

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

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April 09, 2020

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Case Name: **League of Women Voters of New Hampshire, et al v William M Gardner, et al**  
Case Number: **226-2017-CV-00433 226-2017-CV-00432**

You are hereby notified that on April 8, 2020 the following order was entered:

RE: FINAL ORDER:

See Copy of order attach - Anderson, J.

W. Michael Scanlon  
Clerk of Court

(539)

C: Steven J. Dutton, ESQ; Paul Joseph Twomey, ESQ; Bruce V Spiva, ESQ; John M Devaney, ESQ; Marc E Elias, ESQ; Anne M. Edwards, ESQ; Amanda R Callais, ESQ; Anthony J. Galdieri, ESQ; William E. Christie, ESQ; Suzanne Amy Spencer, ESQ; Richard J. Lehmann, ESQ; James S. Cianci, ESQ; Bryan K. Gould, ESQ; Cooley Ann Arroyo, ESQ; Callan Elizabeth Maynard, ESQ; Uzoma Nkwonta, ESQ; Elisabeth Frost, ESQ; Samuel R. V. Garland, ESQ; Tammy Jackson

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

League of Women Voters of New Hampshire, et al.

v.

William M. Gardner, et al.

Docket No. 226-2017-CV-00433

**ORDER**

Plaintiffs have brought this action seeking to overturn legislation commonly known as Senate Bill 3 (“SB 3”), which amended New Hampshire’s voter registration process. Specifically, Plaintiffs allege that SB 3 violates the State Constitution by burdening the right to vote (Count I), contradicting the domicile qualification in the State Constitution (Count II), violating equal protection (Count III), and being void for vagueness (Count IV). On November 4, 2019, the Court partially granted the State’s motion for summary judgment, dismissing Count II in its entirety and Count IV in part.

The Court held a bench trial on the remaining claims from December 2 through December 10, 2019.<sup>1</sup> The parties thereafter submitted post-trial briefs. For the reasons that follow, the Court finds in Plaintiffs’ favor on Counts I and III, and in the State’s favor on the remainder of Count IV.

<sup>1</sup> The Court also held a preliminary injunction hearing from August 27 through September 7, 2018. The testimony received at that hearing was incorporated into the record at the bench trial.

## Factual Background

Pursuant to Part I, Article 11 of the New Hampshire Constitution, all citizens over the age of eighteen that are domiciled in New Hampshire possess an equal right to vote. Prior to an election, New Hampshire residents can register to vote in person at their local town or city clerk's office. On election days, new voters are also able to utilize same-day registration at the polls. Prior to 2017, an individual could register to vote without presenting any proof of his or her domicile; the voter only needed to fill out a form listing his or her domicile address and sign an affidavit swearing that the information was true and accurate. That affidavit, in its entirety, read as follows:

If this form is used in place of proof of identity, age, citizenship, or domicile, I hereby swear that such information is true and accurate to the best of my knowledge.

This form was executed for purposes of proving (applicant shall circle yes or no and initial each item):

Identity	Yes/No	_____	(initials)
Citizenship	Yes/No	_____	(initials)
Age	Yes/No	_____	(initials)
Domicile	Yes/No	_____	(initials)

(Joint Exhibit ("JE") 9.)

In 2017, thirteen Republican state senators sponsored SB 3, a bill intended to amend the law to include stricter requirements for proving one's domicile when registering to vote. SB 3 altered the voter registration process in two significant ways. First, it created a distinction between registrations occurring more than thirty days before an election and those occurring within thirty days of and on election day. New voters who seek to register more than thirty days before an election must present documentation proving they are domiciled in the appropriate town or ward or they will be

turned away. Those who seek to register within thirty days of an election or on election day are not required to have documentation with them in order to vote, but they must fill out the second page of the Voter Registration Form ("Form B").<sup>2</sup>

Form B is the second major change to the registration process. In order to prove domicile, a new voter without documentation is required to select one of two options.

The first option ("Option 1") reads as follows:

I understand that to make the address I have entered above my domicile for voting I must have an intent to make this the one place from which I participate in democratic self-government and must have acted to carry out that intent. I understand that if I have documentary evidence of my intent to be domiciled at this address when registering to vote, I must either present it at the time of registration or I must place my initials next to the following paragraph and mail a copy or present the document at the town or city clerk's office within 10 days following the election (30 days in towns where the clerk's office is open fewer than 20 hours weekly).

\_\_\_ By placing my initials next to this paragraph, I am acknowledging that I have not presented evidence of actions carrying out my intent to be domiciled at this address, that I understand that I must mail or personally present to the clerk's office evidence of actions carrying out my intent within 10 days following the election (or 30 days in towns where the clerk's office is open fewer than 20 hours weekly), and that I have received the document produced by the secretary of state that describes the items that may be used as evidence of a verifiable action that establishes domicile.

Failing to report and provide evidence of a verifiable action will prompt official mail to be sent to your domicile address by the secretary of state to verify the validity of your claim to a voting domicile at this address.

(JE 11.) The second option ("Option 2") states:

\_\_\_ By placing my initials next to this paragraph, I am acknowledging that I am aware of no documentary evidence of actions carrying out my intent to be domiciled at this address, that I will not be mailing or delivering evidence to the clerk's office, and that I understand that

<sup>2</sup> For ease of reference, any mention of Form B in this order refers to the second page of the form, as the first page is largely unchanged from prior years.

officials will be sending mail to the address on this form or taking other actions to verify my domicile at this address.

(*Id.*) The form also retains the balance of the affidavit used the previous year, containing the following in the lower left corner:

This form was executed for purposes of proving (*applicant shall circle yes or no and initial each item*):

Identity	Yes/No	_____	(initials)
Citizenship	Yes/No	_____	(initials)
Age	Yes/No	_____	(initials)

(*Id.*)

Voters who select Option 1 on Form B are provided a separate form titled Verifiable Action of Domicile (“VAD”). This form states that “[t]he following checklist shall be used as a guide for what you may use as evidence and shall be submitted to the town or city clerk along with documentation that you are required to provide.” (JE 12.) It then presents a list of examples of documents that would serve as documentation proving one’s domicile, only one of which is necessary to return to the clerk’s office.<sup>3</sup> The form must be returned with the chosen documentation “by mail or in person” within ten or thirty days as specified above.

