2018-0208

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. _____

NEW HAMPSHIRE DEMOCRATIC PARTY,
BY RAYMOND BUCKLEY, CHAIR

v.

WILLIAM M. GARDNER,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE SECRETARY OF STATE; AND
GORDON MACDONALD,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE ATTORNEY GENERAL

and

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE
DOUGLAS MARINO
GARRETT MUSCATEL,
ADRIANA LOPERA,
PHILLIP DRAGONE,
SPENCER ANDERSON, AND
SEYSHA MEHTA

v.

WILLIAM M. GARDNER,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE SECRETARY OF STATE; AND
GORDON MACDONALD,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE ATTORNEY GENERAL

PETITION FOR ORIGINAL JURISDICTION PURSUANT TO SUPREME COURT RULE 11

WILLIAM M. GARDNER,
SECRETARY OF STATE
AND
GORDON J. MACDONALD,
ATTORNEY GENERAL

By their counsel,

GORDON J. MACDONALD
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I. DECISIONS BELOW

Three decisions are being directly appealed in this Petition. A copy of the April 10, 2018 Order on Pending Motions from the Hillsborough Superior Court, Southern District (Temple, J.) is at Appendix Pages 15-25, along with a copy of a related September 12, 2017 Order on Pending Motions from Hillsborough Superior Court, Southern District (Temple, J.) at Appendix Pages 1-14. A copy of the April 12, 2018 Order on Defendant's (sic) Motion for Protective Order and the April 13, 2018 Order on Plaintiffs' Expedited Motion to Compel Discovery from the Hillsborough Superior Court, Southern District (Temple, J.) is at Appendix Pages 26-42.

II. QUESTIONS PRESENTED FOR REVIEW

1. The Statewide Voter Registration Database established by RSA 654:45 contains the private, personally identifiable information of every active and inactive registered New Hampshire voter in aggregated electronic format. For this reason, the General Court declared in RSA 654:45, VI that "[t]he voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31" and that "[a]ny person who discloses information from the voter database *in any manner not authorized by this section* shall be guilty of a misdemeanor." (emphasis added).

Question Presented: Did the trial court err in ruling in its April 13, 2018 Order that the Defendants had to produce the Statewide Voter Registration Database and the sensitive, personally identifiable information in it about all New Hampshire registered voters to the plaintiffs in response to civil discovery requests, where RSA 654:45 does not authorize such disclosure and thus criminalizes such disclosure?

2. In *Libertarian Party N.H. v. State*, 154 N.H. 376, 381 (2006), this Court held that a plaintiff cannot challenge the sufficiency of the State's asserted interests in a particular election

law under the balancing test adopted in *Akins v. Sec'y of State*, 154 N.H. 67 (2006). Despite this holding, the trial court is requiring the defendants to produce vast amounts of discovery, including but not limited to all communications and meetings within and between the defendants' Offices regarding SB 3, so plaintiffs can test the sufficiency of the State's interests. These discovery demands are not relevant to whether SB 3, an act of the Legislature, is constitutional and are severely disrupting the functions of defendants' Offices.

Question Presented: Did the trial Court err in ruling in its April 12, 2018 Order and in its the April 13, 2018 Order that this type and level of discovery against the defendants is required and relevant in order to adjudicate the constitutionality of an election law under the balancing test adopted in *Akins v. Sec'y of State*, 154 N.H. 67 (2006)?

3. The plaintiffs are seeking a declaratory judgment under RSA 491:22 as to the constitutionality of SB 3, but have failed to allege anything other than hypothetical, speculative, abstract injuries that are neither actual nor imminent, have failed to allege how SB 3 actually harms them in any concrete and particularized way, and have otherwise failed to show that their personal legal rights have been impaired or prejudiced by SB 3.

Question Presented: Did the trial court err when it ruled in its September 12, 2017 Order and its April 10, 2018 Order that plaintiffs have standing to pursue their claims under RSA 491:22?

