domicile affidavits combined. Tr. Day 7 p.m., 54:14-21. Notably, the Attorney General's office has not yet received referrals from the Secretary for QVAs or CVAs executed in elections between 2022 and 2024. Tr. Day 6 a.m., 113:20-25.

C. New Hampshire Law Mitigates Any Discernable Voter Burden with Procedural Safeguards

Even if the absence of the CVA option imposes a *de minimis* burden on challenged voters, the voter challenge process mitigates that burden in its entirety for at least three reasons. First, New Hampshire law protects registered voters from challenges by presuming that voters appearing on checklists are qualified to vote. Tr. Day 6 a.m., 99:15-17. So, any challenge must overcome the initial presumption that the voter has already proven his or her qualifications. Tr. Day 6 a.m., 99:17-100:2. Second, a challenger must execute an affidavit under oath, administered by an election official, and subject to the penalties of perjury. Tr. Day 6 a.m., 97:17-20. The challenger swears to both the grounds for the challenge and the *personal knowledge* upon which the challenger bases the grounds for the challenge. Tr. Day 6 a.m., 97:20-22; Ex. SS at 317-18. Third, any voter aggrieved by a successful challenge may obtain immediate judicial review of the decision in the superior court. RSA 659:27-a, II(b).

D. New Hampshire's Voter Challenge Process Is a Measured and Constitutional Exercise of the State's Duty to Effectively Administer Elections

New Hampshire's voter challenge process serves the state's important regulatory interests by improving election integrity, bolstering public confidence in election processes, and enhancing administrative efficiency. These interests are manifest, cannot be reasonably questioned, and suffice to establish the constitutionality of HB 1569 and HB 464's provisions and repeal of the Challenged Voter Affidavit. These are also compelling state interests and the

mechanism chosen is narrowly tailored to achieve those interests. The voter challenge process establishes a high bar for challengers, and challenged voters have a right to immediate judicial review.

It is important to note that this is a facial constitutional challenge. Plaintiff has not satisfied its burden to show that there is no set of circumstances in which the voter challenge process or judicial review could be applied constitutionally. Accordingly, New Hampshire has lawfully implemented an election regulation that remedies deficiencies and resource drains in the Challenged Voter Affidavit system, and prevents potential future problems and costs from arising. *See Crawford*, 553 U.S. at 196; *Burson*, 504 U.S. at 209.

III. A Voter’s Statutory Right to Immediate Judicial Review Ensures that a Challenged Voter Will Receive Constitutionally Sufficient Procedural Due Process

The Court should rule that New Hampshire law unmistakably guarantees a challenged voter procedural due process, because the voter will not be deprived of his or her right to vote prior to judicial review. The seminal case articulating the procedural due process analysis is *Mathews v. Eldridge*, but it should be noted that *Mathews* resolves “the issue whether the *administrative* procedures provided [] are constitutionally sufficient[.]” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (emphasis added). In contrast, Plaintiffs challenge whether *judicial* procedures will provide constitutionally sufficient process.

As impartial and disinterested tribunals, courts are the principal institutional safeguard of procedural due process. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). A New Hampshire voter aggrieved by a successful challenge to his or her qualifications has an immediate right to appellate review in the superior court. RSA 659:27-a, II(b). This right of appeal to a state court is orthodox due process, and it cannot be reasonably disputed.

But even under the Mathews framework, Plaintiffs' due process claim fails. Voters have an interest in their rights to cast ballots, so the Court should weigh

the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Voters are not at risk of erroneous deprivation and the state has a substantial interest in efficient election administration and protecting the public fisc.

A. Voters Do Not Face a Risk of Erroneous Deprivation of Their Rights

Plaintiff Open Democracy has not identified a single person who previously used a CVA to vote after a successful challenge. As cited above, both Plaintiff and Defendants' witnesses testified that they have no knowledge of a successful voter challenge—before or after HB 1569. Moreover, procedural due process guarantees that an affected individual be forewarned and provided an opportunity to be heard at a meaningful and in a meaningful manner. *Harper v. Rettig*, 675 F. Supp. 3d 190, 205 (D.N.H. 2023) (quoting *Perrier-Bilbo v. United States*, 954 F.3d 413, 433 (1st Cir. 2020)). That is precisely what New Hampshire law provides.