In addition to the foregoing, SB 3 also extended the existing penalties for wrongful voting set forth in RSA 659:34 to three new categories of conduct specific to SB 3: (1) presenting falsified proof of domicile or verifiable action of domicile; (2) providing false information in a written statement to prove that another is domiciled at a particular address; and (3) failing to provide follow-up documentation if choosing

<sup>3</sup> The following are examples of acceptable evidence for proving domicile: (1) establishing residency at an institution of learning; (2) renting or leasing an abode for a period of more than thirty days prior to an election day; (3) obtaining a New Hampshire motor vehicle registration, driver’s license, or identification card; and (4) enrolling a dependent minor child in a publicly funded elementary or secondary school serving the town or ward where the applicant is claiming to be domiciled. (JE 12.)

Option 1. The potential penalties imposed include a civil fine of up to \$5,000 and criminal liability for a class A misdemeanor. RSA 659:34.

Governor Sununu signed SB 3 into law on July 10, 2017, and it became effective September 8, 2017. Prior to the statute becoming effective, Plaintiffs initiated the present lawsuit, arguing the law was unconstitutional as it would effectively suppress voter turnout. On September 12, 2017, the court (Temple, J.) preliminarily enjoined enforcement of the criminal and civil penalties associated with SB 3. On October 22, 2018, the court (Brown, J.), granted a preliminary injunction enjoining the entirety of SB 3 from going into effect. After an emergency appeal, the New Hampshire Supreme Court stayed the preliminary injunction until after November 6, 2018, allowing SB 3 to remain in effect for the 2018 Midterm elections, but thereafter leaving the preliminary injunction in place.

### **Analysis**

A plaintiff “may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both.” *State v. Hollenbeck*, 164 N.H. 154, 158 (2012). Here, Plaintiffs assert a facial challenge to the statute. “A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications.” *State v. Lilley*, 171 N.H. 766, 772 (2019). “To prevail on a facial challenge, the challenger must establish that no set of circumstances exists under which the challenged statute . . . would be valid.” *Id.* “On the other hand, an as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case.” *Id.* In its order on the State’s motion for

summary judgment, this Court (Anderson, J.) determined that the proper approach on facial challenges is to conduct an ordinary constitutional analysis after first determining the appropriate level of scrutiny to apply.

**I. Count I – Part I, Article 11**

“Although the right to vote is fundamental, [the Court] do[es] not necessarily subject *any* impingement upon that right to strict scrutiny.” *Guare v. State*, 167 N.H. 658, 663 (2015). “Instead, [the Court] applies a balancing test to determine the level of scrutiny that [it] must apply.” *Id.* “Under that test, [the Court] weigh[s] the character and magnitude of the asserted injury to the voting rights sought to be vindicated against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* “Under this standard, the rigorousness of [the Court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens the fundamental right to vote.” *Id.* When voting rights are subject to severe restrictions, strict scrutiny applies and “the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Id.* Where restrictions are reasonable and nondiscriminatory, however, “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* “Most cases fall between these two extremes.” *Id.*

“Courts in other jurisdictions have recognized that a test similar to intermediate scrutiny applies to a voting restriction that falls between the two extremes.” *Id.* at 666. “Our intermediate level of scrutiny requires that a challenged law be substantially related to an important government objective.” *Id.* at 665. The State bears the burden

under this level of review, and “may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations.” *Id.* Where a law imposes unreasonable restrictions on the right to vote, “the State must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest set forth.” *Id.*

In Count I of their Complaint, Plaintiffs allege that SB 3 violates Part I, Article 11 of the New Hampshire Constitution by burdening the fundamental right to vote. Plaintiffs argue that SB 3 imposes severe or, in the alternative, unreasonable burdens upon voters, subjecting the law to strict or intermediate constitutional scrutiny. They articulate a number of burdens that fall within the following broad categories: (1) the criminal and civil penalties imposed; (2) the confusing language and procedures on the forms; and (3) the creation or exacerbation of long lines at polling places. Plaintiffs argue these burdens will result in voters being dissuaded from voting, relying upon a theory known as the calculus of voting. The Court will summarize these topics below and then address SB 3’s impact on voters.

A. Burdens Imposed by SB 3

1. Penalties

As noted above, SB 3 imposed new penalties on registrants who failed to comply with the registration process. The first page of the modified registration form includes the following passage:

In accordance with RSA 659:34, the penalty for knowingly or purposely providing false information when registering to vote or voting is a class A misdemeanor with a maximum sentence of imprisonment not to exceed one year and a fine not to exceed \$2,000. Fraudulently



registering to vote or voting is subject to a civil penalty not to exceed \$5,000.

(JE 11.) Form B also contains this same language but adds the following sentence: "In accordance with RSA 659:34-a voting in more than one state in the same election is a class B felony with a maximum sentence of imprisonment not to exceed 7 years and a fine not to exceed \$4,000." (Id.)

SB 3 also amended RSA 659:34, I, to add the following (additions in bold):

A person is subject to a civil penalty not to exceed \$5,000 if such person:

.....

(g) Presents falsified proof of identity, **domicile, or verifiable action of domicile** at any election;

**(h) Registers to vote on election day using an affidavit to satisfy proof of being qualified, represents on the affidavit that the person possesses proof that he or she does not have in his or her possession at the polling place, and purposely and knowingly fails to provide a copy of the document by mail or present the document in person to the town or city clerk by the deadline established in RSA 654:12; or**

**(i) Purposely and knowingly provides false information in a written and signed statement or other documentation that another person is domiciled at an address that is owned, leased, rented, or managed by the individual providing the statement for the purposes of voter registration and that statement is used for voter registration purposes.**

RSA 659:34, I(g)–(h). The statute also states that "[a] person is guilty of a class A misdemeanor if, at any election, such person purposely or knowingly commits" the above-noted acts. RSA 659:34, II.