III. PROVISIONS OF CONSTITUTION, STATUTES, RULES, AND REGULATIONS INVOLVED

New Hampshire Constitution

Part I, Article 11

Statutes

RSA chapter 91-A

RSA chapter 654 - specifically:

RSA 654:2

RSA 654:7

RSA 654:7-a

RSA 654:7-b

RSA 654:12

RSA 654:31, III

RSA 659:34

RSA 654:45

RSA 654:45, I

RSA 654:45, VI

IV. DOCUMENTS INVOLVED IN THE CASE

The following records involved in the case are provided in an Appendix to this petition:

September 12, 2017 Order on Pending Motions

April 10, 2018 Order on Pending Motions

April 12, 2018 Order on Defendant's (sic) Motion for Protective Order

April 13, 2018 Order on Plaintiffs' Expedited Motion to Compel Discovery

Affidavit of David Scanlan In Support of Defendants' Objection to Plaintiff League of Women Voters of New Hampshire's Expedited Motion to Compel Discovery.

V. STATEMENT OF THE CASE

This lawsuit began as two nearly identical nine-count complaints filed in the Hillsborough County Superior Court, Southern District, on August 22 and 23, 2017, almost two months after passage of SB 3 (2017). The defendants removed the case to the United States

District Court for the District of New Hampshire pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446. To avoid federal jurisdiction, the plaintiffs amended out of their complaints their federal claims and sought remand back to Hillsborough County Superior Court, Southern District. On Sunday, September 3, 2017, the federal district court granted the remand.

On September 5, 2017, the plaintiffs in both cases filed second amended complaints. Both second Amended Complaints consist of four counts: Count I: Violation of New Hampshire Constitution Part I, Article 11 (the Right to Vote); Count II: Violation of New Hampshire Constitution Part I, Article 11 (Contradicting the Domicile Qualification); Count III: Violation of Various Provisions of the New Hampshire Constitution (Equal Protection); Count IV: Violation of Various Provisions of the New Hampshire Constitution (Void for Vagueness). The same day, defendants filed a motion to dismiss for lack of standing and an emergency motion for a structuring conference. Plaintiffs objected on September 8, 2017.

On September 8, 2017, defendants objected to the motion for preliminary injunction. On September 11, 2017, the trial court consolidated the two cases and held a hearing on the petition for injunction and the motion to dismiss. The trial court heard argument on standing and then entertained many offers of proof and objections within one hour, without the opportunity for defendants to engage in cross-examination. Despite briefing by the defendants that plaintiffs failed to allege or otherwise show any threat of irreparable harm, the trial court issued an injunction at 6:51 AM on September 12, 2017, just prior to the 7 AM start of a Special Election in Belknap County District 9.

Among other things, the trial court found that plaintiffs had standing to pursue their case and enjoined a provision of SB 3 from being implemented. The trial court then suggested in a footnote that its ruling on standing did not consider issues related specifically to RSA 491:22

because defendants had raised those issues in their reply briefing. Thus, on September 26, 2017, the defendants filed a Renewed Joint Motion To Dismiss for lack of standing to ensure all of its standing arguments had been reviewed and considered by the trial court. On October 10, 2017, the plaintiffs filed a voluminous objection to the renewed motion and, on the same date, the League of Women Voters of New Hampshire ("LWVNH") plaintiffs also filed a third motion to amend to add three new plaintiffs to the case.[1] The defendants filed their reply on October 17, 2017 and filed an objection to the motion to amend on October 20, 2017, arguing that the amendment was futile and would not cure the standing issues this case presents. The plaintiffs replied to defendants' objection on October 31, 2017.

On December 26, 2017, plaintiffs filed an expedited motion to compel discovery seeking voluminous amounts of irrelevant discovery materials that also encompassed vast swaths of privileged information. Defendants objected to the expedited motion to compel discovery on January 16, 2018. The plaintiffs replied on January 30, 2018. Oral argument was held on the renewed joint motion to dismiss for lack of standing and on the expedited motion to compel on February 20, 2018.