“Notice” is that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [a legal] action and afford them an opportunity to present their objections.” *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 35 (1st Cir. 2001). Voters have notice when a challenger executes an affidavit that requires express articulation of every ground for the challenge, and the basis for the challenger's personal knowledge that the voter is not eligible to cast a ballot. Ex. SS at 317-18. Deputy O'Donnell testified that the moderator explains the grounds and basis for the challenge to the voter and the voter has an opportunity to address the issues. Tr. Day 6 a.m., 96:12-98:18. This is adequate notice to the voter. Deputy

O'Donnell's testimony is uncontested, and Plaintiff has failed to meet its burden to establish a lack of notice.

“An opportunity to be heard at a meaningful and in a meaningful manner” means “ the state must provide ‘some kind of hearing’ before depriving an individual of a protected property interest.” *Mard v. Town of Amherst*, 350 F.3d 184, 192 (1st Cir. 2003). Under New Hampshire law:

Any dispute as to whether a person has met the requirements to register to vote or to vote shall be decided by the election official of the town or ward in charge of voter registration or in charge of the polling place if the dispute arises at the polling place. A person aggrieved by the decision of said official may take an immediate appeal to the superior court, which shall hear the appeal forthwith and shall make every reasonable effort to decide the matter as soon as possible and before the close of the polls on election day.

RSA 654:12, V. An aggrieved voter does not just get “some kind of hearing,” the voter is entitled to a judicial appeal. And the voter's appeal will be heard in time to vote in that election.

Deputy O'Donnell testified that prior to HB 1569, New Hampshire courts established procedures to handle election-related matters on election day. Tr. Day 6 a.m., 104:18-105:4. In his role as ELU Chief at the time, Deputy O'Donnell reached out to the federal court and the state superior court to confirm that election day docket procedures would be available. Tr. Day 6 a.m., 104:18-21. He confirmed, for example, that the court designated a WebEx courtroom or a standby judge. Tr. Day 6 a.m., 104:21-23. State court consolidated election-related matters in the Merrimack Superior Court to ensure access and uniformity of decisions. *See* Tr. Day 6 a.m., 104:24-105:4. After HB 1569, the judiciary made additional procedures available. Tr. Day 6 a.m., 105:5-107:21. The New Hampshire Administrative Office of the Courts confirmed that it will use the same election day docket procedure where all complaints are directed to Clerk Uhouse at the Merrimack County Superior Court. Tr. Day 6 a.m., 105:8-17. The superior court Election Docket Court Procedures (Mar. 6, 2025) have been admitted as Exhibit HH-2. Deputy

O'Donnell's testimony is uncontested, and Plaintiff has failed to meet its burden to establish that voters will not be afforded an opportunity to be heard at a meaningful and in a meaningful manner.

B. New Hampshire Has a Substantial Interest in Election Integrity, Efficient Election Administration, and Protecting the Public Fisc

As explained above, New Hampshire has a substantial interest in its voter challenge process. It has an interest in preventing the risk and suspicion of fraud, election misadministration, voter confusion, voter registration inaccuracies, and other threats to the electoral process. *See generally Crawford*, 553 U.S. at 191. It also has an interest in efficiency and reducing administrative burdens. *See generally Sam Party of N.Y.*, 987 F.3d at 271. And as described above, the prior CVA scheme allowed a voter to cast a ballot even if a local election official believed that the voter was more likely than not ineligible. Tr. Day 6 a.m., 100:12-21. This system had significant implications for election integrity. Once cast, ballots cannot be removed from the election results. Tr. Day 6 a.m., 93:5-12. And CVA-verification by the Secretary's and Attorney General's offices were a substantial drain on state resources. Tr. Day 8 a.m., 39:3-8. That the CVA scheme did not require voters to confirm their eligibility with verifying state officials substantially reduced the value to the state's resource costs. *See* Tr. Day 6 a.m., 116:21-117:6.