Finally, SB 3 amended RSA 654:12, I(c)(2)(A) to include the following language:

"An applicant whose voter registration is approved based on an acknowledgment of a domicile evidence obligation who knowingly or purposely fails to provide a document to

the city or town clerk as required by this paragraph shall be subject to the penalties of wrongful voting as established in RSA 659:34.” In its order on the State’s motion for summary judgment, the Court interpreted the statute as requiring a “knowing *and* purposeful” mental state for civil penalties, and a “knowing *or* purposeful” mental state for the criminal penalties. While the Court found this does not render the statute unconstitutionally vague, it did note that it has the unusual effect of holding criminal conduct to a lower standard than related civil misconduct.

## 2. Confusing Language

Plaintiffs argue that any burden imposed by the new penalties is augmented by the complexity of SB 3, specifically Form B and the Verifiable Action of Domicile form. At the preliminary injunction hearing, the Court heard testimony from Dr. Deborah Bosley, an expert in plain language and readability. As Dr. Bosley did not offer additional testimony or supplemental reports at the subsequent bench trial, the following summary of her testimony is largely taken from the court’s (Brown, J.) preliminary injunction order.

Dr. Bosley conducted an analysis of Form B and the VAD, utilizing four methodologies: (1) a readability test, which is an algorithm-based analysis of the grade level necessary to understand the text and ease of understanding; (2) a comparison of the existing language with best practices in plain language; (3) usability testing, which consisted of one-on-one interviews with intended users; and (4) an expert review.

Dr. Bosley’s readability test scored readability on a scale of 0–100, with 100 being equivalent to a comic book, 60–70 equivalent to a local newspaper, and 0–30 equivalent to the Harvard Law Review. The results are based upon the average

number of words, the number of syllables per word, the average number of words per sentence, and the number of sentences.

In performing her analysis, Dr. Bosley separately tested both Option 1 on Form B and the entirety of Form B. The tested paragraph of Option 1 consists of a single sentence containing just over 100 words. Dr. Bosley testified that the ideal sentence should contain only 12–25 words. Option 1’s readability score was below 0. Form B as a whole has an average sentence length of 72 words and its reading score was also below 0. Dr. Bosley testified that the readability scores alone indicated that the forms would be very difficult for the average adult to read and understand.

Dr. Bosley performed the same analysis on the VAD. For the entire form, the average sentence length is 31 words, the grade level of the text was 17 (equivalent to that of a first-year graduate student), and the readability score approached 30. Dr. Bosley also tested the second to last paragraph of the form, which instructs the reader what to do if they do not have any of the listed documents. The paragraph is 97 words long, had a grade level of 23 (equivalent to that of a doctoral candidate), and its readability score was 16.32. Ultimately, as with Form B, the analysis demonstrated that the VAD would be very difficult for the average adult to read and understand, as the average adult in the United States reads at an eighth-grade level. Consistent with the foregoing, Dr. Bosley testified that both forms fail to meet many of the best practices in the field of plain language.

As to this readability analysis, the State argues that Dr. Bosley’s conclusions are implausible on their face, claiming that “Dr. Bosley stated that the SB 3 registration forms are incomprehensible to every person in the state and would require 32 years of

formal education to understand.” (State’s Post-Trial Mem. at 34.) This, however, is an inaccurate characterization of Dr. Bosley’s testimony. While the algorithm Dr. Bosley employed did indicate a grade level of 32 for the combination of Options 1 and 2, Dr. Bosley testified that she interpreted these results to simply indicate the complexity of the document being analyzed. (Preliminary Injunction (“PI”) Tr. (8/29) at 22.) Instead of stating that the forms would be incomprehensible to everyone in the state, Dr. Bosley testified that “nobody would be able to ready this easily. Easily.” (*Id.* at 23.)

Dr. Bosley also conducted usability testing with 12 participants<sup>4</sup> consisting of 7 college students, several part-time workers, and some full-time workers, all aged between 18–29 years old. The participants found some of the forms’ words or phrases confusing, such as “domicile,” “verifiable action,” and “democratic self-government.” (See JE 43B at 198, 264, 316, 348.) The participants also found the forms difficult to navigate. (See *id.* at 193, 262–65, 316–19.) Following the PI hearing, the State argued that Dr. Bosley prompted some of the participants with leading questions. However, the court (Brown, J.) found this does not invalidate the entirety of the testing, as there are many instances of confusion recorded without any such leading questions. As a result of the complexity of the forms, Dr. Bosley testified that the readers were skimming its contents, rather than reading the materials provided. (PI Tr. (8/28) at 62-64; see also JE 43B at 183 (tester indicating that if she was in a hurry she would probably initial the form without reading it because it was so tedious).)

<sup>4</sup> Dr. Bosley testified that research by others in the field has indicated that 12 test subjects should result in the discovery of approximately 96% of the issues in a given document.

### 3. Long Lines

Another central argument made by Plaintiffs is that the confusion caused by the forms, in addition to dissuading some from voting, will cause those who do register and vote to take more time at the registration table, resulting in longer lines. At both the preliminary injunction hearing and the bench trial, the Court heard testimony from Dr. Muer Yang regarding the increase in wait times that would result under SB3. Dr. Yang is a queuing expert that applied Queueing Theory to this case. Queueing Theory is a mathematical model that looks at three factors (arrival rate, service rate, and number of servers) to describe the behavior of queueing systems. With respect to elections, the inquiry is how to effectively use election resources to minimize voter wait time. Dr. Yang identified the strengths of Queueing Theory as its simplicity, transparency, and ease of use, as it does not require many data points to generate predictive models. Its primary weakness is that it makes strong assumptions. Specifically, it assumes that the arrival process is constant, which is not reflected in reality, as there are peaks and valleys to the rate that voters arrive at polls. Notably, Dr. Yang testified that because of the irregular arrival rate of voters, queueing theory has a tendency to underestimate wait times.