On March 16, 2018, defendants filed a motion for protective order seeking relief from the trial court as to newly propounded interrogatories and document requests that violated the 25 interrogatory rule limit, expressly sought attorney-client privileged and work product protected information, and many of which posed substantially the same relevancy issues pending before the trial court in the fully briefed Expedited Motion to Compel. The LVWNH plaintiffs objected to the motion on March 29, 2018, and the NHDP objected on April 9, 2018. On April 10, 2018,

[1] The defendants would not learn until November that the LWVNH plaintiffs likely filed the motion to amend because the one individual that the trial court considered to have standing to challenge SB 3, Adriana Lopera, had registered or was going to register to vote in the upcoming municipal elections. The defendants had to conduct their own investigation to discover that this had occurred after the November 7, 2017 municipal elections.

the Court issued its Order on Pending Motions and, relying almost solely on federal cases construing Article III's injury requirement and without regard to RSA 491:22's statutory requirements, held that plaintiffs had standing to maintain this case.

On April 11, 2018, the Court held a status conference and heard additional arguments related to the status of the case and the undue burden that plaintiffs' pending discovery requests are placing on them. On April 12, 2018, the Court issued an Order denying Defendant's (sic) Motion for Protective Order and ordering the defendants to respond to plaintiffs' discovery requests by April 20, 2018. On April 13, 2018, the Court issued an Order granting Plaintiffs' Expedited Motion to Compel Discovery and ordering the defendants to release the entire Statewide Voter Database to the plaintiffs, as well as any and all communications and meetings related to SB 3. This petition for original jurisdiction followed.

VI. STAGE OF PROCEEDINGS IN THE SUPERIOR COURT AT WHICH THE QUESTIONS TO BE REVIEWED WERE RAISED, THE MANNER IN WHICH THEY WERE RAISED, AND THE SUPERIOR COURT'S RULING

The questions sought to be reviewed were raised in the initial motion to dismiss, objection to petition for preliminary injunction and accompanying memorandum of law, in the renewed motion to dismiss, in discovery motions and objections, and, to varying degrees, at all four of the hearings in this consolidated matter.

VII. REASONS THIS COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION

The special and important reasons for granting this petition for original jurisdiction are as follows. N.H. Sup. Ct. R. 11(1).

A. The Trial Court Exceeded Its Authority In Ordering The Release Of The Statewide Voter Registration Database And Has Put In Jeopardy The Privacy Rights Of Hundreds Of Thousands Of New Hampshire Voters.

In its order, the trial court mandated that the Secretary of State's Office turn over the private, confidential, and personally identifiable information of approximately 960,000 active

New Hampshire registered voters and approximately 365,400 inactive New Hampshire registered voters. The trial court issued this order despite the fact that the Legislature unambiguously made it a crime to disclose this information in any manner not authorized by statute. As such, the trial court has decided a question of substance that this Court has never decided: Whether the trial court can ignore the unambiguous intent of the Legislature to maintain the confidentiality of the database and the information in it. The trial court's decision on this important question violates an act of the Legislature, jeopardizes the security of the personally identifiable information of every active and inactive registered New Hampshire voter, puts the defendants' agents in the position of having to commit a crime in order to release this information to the plaintiffs, and, if permitted to happen regularly in election law litigation, threatens to deter persons from registering to vote in this New Hampshire. The trial court's order with respect to the Statewide Voter Registration Database therefore constitutes clear error and threatens immediate harm.

In 2002, Congress enacted the Help America Vote Act ("HAVA"), Pub. L. No. 107-252 (2002). Among HAVA's requirements, Section 303 mandated that states establish computerized statewide voter registration lists. HAVA authorized federal funds to assist with the implementation of its various requirements. *See id.*, at § 251.

To implement HAVA, the New Hampshire Legislature directed the Secretary of State to establish a "statewide voter registration database and communications system, hereinafter referred to as the voter database, connecting users throughout the state." RSA 654:45, I ("voter database"). The voter database contains information that is broader than that contained on public voter checklists. *Compare* 654:45, I ("The voter database shall include the current information on the voter registration forms, the accepted absentee ballot applications, the voter checklists,

and voter actions as recorded on the marked checklist maintained by each city, ward, and town in the state.") *with* RSA 654:25 (Checklists "shall include the full name, domicile address, mailing address and party affiliation, if any, of each voter on the checklist. . . .").