C. The Voter-Challenge System's Procedural Due Process Mechanism Has a Plainly Legitimate Sweep

Plaintiff has not satisfied its burden to establish that no circumstance exists in which the New Hampshire's challenged-voter system could satisfy the requirements of due process. "A facial challenge must fail where the statute has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202 (quotations and citations omitted). Moreover, a court must "not to go beyond the statute's

facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Wash. State Grange*, 552 U.S. at 449-50 (citing *Raines*, 362 U.S. at 22).

IV. Miles Borne’s Challenge to House Bill 1569’s Repeal of the Qualified Voter Affidavit Is Moot

“[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496–97 (1969); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (citation omitted). A plaintiff must maintain a personal interest in the outcome throughout the litigation or the plaintiff’s participation becomes unjusticiably moot. *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 15 (1st Cir. 2004). In other words, the mootness inquiry must be made at every stage of the litigation. *Lawrence v. Blackwell*, 430 F.3d 368, 370-371 (6th Cir. 2005). Mr. Borne was not a registered voter at the time this lawsuit was filed. He has since successfully registered to vote, so he does not have a personal interest in the outcome of this case.

Mr. Borne was born in 2007 in Portsmouth, New Hampshire, and he possesses both a United States passport and a birth certificate. Joint Stip. of Certain Facts, ECF No. 132, ¶¶ 1-2, 4. He maintains his birth certificate and passport in a fireproof box at his home in Rye, New Hampshire. Joint Stip. of Certain Facts, ECF No. 132, ¶ 4. Borne has had his passport since 2022 (Joint Stip. of Certain Facts, ECF No. 132, ¶ 6) and his birth certificate since 2009 (Joint Stip. of Certain Facts, ECF No. 132, ¶ 5). Mr. Borne also has a New Hampshire-issued Real ID driver’s license. Joint Stip. of Certain Facts, ECF No. 132, ¶¶ 7-8.

Borne faced no adversity in registering to vote. He registered to vote in 2025 on his 18th birthday, verifying his eligibility by presenting his Real ID and passport. ECF No. 132, ¶¶ 9-11. Borne did not wait until election day to register to vote, rather, he was able to register during a weekday on his way to school. On the morning of his 18th birthday, Borne woke up early,

performed his normal routine and then grabbed his passport and driver's license and drove down the road to town hall. Joint Stip. of Certain Facts, ECF No. 132, ¶ 10. He lives in the town of Rye, minutes from the town hall where he registered to vote. Joint Stip. of Certain Facts, ECF No. 132, ¶ 11. He registered to vote sometime between 8:00 AM and 8:35 AM, before arriving at school. Joint Stip. of Certain Facts, ECF No. 132, ¶ 12. Because Borne is now a registered voter in New Hampshire his claim is now moot.

There is an exception to the mootness doctrine in that “[a] case will not be considered moot if the challenged activity is capable of repetition, yet evading review.” *Lawrence*, 430 F.3d at 371. However, this exception applies only when “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.” *Id.* “The party asserting that this exception applies bears the burden of establishing both prongs.” *Id.* There are no facts in this record that Borne can satisfy either prong of this exception to the mootness doctrine.

Borne is a college student at Middlebury College in Vermont and that he still lives in his parent's home in Rye, New Hampshire. Joint Stip. of Certain Facts, ECF No. 132, ¶ 14. Borne stated that he does not know what the future will hold, but he plans to vote in future elections, including voting in the November 2026 election in New Hampshire by absentee ballot. Joint Stip. of Certain Facts, ECF No. 132, ¶ 14. Having now been registered, he is free to request an absentee ballot from the Town of Rye for future elections without having to re-register to vote. Also, his college is about three hour drive from his home in Rye, New Hampshire. Joint Stip. of Certain Facts, ECF No. 132, ¶ 13.