Following the preliminary injunction hearing, Dr. Yang issued a supplemental report updating his numbers with data from the 2016 general election that he did not have access to before, as well as from the 2018 midterm election, during which SB 3 was partially in effect. Dr. Yang also interviewed moderators, supervisors, and city/town clerks from the same towns as his original report, minus one. Finally, he interviewed two election observers.

Dr. Yang's high-level conclusions are simple: due to its increased complexity, SB 3 will increase registration time for voters, resulting in longer lines. This reduces the margin of error for election officials when they plan for future elections. Overall, Dr. Yang concluded that SB 3 will have a negative impact on lines for same-day registrants. These negative effects will naturally be greater at larger polling locations.

Dr. Yang looked at the registration forms used both before and after SB 3, including the VAD, and the training materials provided by the State. He also looked at the number of ballots cast and the election files in past elections, the number of same-day registrants at each polling location in prior elections, the number of same-day registrants submitting domicile affidavits, and the opening and closing times of the polls. Dr. Yang also based his calculations in part on data gathered by local election officials and observers at various polling locations. For example, Louise Spencer, an observer at Durham in 2018, recorded transaction time information on voters. (JE 88-1.) She did so by randomly selecting an individual and observing their progress through the line, noting the time they entered the line, sat at the registration table, and left the registration table. Her data indicated an average registration time of 7.8 minutes. (*Id.*)

Dr. Yang also reviewed data provided by the State demonstrating average registration times for several cities and towns in both 2016 and 2018. (JE 88-5.) While some polling places, such as Bedford and Londonderry, actually saw a reduction in the average registration time, more saw an increase. (*Id.*) For example, Plymouth's average registration time of 3-5 minutes in 2016 increased to 5-15 minutes in 2018; Manchester Ward 11 increased from 5-10 minutes in 2016 to 7-12 minutes in 2018; and Milford increased from 4-6 minutes in 2016 to 5-10 minutes in 2018. (*Id.*)

Using the foregoing data, Dr. Yang conducted two types of analyses. The first is the utilization of an M/M/c queuing formula to generate tables analyzing several variables, including numbers of registrants, number of servers, and average transaction time. (See, e.g., JE 88-2.) This formula generates expected wait times for polling locations of different sizes, using variables for average registration time with and without proof of domicile, as well as different percentages of individuals without proof of domicile. For example, one of Dr. Yang's M/M/c queueing charts assumed an average registration time of 5 minutes for an individual with proof of domicile, and further assumed that someone without proof of domicile would require an additional 2.5 minutes to fill out Form B. (*Id.* at 2.) At small polling locations of 100 same-day registrants, SB 3 will have only minor impacts on expected wait times, increasing from a baseline of an 18% probability of waiting an expected 0.7 minutes to a 19% probability of waiting the same time if 5% of registrants lack proof of domicile. (*Id.*) Even under the worst case scenario of 40% of registrants having no proof of domicile, there is only a 25% probability of waiting an expected 1.3 minutes. (*Id.*)

As the number of registrants increases, however, the wait times become more pronounced in a nonlinear fashion. At a polling place with 1000 same-day registrants, the baseline wait time is expected to be 2.9 minutes with a 62% probability. (*Id.*) If 5% of same-day registrants lack proof of domicile, the expected wait time increases a full minute to 3.9 minutes with a 67% probability. (*Id.*) If 25% of same-day registrants lack proof of domicile, the wait time jumps to 27.8 minutes with a 93% probability. (*Id.*) At 40% lacking proof of domicile, the queue becomes overloaded, meaning it will continue to increase faster than registrations can be processed until the polls close. (*Id.*)

Not surprisingly, the effects are worst at the most populous polling places, such as Durham. At a polling place with 3,000 same-day registrants, the baseline wait time is 3.1 minutes with a 73% probability. (*Id.*) With only 5% lacking proof of domicile, the wait time more than doubles to 6.7 minutes with an 84% probability. (*Id.*) At 10% lacking proof of domicile, the expected wait time jumps to 40.7 minutes with a 97% probability. (*Id.*) At 15% and above lacking proof of domicile, the queue becomes overloaded. (*Id.*) Therefore, Dr. Yang's models indicate that the largest polling places are greatly impacted by even incremental effects of SB 3. It goes without saying that all of the foregoing issues become increasingly pronounced as the average registration time under SB 3 increases. It is also important to recall Dr. Yang's caveat about the fact the Queueing Theory tends to underestimate lines as it assumes a consistent rate of new arrivals.

The second analysis Dr. Yang performed was a computer simulation model. Dr. Yang testified that he used three data inputs for his simulation: (1) the actual number of same-day registrants as recorded by the State; (2) the transaction time information recorded by Louise Spencer; and (3) the number of registrars working the polls. The model was cross-validated using video footage from the Durham polls in 2018, which showed 120-130 individuals waiting in line at 5:40 p.m. (PX 107.) Dr. Yang's simulation estimated that there would be 126 individuals in line at that time. (JE 88-8.) The model predicted an average maximum wait time of 35 minutes, which exactly matched the longest wait time in Louise Spencer's data. (*Id.*; JE 88-1.) Finally, the model predicted an average overtime wait—meaning the time a voter spends at the polls after they close—of 19 minutes, compared to 20 minutes reflected in the State's own data.



Therefore, many of the data points generated by the simulation accurately reflected the situation in reality.