It also contains the personally identifiable information of registered New Hampshire voters and other private information related to a person's voting history and status and in which party's primary a voter participated. *See* Appendix 44-49 (providing a list of all data about registered New Hampshire voters contained in the database). For example, the Statewide Voter Database includes the following personally identifiable and other private information about individual registered voters: First name, middle name or initial when provided, last name, suffix (if any); Domicile address; Mailing address; date of birth; driver's license number; last four digits of a social security number (where the applicant did not have a driver's license number); a system generated voter ID number; party affiliation; a person's place of birth; naturalization information about a person including the State, city/town, and name of court where naturalized and the date naturalized; whether someone is in the military and, if so, whether they are domestic or overseas; the gender of a voter; the mailing address to which an absentee ballot was sent. *Id.*

In permitting the Secretary of State's Office to accumulate all of this personally identifiable and other private voting information about individual New Hampshire citizens into a single electronic database, the New Hampshire General Court made a policy decision to tightly control, protect, and secure this information from disclosure due to the special risks its citizens face in our modern, technological society if this information were to enter the public domain.

The General Court accomplished this goal in at least the following ways. *First*, the General Court narrowly circumscribed the Secretary of State's authority to release information contained the New Hampshire voter database. RSA 654:45, VI; RSA 654:31. *Second*, the

General Court ensured that the information released under RSA 654:31 is information that is already publicly available via city or town public checklists. RSA 654:31; RSA 654:25. *Third*, the General Court made it a criminal offense for any person to disclose information in the New Hampshire voter database other than in accordance with RSA 654:45. *See* RSA 654:45, VI ("Any person who discloses information from the voter database *in any manner not authorized by this section* shall be guilty of a misdemeanor.") (emphasis added). *Fourth*, the General Court required the Secretary of State to "[s]pecify the employees of the department of state authorized to access records contained in the voter database, subject to the limitations of paragraph VI" and to "[p]rovide adequate technological security measures to deter unauthorized access to the records contained in the voter database." RSA 654:45, V(a)-(b) (emphasis added). *Fifth*, the General Court did not include a mechanism to allow litigants to obtain this private, confidential information from the Secretary of State's Office through civil discovery requests.

Based on the above, the defendants asserted that RSA 654:45, VI effectively creates an absolute privilege against disclosure of a citizens' information in the voter database in any manner not authorized by statute. The New Hampshire Legislature is empowered to create such substantive statutory privileges. *See, e.g.*, N.H. R. Evid. 501 ("Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to: . . . (2) Refuse to disclose any matter; (3) Refuse to produce any object or writing . . . .") (emphasis added); *id.*, Report's Note ("Although the principal statutory privilege provisions have been embodied in the Rules, the saving for statutory privileges recognizes the inherent right of the Legislature to deal with such matters."). The defendants asserted that "[t]he essence of a privilege is to prohibit disclosure, and thus also discovery," *Commonwealth v. Chauvin*, 316 S.W.3d 279, 287 (Ky. 2010), and thus RSA 654:45, VI's

command that the database information not be disclosed "in any manner not authorized by this section" created an absolute substantive privilege barring the defendants from producing the database information in response to civil discovery requests. *See Stewart v. McCain*, 575 S.W.2d 509 (Tex. 1978) (holding that a law imposing criminal sanctions on government employees for disclosing information created an absolute privilege that barred production of certain bank examination information in civil proceedings).

The trial court disagreed with defendants, relying on a New Hampshire Supreme Court case from the 1950s involving paper records related to a single person that had nothing to do with the logistics of protecting an entire electronic database containing the aggregated, personally identifiable and private voting information of over a million persons. *See Marceau v. Orange Realty, Inc.*, 97 N.H. 497 (1952) (cited by trial court). Despite the many apparent dangers of releasing such a database in this day and age (such as exposing the database to substantially increased risks of cyber-attack by foreign governments or criminals, none of which can be entirely managed with a protective order), the trial court ordered production of the entire database to the LWVNH plaintiffs and has put the defendants in the position of having to commit a crime in order to release that information to the plaintiffs or otherwise face being held in contempt of court.

It bears noting as well that production of the Statewide Voter Database in response to civil discovery requests in election law cases not only violates the plain language of RSA 654:45, VI, but also runs the very real risk of chilling the right to vote in this State and dissuading citizens from registering to vote if they know that their personally identifiable information will be automatically given away to third-parties every time a person or entity decides to challenge the constitutionality of an election law as a burden on the right to vote.