The first prong of the mootness exception is not met here because Borne has been registered to vote in Rye for over a year and plans to vote in that location either in person or by absentee ballot. Having registered to vote, Borne is not subject to any additional requirement in order to cast a vote in the next election. There is no evidence that this Court would be required to intervene at a future date on Borne's behalf, as was the case in *Lawrence*, 430 F.3d at 371, where it was undisputed that it was "impossible" for the Court to place a candidate's name on a ballot. Borne faces no such impossibility here. Similarly, the second prong of the exception to mootness is not met because Borne cannot prove that the controversy, i.e. having to register to vote by producing his documents, is capable of repetition. There are no facts in the record to support that Borne has been or will be removed from the registration roles for future elections. Additionally, even if Borne were somehow removed from the town's registration roles between now and the next election, Borne would not even need to bring his documentary proof of citizenship because, as a previously registered voter in New Hampshire, his citizenship may be verified by a local election official at the time of registration. Tr. Day 6 p.m., 7:19-8:3; see also, HB 464. Nor has he offered any evidence that, if he was removed, that he would have any trouble locating any documents in his possession that provide documentary proof of citizenship, identity, age, and domicile in advance of the next election he intends to vote in and bringing them into the town hall prior to or on election day..

V. Plaintiffs Have Not Satisfied Their Burden to Establish that There Is No Possible Application of New Hampshire's Proof of Citizenship Requirement or Its Voter Challenge Process that Can Be Applied Constitutionally

Plaintiffs had the burden of proof to establish all elements of their claims. *Clukey v. Town of Camden*, 894 F.3d 25, 33 (1st Cir. 2018). A facial constitutional challenge requires a showing "***that there is no possible*** application of the statute" could be applied constitutionally. See *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 94 (1st Cir. 2001) (internal

quotations omitted) (emphasis in original). That is why a facial constitutional challenge to a legislative act “is the most difficult challenge to mount successfully.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Here, Plaintiffs ask the Court to declare HB 1569 unconstitutional and to issue a permanent injunction to prohibit Defendants from implementing and enforcing HB 1569. *OD Compl.* ¶ 124; *YM Compl.* at 32. The record in this case does not merit such a declaration. There is no evidence that the proof of citizenship requirement, which does not require documentary proof where other legally sufficient proof is available, cannot be constitutionally applied to some. Also, there is no evidence that anyone’s eligibility to vote was ever successfully challenged, so the voter-challenge process and its avenue of judicial appeal could certainly be constitutionally applied to some. Moreover, since no one has been successfully challenged, the notion that judicial process cannot adequately protect liberty interests is quite apparently grounded in speculation about hypothetical or imaginary cases, which does not suffice to mount a successful facial challenge.

Plaintiffs’ failure to establish a basis from which this Court could declare HB 1569 unconstitutional on its face, highlights another fundamental defect in the relief Plaintiffs seek. Sweeping equitable relief that prohibits enforcement and implementation of HB 1569, is unworkable, would unnecessarily create confusion, and is not warranted by the balance of the equities. HB 1569 amends nonconsecutive provisions of New Hampshire election law in the Revised Statutes Annotated. Some of these provisions were later amended by HB 464, and HB 464 amended other related nonconsecutive provisions not amended by HB 1569. Broad equitable relief can undermine comprehensive election schemes and create public confusion.

VI. Alternatively, an Adverse Order's Compliance Deadlines Should Consider the Scope of the Remedies and the Proximity to the Next Election

The United States Supreme Court has advised courts to exercise caution when ordering changes to election laws close to an election. *Purcell*, 549 U.S. at 4-5. Should the Court decline to adopt the rulings Defendants request here, Defendants alternatively request that the Court consider the scope of its final order, the demands the adverse order will likely place on Defendants and third parties out of Defendants' direct control (including vendors and non-party local election officials), and the order's the proximity of the next election, when setting deadlines for compliance. *See id.*

CONCLUSION

Defendants respectfully request that the Court make the foregoing requested rulings for the reasons asserted herein.

Respectfully submitted,

DEFENDANTS DAVID M. SCANLAN, in his official capacity as New Hampshire Secretary of State and JOHN M. FORMELLA, in his official capacity as New Hampshire Attorney General

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: March 5, 2026

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all parties of record in the consolidated cases, *New Hampshire Youth Movement v. Scanlan* (1:24-cv-00291-SE-TSM) and *Coalition for Open Democracy, et al. v. Scanlan, et al.* (1:24-cv-00312-SE-TSM), through the Court's e-filing system.

/s/ Michael P. DeGrandis
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