Dr. Yang created simulations that showed what registration wait times might look like in Manchester Ward 4 in 2020 in order to demonstrate how SB 3 could reduce the margin of error for local election officials. He first used real-world data from the 2016 general election for the same ward to generate a table showing the number of same-day registrants, average registration time, average wait time, maximum wait time, average queue length, and average overage time. (JE 42 T22.) The chart then simulates results for 5%, 10%, and 15% increases in same-day registrants. (Id.) Based on that data, Dr. Yang ran a simulation for a 2020 general election using SB 3's registration forms, assuming that registering with Form B would take an average of 7.5 minutes (compared with 5 minutes for those who possessed proof of domicile), and assuming that 5% of registrants would need to use Form B. (JE 42 T23.) Separately assuming a 5% increase in the number of same-day registrants, the average wait time under SB 3 increased 9 minutes, to 47 minutes total, over the 2016 simulation data. (Id.)

Since 2004, the State had taken the consistent position that anything exceeding 15 minutes is a "long line," and has encouraged local officials to do everything they can to keep voter wait times below that threshold. (See JE 33 at 6; PX 41 at 10; PX 42 at 5; PX 43.) That remains the standard today for voter check-in lines. However, according to testimony from Assistant Attorney General Matthew Broadhead, the State has recently changed its position on voter registration lines, establishing a new threshold of 30 minutes until a line is deemed "long." (Trial Tr. (12/11) at 1270.) Specifically,

question 8(c) of the Attorney General's Polling Place Checklist for the 2018 General Election reads: "Are eligible voters who choose to register on election day able to start the voter registration process in less than 30 minutes?" (JE 71 at 2.)

In its cross-examination of Dr. Yang, the State challenged his reliance on Ms. Spencer's data for his average registration time of 7.8 minutes, noting that Dr. Yang also interviewed Ann Shump, Chairman of the Supervisors of the Checklist in Durham, who indicated that she was able to register voters under SB 3 in 5 minutes on average. Dr. Yang explained that he reconciled the difference first by noting that Ms. Shump's 5 minutes was within the range of Ms. Spencer's data, which was 4-16 minutes. He also noted that Ms. Shump is a very experienced registrar, so she would be able to register a voter faster than someone else, while Ms. Spencer recorded registration times across numerous registrars. Given that there are over a dozen registrars at Durham alone during general elections, it would be inappropriate to use a single person's registration time to estimate SB 3's effect across multiple registrars and polling locations. Moreover, Ms. Shump herself testified that it took her a couple minutes more to register voters without proof of domicile, and Barbara Ward stated in her email to the Secretary of State that in some cases it took several minutes simply to explain Options 1 and 2 to registrants. (Trial Tr. (12/5) at 579, 581-82; PX 147 at 2.)

The State also questioned the accuracy of Dr. Yang's predictive models, arguing he lacked sufficient data. Dr. Yang explained that the average registration time was an input into his calculations, and that the length of resulting lines are the output. If the input changes, so too will the output. He further noted that the output is based on the simple physics of the system, and if the output is known, such as by observing video

footage of the lines recording during the 2018 election, that information can be used to validate the input, i.e., the average time it took to register voters during that election. As noted above, Dr. Yang did have this footage, which he used to validate his model.

Finally, the State took issue with the larger numbers Dr. Yang included in his charts, specifically identifying a significant drop in estimated registrants lacking proof of domicile in Dr. Yang's predictive models from the actual numbers recorded during the 2018 midterm elections. For example, Dr. Yang's earlier models included situations where up to 50% of voters in Durham lacked proof of domicile, but only 2.4% actually lacked domicile in the 2018 general election. (See JE 93.) In response, Dr. Yang first noted that the high numbers were based on 2016 presidential election data, that his simulation model was predicting the 2020 presidential election, and that the 2018 midterm was not comparable to either. This is consistent with the testimony of Dr. Herron set forth below.

Second, Dr. Yang said his table results were not intended to predict any particular precinct and characterized it like a dictionary. In other words, any given election official can look at the tables and, using their own judgment, pick a row that appears closest to what they expect to take place and prepare accordingly.

Overall, the Court finds Dr. Yang persuasively addressed the State's criticisms of his methodology and conclusions, and further notes that the State offered no rebuttal expert on the issue of lines.

#### 4. Calculus of Voting

To support their claim that SB 3 imposes a burden on voters, Plaintiffs retained the services of Michael Herron, Ph.D, a professor at Dartmouth College and an expert

in statistical analysis of election administration. Dr. Herron discussed the “calculus of voting,” which he described as an old and prominent theory in political science that looks at the costs and benefits of voting, and how this influences a voter’s decision to vote. Within this theory, “costs” refer to a broad range of expenditures incurred as a result of voting, such as time spent waiting in line, gathering documentation, traveling to the town or city clerk’s office or the polls, etc. “Benefits” fall into two classes: the benefit that one might receive by casting a deciding vote, and benefits that voters accrue through the act of voting, such as performing one’s civic duty and expressing his or her opinions. In essence, the calculus of voting is simple: the probability of an individual voting increases as costs are reduced and decreases as costs are increased.

In evaluating the impact of SB 3 upon the population of New Hampshire, Dr. Herron performed bivariate, multivariate, and individual-level analyses, updated with data from the 2018 midterm election. For his bivariate plot analysis, Dr. Herron examined how one’s age, mobility, and median income impacted the rate at which voters utilized same-day registration. (JE 89-1, 89-2, 89-3.) These analyses showed that young voters between the ages of 18-24, mobile voters, and individuals with lower median incomes all used same-day registration at higher rates. (Id.)

Dr. Herron testified that he conducted a multivariate regression analysis because bivariate plots are limited in that one might wonder if, for example, young people use same-day registration independently of being mobile or not. The multivariate analysis contained variables for youth, mobility, income, and partisanship. The multivariate analysis confirmed that young, mobile, and lower-income individuals used same-day

registration at a higher rate, and also indicated that undeclared voters and Democrats also utilized same-day registration at a higher rate than Republicans. (JE 89-5.)