Accordingly, this Court should grant defendants' petition for original jurisdiction to resolve whether RSA 654:45, VI permits the Secretary of State's Office to release the Statewide Voter Registration Database and/or the data or information contained in it in response to civil discovery requests.

B. The Trial Court's Discovery Rulings Depart From This Court's Holding In *Libertarian Party N.H. v. State*, 154 N.H. 376, 381 (2006) And Impose On Defendants Enormous Burden And Expense In Connection With Defending Election Law Changes.

With respect to plaintiffs' discovery requests, the defendants are not, as a matter of law, required to produce information relating to the sufficiency of the State's interests in or justifications for an election law. The Legislature passed SB 3, not the defendants. Nonetheless, the trial court has ordered the defendants to produce thousands of pages of documentation from within their offices that can only be used in this case to challenge the sufficiency of whatever interests or justifications the defendants advance in defense of the law. These requests are irrelevant to the constitutional analysis, are extraordinarily burdensome, and threaten to disrupt the important government functions of two critical state agencies. In this regard, the trial court has so far departed from the accepted or usual course of judicial proceedings in this area of the law as to call for an exercise of this court's power of supervision and has decided these discovery issues in a way not in accord with applicable decisions of this court, including *Libertarian Party N.H. v. State*, 154 N.H. 376, 381 (2006).

In *Libertarian Party N.H. v. State*, 154 N.H. 376, 381 (2006), this Court held that a plaintiff is not entitled to challenge the sufficiency of a State's asserted interests in or justifications for a particular election law under the balancing test this Court adopted in *Akins v. Sec'y of State*, 154 N.H. 67 (2006). Specifically, this Court quoted from the United States

Supreme Court's decision in *Munroe v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986), wherein the United States Supreme Court explained:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Libertarian Party N.H., 154 N.H. at 386-87.

The balancing test this Court adopted in *Akins* does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). To hold otherwise would inevitably lead to the type of endless, burdensome court battles that this Court in the *Libertarian Party* case sought to foreclose and would require the New Hampshire Legislature to evaluate in advance of passing an election law nearly all of the documents and communications related to the issue under consideration that exist in Secretary of State's Office and the Attorney General's Office as the legislative process unfolds. That is not how our representative form of government works, and the plaintiffs in this case should not be permitted to unduly burden and bog down two critically important state agencies with voluminous, unbridled discovery demands designed to challenge the sufficiency of the State's asserted interests in or justifications for SB 3.

This is not just an isolated discovery dispute where the impact is limited to the instant litigation. Should such a course of action be allowed, any plaintiff challenging a statutory provision will be emboldened to seek such voluminous discovery about facts

and circumstances that are not relevant to the legal analysis at issue in election law cases. The defendants' burden under *Akins* is to put forth State interests and justifications and to explain how the the law at issue furthers those within the appropriate level of scrutiny. This is predominately legal argument that does not entitle the plaintiffs to full-blown discovery involving the e-mail inboxes of every employee within the Secretary of State's Office and the Attorney General's Office.

Accordingly, this Court should grant the petition for original jurisdiction to make clear that the type of broad, burdensome discovery the plaintiffs are seeking in this case is irrelevant to whether SB 3 is unconstitutional under the *Akins* balancing test.

C. The Trial Court's Standing Ruling Departs Significantly From This Court's Well-Developed Standing Doctrine Under RSA 491:22.

With respect to standing, the trial court has committed clear error and has departed so far from this Court's existing standing jurisprudence as to enable the plaintiffs to seek an advisory opinion on the constitutionality of an election law. Immediate and irreparable harm flows from this because the defendants are now enjoined from fully implementing a constitutional act of the Legislature, will be forced to litigate an unduly burdensome matter for which subject matter jurisdiction does not exist, and will be forced to divulge and expose to potential misappropriation by foreign governments and criminals the personally identifiable information of every active and inactive New Hampshire registered voter.