Finally, Dr. Herron conducted an individual-level analysis of New Hampshire voters in which he looked at college students in dormitories, new movers, and new registrants because these groups would be disproportionately impacted by SB 3. His data demonstrated that the vast majority of college students in dormitories are registered Democrats or undeclared. (JE 89-8.) The same holds true for new registrants and movers. (JE 89-9, 89-10.)

In his supplemental report, Dr. Herron also performed an analysis of turnout in the 2018 election. He testified that he did so because SB 3 was partially in effect for that election and wanted to understand what if anything he could learn about the implementation of SB 3 based on the 2018 midterms. Based upon the voter turnout for both presidential and midterm elections since 2008, and particularly noting that the turnout for the 2018 midterms was significantly higher than the turnout for the midterm elections in 2010 and 2014, Dr. Herron opined that one could expect an additional 130,000 to 175,000 more voters in the 2020 election. (See JE 89-11.) This would tend to magnify all of the aforementioned issues caused by SB 3, in particular the length of lines predicted by Dr. Yang.

Further compounding the foregoing issues is the existence of significant variability in the data at local levels. Dr. Herron compiled a list of towns with the highest rates of registrants failing to bring proof of domicile to the polls, which ranged from 7.27% to 32.26%. (JE 92-5.) There was also a wide variety in the rates at which registrants selected Option 1 versus Option 2 during the 2018 general election. (JE 92-

3.) Dr. Herron offered two possible explanations: (1) voters in different towns simply brought documentation at different rates; or (2) variability in the discretion of local election officials resulted in different implementations of SB 3. In fact, based on testimony from Assistant Secretary of State Bud Fitch, the 32% rate, which was from Rochester Ward 5, was improperly skewed as a result of human error; at some point during the day, one of the supervisors of the checklist was requiring everyone to fill out Form B, regardless of whether they had proof of domicile or not. (Trial Tr. (12/11) at 1488-89.) In addition, Dover reported that of its greater than 2,000 new registrants, not a single one utilized Form B. (JE 92-2.) This also appears to indicate some error in the recording of data. Setting aside these outliers, this data suggests that whatever burdens SB 3 imposes will not be felt uniformly across the state.

The most prominent costs associated with SB 3 are the confusion arising from the language of the forms; increased wait times likely to result from the complexity of the forms; and incurring post-election obligations and being exposed to potential penalties if selecting Option 1. These costs will disproportionately impact certain members of the electorate, such as college students, mobile voters, and the homeless. Ultimately, considering the foregoing, Dr. Herron concluded that all things being equal, over time and across multiple elections, fewer people would participate in New Hampshire elections as a result of SB 3. Dr. Herron testified that his conclusion remained the same after the 2018 midterms.

To counter Dr. Herron's testimony, the State retained M.V. Hood, III, Ph.D, a professor of political science at the University of Georgia. Dr. Hood's methodology consisted of asking two basic questions: (1) What did SB 3 change?; and (2) What

were the effects of SB 3? In answering the first question, Dr. Hood examined the law prior to SB 3 and read the text of SB 3. He also interviewed a number of state and local election officials. In doing so, he concluded that SB 3 does not change the registration process in any significant manner in that new registrants must still present documentary proof of domicile or sign an affidavit, and can still register and vote on election day.

In answering the second question, Dr. Hood reviewed data for voter turnout in the 2018 midterms and compared it to turnout in prior elections. In 2018, voter turnout in New Hampshire was 54%, an increase over both the 2014 (47.6%) and 2010 (45.7%) midterm elections. (JE 90-F1.) Dr. Hood also reviewed turnout among young voters for the same elections and observed a similar trend. As a percentage of total turnout, 6.3% of voters aged 18–24 voted in the 2018 midterms, compared to 4.4% in both 2014 and 2010. (JE 90-F2.)

Dr. Hood also reviewed election-day registration statistics based on data from the New Hampshire Secretary of State's office. From September to November 2018, including the midterm election, a total of 1,266 domicile affidavits were submitted by new registrants, comprising 2.6% of election-day registrations. (JE 90-T1.) This represented a significant decrease from the presidential election in 2016, when 6,033 domicile affidavits were submitted, comprising 7.3% of election-day registrations. (JE 90-T2.) Dr. Hood testified that if Plaintiffs' hypothesis about the harmful effects of SB 3 was true, one would expect a spike in the number of affidavits being used, because it indicates that people were unable to comply with the law. To the contrary, Dr. Hood concluded that not only do voters overwhelmingly come to the polls with proof of

domicile, but the fact that use of domicile affidavits appears to be falling indicates that New Hampshire voters are aware of the law and are capable of complying with it.

Dr. Hood also examined post-election verification efforts by the State both before and after SB 3 by considering the 2016 presidential election and the 2018 midterm election. In 2016, of the 6,033 domicile affidavits completed, all but 66 were able to be verified by the Secretary of State. (Defs.' Ex. ("DX") 5A-T4.) By contrast, between July and December 2018, of the 1,380 domicile affidavits were completed, all but 7 were able to be verified by the Secretary of State. (JE 90-T4.) As a result, Dr. Hood concluded that in addition to reducing overall affidavit use, SB 3 resulted in a significant reduction in the cost of post-election investigations. Dr. Herron noted that this conclusion was unsupported by any data about the manpower or financial cost incurred by the State in its post-election investigation efforts.

Dr. Hood ultimately concluded that he could not find any detrimental effects associated with SB 3. However, there are significant shortcomings in Dr. Hood's analysis. With respect to voter turnout, Dr. Hood acknowledged that turnout can be affected by numerous factors, such as how competitive the race is, who the candidates are, the saliency of the issues at play, how much is spent on advertising, efforts by candidates to mobilize voters, and the existence of aggressive get-out-the-vote efforts. Dr. Hood further acknowledged that one would ordinarily control for these factors, but admitted he did not do so when looking at the numbers from the 2018 midterm. He specifically conceded that he did not look at any candidate effects, specific issues, or the competitiveness of any of the races in 2018; he did not look at any voter education campaigns specific to SB 3; and he could not say to what extent any of the



aforementioned factors contributed to turnout. He also agreed that there was a national trend of increased turnout in 2018 over 2014 and 2010, but did not perform any comparison between the rate of increase in New Hampshire and other states. With respect to the youth turnout data, Dr. Hood admitted he could not offer an opinion as to why it was higher in 2018 due to lack of sufficient information. Dr. Hood also did not look at national data for youth turnout in the 2018 election, and performed no analysis to determine what percentage of the youth were college students.

Dr. Hood's comparison between the 2018 midterm election and the 2016 presidential election is also flawed. As indicated by Dr. Hood's own data, the turnout in presidential elections is always significantly higher than midterm elections; in 2008, 2012, and 2016, turnout was approximately 70%, compared to 45-54% for the past three midterm elections. (JE 90-F1.) In addition, Dr. Herron testified that the demographics of those who participate in midterm elections differ from presidential elections. According to Dr. Herron, voters in midterm elections tend to be better informed and have attained higher levels of education, and midterm elections see fewer first-time voters than presidential elections. (See JE 89-12.) Therefore, one would always expect to see lower overall numbers in a midterm election, particularly those using same-day registration, regardless of any changes in election law. Due to the lower turnout and more experienced voter base, one would naturally expect to see fewer domicile affidavits being filed in midterm elections. As a result, a comparison between the 2018 and 2016 elections offers little insight into the overall impact of SB 3 going forward.

Other courts evaluating Dr. Hood's expert opinions have identified the same or similar flaws. In *Florida v. United States*, the United States District Court for the District of Columbia stated that it:

reject[ed] other calculations in Professor Hood's expert report because [it] agree[d] with the intervenors' expert that in several instances Professor Hood inappropriately pools together groups of dissimilar data, which is not methodologically appropriate. For example, Professor Hood attempts to draw conclusions based on data pooled from different kinds of elections, without offering a reason to believe that early voting patterns are in fact common across the different types of elections.

885 F. Supp. 2d 299, 367 (D.D.C. 2012). This Court agrees that Dr. Hood's conclusions are based upon methodologically inappropriate analyses. Accordingly, for the reasons set forth above, the Court finds Dr. Hood's expert opinion not credible.

B. Impact on Voters

"Courts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). "[D]iscriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *Id.* "[O]nce the election occurs, there can be no do-over and no redress." *Id.* "While states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). "That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Id.* at 437. "The public interest therefore favors permitting as many qualified voters to vote as possible." *Id.*

The State argues, and the Court agrees, that the burdens imposed by SB 3 are not severe. As noted by the State, burdens are generally deemed severe where they outright exclude voters from the process. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (requirement that voter reside in state for one year and county for three months to register); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1996) (poll tax); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd* 336 U.S. 933 (1949) (literacy test). Where long lines have contributed to other courts' finding of a severe burden, the lines in those cases extended multiple hours, far longer than anything recorded in even the busiest of New Hampshire elections. See, e.g., *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008) (voters forced to wait two to twelve hours); *Ury v. Santee*, 303 F. Supp. 119, 124, 126 (N.D. Ill. 1969) (voters waited two to four hours). Those lines are also often accompanied by multiple additional egregious violations. In *Brunner*, for example, voting machines were not allocated proportionally to the voting population, poll workers misdirected voters to the wrong polling places, provisional ballots were improperly utilized, disabled voters in need of assistance were turned away, and one witness testified that the touchscreen voting machine changed the candidate she voted for. *Id.* at 478. Here, in contrast, as repeatedly argued by the State, an individual lacking proper documentary proof of domicile who goes to the polls will be able to cast a ballot after filling out Form B's affidavit; they will not be turned away outright.

That being said, the burdens imposed by the law are neither reasonable nor nondiscriminatory. The language contained on the forms is needlessly complex, both in length and diction. As set forth in more detail below, the forms are also confusing or

outright misleading in several respects. First, the language on Form B does not readily clarify when Option 1 or Option 2 should be selected, as indicated by the fact that two State witnesses, both of whom occupy high levels in the government, offered competing testimony on this matter. Second, the VAD also contains confusing and potentially misleading language suggesting that its list of documents is more exhaustive than the State believes it to be. Finally, Form B is outright misleading with respect to the penalties associated with failing to return documentation under Option 1; not only does it avoid mentioning specific penalties, but it improperly suggests that failing to return documentation will only result in official mail being sent to the registrant's address.

Confusion manifested among voters in different ways during the elections in which SB 3 was partially in effect. For example, Elizabeth McClain, the Hanover Town Clerk, observed some students had initialed both Options 1 and 2 on Form B when registering. (Trial Tr. (12/4) at 405.) An inspector with the Attorney General's Office reported that a registrant in Goffstown Ward 5 did the same. (JE 70 at 43.) Elizabeth Correll, Concord's Supervisor of the Checklist, testified to two instances of voter confusion during the 2018 midterm election. First, she observed a woman complete the registration forms and then head toward the exit without voting. When stopped and asked why, the woman stated that she did not think she was able to cast a ballot that day. (Trial Tr. (12/3) at 111-12.) Second, a registrant did not have any proof of domicile on him but remembered that he did have a ham radio license that would have listed his address. After unsuccessfully attempting to find the license online with his phone, the man became frustrated and left without registering, despite being informed that he could register without providing any documentation that day. (Id. at 113-14.)

Voters in other locations left the polls to retrieve documents proving domicile because they thought they had to, and Chief Investigator Richard Tracy testified that local election officials in Lyndeborough improperly sent voters away from the polls with instructions to bring back documentation. (Trial Tr. (12/10) at 1136-37.) In an email to the Secretary of State and the Attorney General, among others, Barbara Ward, Supervisor of the Checklist for Portsmouth, stated that “[w]e noticed a considerable amount of confusion on the part of voters due to the new forms. Many individuals—including at least one former chair of the NH Republican Party and former candidate for State Senate—were confused by the forms.” (Pls.’ Ex. (“PX”) 147 at 2.)