Not every law that regulates voting impairs or prejudices the personal legal rights of persons who are qualified to vote. *See* RSA 491:22. SB 3 made a minor change in the State's voter registration system. Instead of permitting anyone registering to vote to use a domicile affidavit, SB 3 merely requires persons who possess documentation reflecting their domicile either to produce that documentation at the time they register to vote or to agree to return that

documentation to the clerk's office within a certain number of days after the election. *See* RSA 654:12, I(c)(1-2). SB 3 permits qualified persons to use a wide array of documents to satisfy this requirement. RSA 654:2, II(d); 654:12, I(c)(1). If a person does not possess documentation confirming his or her domicile, or is not aware at the time of registration if he or she possesses such documentation, that person may still register to vote within 30 days of an election or on election day by acknowledging this fact and shifting the burden to local and state election officials to confirm the person's claim of domicile. RSA 654:2, IV; RSA 654:7, IV(c). This option results in the same investigation that occurred pre-SB 3 with respect to the signing of domicile affidavits.

The hallmark of SB 3 is the fact that every qualified voter who wants to register to vote is able to do so and cast a ballot that counts in any election. No one is disenfranchised by SB 3. No one's right to vote is impeded in any way by SB 3. In fact, SB 3 does not require a qualified voter to create a document he or she does not already possess or otherwise obtain one in order to register to vote and cast a ballot.

The defendants moved to dismiss the plaintiffs' claims for lack of standing because the plaintiffs had failed to plead allegations sufficient to meet the requirements of RSA 491:22, the declaratory judgment statute. In so moving, the defendants argued that standing is a doctrine that rests on the transcendent principle that the judicial power is limited. *Duncan v. State*, 166 N.H. 630, 642 (2014) ("the judicial power in this State is limited to deciding *actual* and not hypothetical cases") (emphasis in original). Indeed, "[t]he doctrine of standing serves to prevent the judicial process from being used to usurp the powers of the political branches. In light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of an

important dispute and to 'settle' it for the sake of convenience and efficiency." *State v. Actavis Pharma, Inc.*, 170 N.H. 211, 215 (2017) (quotations and citations omitted).

"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). "[A] party does not obtain standing under RSA 491:22 merely by demonstrating that he has suffered an injury." *Id.* at 608. Rather, under RSA 491:22, "'[a] party will not be heard to question the validity of a law, or any part of it, 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)). "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).

Moreover, RSA 491:22 does not permit associations and organizations to seek declaratory judgments on behalf of their members. *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).

Under this standard, this Court has consistently held for years that a party must demonstrate that "some legal right of his has been impaired or prejudiced" by SB 3. *Avery*, 162 N.H. at 608. Also,

> [t]he 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). Furthermore, in order to obtain a declaratory judgment under RSA 491:22, the harm the plaintiffs purport they will encounter must be actual and imminent, *Actavis Pharma, Inc.*, 170 N.H. at 216-17; "'some day intentions–without any description of concrete plans, or indeed even any specification of *when* the some day will be–do not support a finding of the 'actual or imminent' injury that our [standing] cases require.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

Plaintiffs Douglas Marino and Garrett Muscatel are and have been registered to vote in New Hampshire since this case began. Plaintiff Adriana Lopera was not registered to vote at the outset of this case, but has since registered to vote and voted in the recent November 7, 2017 municipal elections. Three additional individual plaintiffs have been added into this case as of April 10, 2018, in an attempt to create standing. They are college students who have alleged nothing more than some day intentions about their desire to register to vote and who have not alleged how SB 3 will prevent them from registering to vote and casting a ballot in any way. Instead of alleging an actual concrete and particularized injury, they allege generally that they are confused by SB 3, they are intimidated by SB 3, they are concerned that SB 3 may create long lines at some election in the future that they may someday encounter, they may have to search to see if they possess an SB 3 document prior to registering to vote, and they, like the one or more of the original individual plaintiffs, engage in Get Out The Vote volunteer or other educational efforts that will be made more difficult by SB 3.

These purported "injuries" are not sufficient as a matter of law to enable these plaintiffs to seek a declaratory judgment with respect to the constitutionality of SB 3. Rather, all of these so-called "injuries" are too conclusory, generalized, abstract, and hypothetical to create standing.

They are also neither actual nor imminent, but consist of a series of "some day" allegations without any indication as to when that "some day" might come. They fail to specify in any way how SB 3 will actually impair or prejudice their personal legal right to vote. Moreover, the plaintiffs do not have a personal legal right in avoiding changes in the law so that their volunteer efforts remain unaltered or otherwise easy to perform.

The League of Women Voters of New Hampshire similarly lacks standing. The LWVNH has no personal legal right to vote. Thus, SB 3 does not imperil the LWVNH's personal legal rights in any way. The trial court's decision to the contrary amounts to legal error. The trial court found that the LWVNH has standing in its own right to challenge SB 3 as unconstitutional because SB 3 will allegedly increase its volunteer and educational efforts and will allegedly require it to spend money on those efforts. However, a mere injury as a result of the passage of law is not sufficient to invoke RSA 491:22. Rather, the LWVNH must show that some personal legal right of its has been impaired or prejudiced by SB 3. The LWVNH does not have a personal legal right to see their volunteer or education efforts remain unaltered. It also does not have a personal legal right to not have to spend money in furtherance of its voluntary efforts. Consequently, the LWVNH lacks standing to pursue this case.

The NHDP also lacks standing to pursue this case. The NHDP has no legal right to vote. Moreover, the NHDP has failed to allege how SB 3 will impede certain groups of people from registering to vote and voting who it contends tend to vote Democratic, and the trial court failed to test the NHDP's conclusory allegations against SB 3's text to discern whether or to what extent a young voter or a minority voter might be impeded from registering to vote and voting. Instead, the trial court simply accepted all of the NHDP's conclusory allegations as true, including its legal conclusions about SB 3, without regard for how SB 3 actually operates, and

decided on that basis that the NHDP had standing to pursue this litigation. *See* April 10, 2018 Order at 5 ("Because SB 3 makes it more difficult for voters to register on election day, and because same-day registrants tend to support Democratic candidates, it is logical to infer that NHDP's candidates will receive disproportionately fewer votes as a result of SB 3") (emphasis added). The trial court erred in making these kinds of legal assumptions on a motion to dismiss, rather than testing the factual allegations against SB 3 itself to determine if the NHDP has plausibly alleged that SB 3 will imperil or prejudice its personal legal rights.

Consequently, none of the plaintiffs in this case have standing at this point in time to challenge SB 3 as unconstitutional under RSA 491:22. The defendants should therefore not be required to release the personally identifiable and private voting information of every registered New Hampshire voter to the plaintiffs in violation of RSA 654:45, VI nor should they be forced to continue to slog through inappropriately burdensome discovery solely so plaintiffs can obtain an advisory opinion on the constitutionality of SB 3.

Accordingly, the Court should also grant defendants' petition for original jurisdiction to resolve whether the plaintiffs in this case have standing to pursue it.

VIII. JURISDICTIONAL BASIS FOR THE PETITION

The New Hampshire Supreme Court has jurisdiction to hear this case pursuant to RSA 490:4 and as further specified in Supreme Court Rule 11.

IX. PRESERVATION OF ISSUES

These issues were preserved in Defendants' motions and objections in the case and in the arguments at the hearings on September 11, 2017, October 30, 2017, February 20, 2018, and April 11, 2018.

Respectfully submitted,

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SECRETARY OF STATE
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CERTIFICATION

I hereby certify that two copies of the foregoing and the appendix to same were mailed this day, postage prepaid, to:

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Dated: April 20, 2018

Anthony J. Galdieri

X. LIST OF PARTIES AND COUNSEL

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The New Hampshire Democratic Party By Raymond Buckley, Chair

William E. Christie, Esquire

William M. Gardner, Secretary of State and Gordon MacDonald, Attorney General:

Anne M. Edwards, Esquire, Associate Attorney General, and Anthony J. Galdieri, Esquire, Assistant Attorney General of the New Hampshire Department of Justice, Civil Bureau, 33 Capitol Street, Concord, NH 03301, (603) 271-3605

XI. TRANSCRIPT

Transcripts of the September 11, 2017, October 30, 2017, February 20, 2018, and April 11, 2018 hearings will be necessary if the petition for original jurisdiction is accepted. A Transcript Order Form is enclosed.