As noted in prior orders of the Court, the VAD also contains confusing language and directions. For example, although the State repeatedly described the VAD as a general, non-exhaustive guideline, the form states: “To establish that you have engaged in a verifiable act establishing domicile, provide evidence that you have done at least one of the following.” (JE 12.) It also states that “[o]nly one item *on the list* is required to demonstrate a verifiable act.” (*Id.* (emphasis added).) This may lead an individual who does not have documentation that exactly matches the provided list to believe that he or she cannot comply with it. Indeed, a number of college students testified at the preliminary injunction hearing that they did not believe they had anything that met the descriptions of any item on the list. Further, multiple witnesses testified that the ultimate decision of what constitutes acceptable proof is up to the discretion of the town clerk and/or the poll worker at the polling location.

The State repeatedly argued that no witness testified to a voter being actively turned away and prevented from casting a ballot after SB 3 went into effect. However,

as just noted, Investigator Tracy did testify that some voters were, in fact, turned away in order to acquire documentation; whether they returned and voted is unknown. (See Trial Tr. (12/10) at 1136-37.) Moreover, there were several near misses where individuals only voted because someone took the time to stop, ask questions, and explain. One witness testified that if things were busier, she would not have had the time to do this. Moreover, several witnesses testified to people leaving the polls after expressing frustration with the forms. Although the stories of voters leaving the polls are not extensive and are anecdotal, they are supported by the persuasive and credible expert testimony offered by Plaintiffs, for which the State had no effective rebuttal (see *infra*). Based on the expert testimony, the Court finds there exists strong evidence that SB 3, if fully implemented, will suppress voter turnout.

The complicated nature of the forms is reflected not only in voter confusion, but also confusion among local election officials. Assistant Secretary of State Bud Fitch testified that one of the supervisors in Rochester Ward 5 was instructing everybody who registered on election day to fill out an affidavit regardless of whether they needed to or not. Assistant Secretary Fitch also testified that with respect to choosing between Option 1 and Option 2, a voter should only select Option 1 if he or she knows that they have, at that moment in time, documentary proof of domicile. However, Deputy Secretary Scanlan testified earlier that same day that voters should select Option 1 if they believed they *could* obtain said proof, and should select Option 2 only if they did not believe they could obtain it. The latter position would push a greater number of individuals to Option 1, exposing those registrants to potential penalties.

Various towns also displayed inconsistent information on their websites.

Londonderry's voter registration page contained the following: "What are the requirements to register to vote? Proof of Londonderry, NH Residency (Driver's License or Passport with current Londonderry address)." (PX 164.) Goffstown's website said that without a driver's license, "a second proof of residency will be required (i.e. – utility bill, lease agreement)." (PX 165.) Brentwood's website states that in order to register, "[y]ou need to have a Driver's License with your Brentwood address or a bill with your name and address." (PX 174.) Finally, Hopkinton stated that "[a]cceptable proof [of domicile] is a vehicle registration, lease, utility or tax bill, or payroll stub with your Hopkinton/Contoocook address." (PX 175.)

In practical terms, due to all of the foregoing, a significant majority of registrants will find themselves subject to the substantial penalties imposed by SB 3. Of the 66 new registrants who selected Option 1 between January and June 2018, not one actually complied with the law and submitted proof of domicile within the time period required. (JE 58.) Of the 1,104 new registrants who selected Option 1 between July and December 2018, only 289 individuals returned proof of domicile, subjecting 815 to potential civil and/or criminal penalties. (JE 59.)

In addition, inconsistent or incorrect guidance from official sources or authority figures may result in unregistered voters being dissuaded from even attempting to vote. For example, on October 9, 2018, the president of UNH sent an email to students informing them that they were entitled to vote in New Hampshire and encouraging them to do so. (JE 80.) However, he stated that "[t]o register to vote in New Hampshire, you will need a photo ID, proof of your date of birth (a driver's license suffices), and proof of

domicile (where you live).” (*Id.*) The email offers examples of what would suffice for proof of domicile—such as a utility bill, lease, housing agreement, or any other document containing the student’s name and address—but makes no mention of the possibility of filling out an affidavit when registering. (*Id.*) Therefore, a student reading the email from the president of the institution who did not have any of the referenced documents may have been led to believe that they would be unable to vote.

The credible testimony of Plaintiffs’ expert witnesses, supported by testimony from a multitude of witnesses and the State’s own data, suggests that the complicated and confusing nature of the forms will increase average registration times and result in longer lines at polls. The increased time waiting in line is a cost of voting that, together with navigating the forms and the penalties, may outweigh the benefit of voting for some individuals. To this point, an election observer testified that during the 2018 midterms, she witnessed five voters leave the registration line without registering or voting during a time that the line was continuing to grow without moving forward. (Trial Tr. (12/4) at 448-49.) This is a fact that the State’s own materials concede. (See PX 41 at 10 (stating that “excessive waiting times deter voting”); PX 43 at 2 (same).) Moreover, the State failed to present testimony rebutting the well-supported opinions of Drs. Yang and Herron on these points.

The Court finds it is important to note that the data suggests that the number of individuals lacking proof of domicile is, overall, a small minority of new registrants. (See, e.g., JE 93.) Most new registrants possess proof of domicile and thus never encounter SB 3’s forms. While it is unlikely that the worst case scenarios in Dr. Yang’s models will be realized, as they require 40% of same-day registrants to lack proof of



domicile, the models strongly indicate that the increased average registration time under SB 3 will have some negative impact on lines in the upcoming 2020 general election. Because this impact increases with population, Dr. Yang's credible testimony supports a conclusion that larger polling places and elections with larger turnout will both experience noticeably longer lines under SB 3. Because waiting in line constitutes a cost of voting, SB 3 will increase the likelihood that certain voters will not vote.

As to the penalties, at the outset, the Court notes that one of Plaintiffs' experts, Dr. Lorraine Minnite, testified at the preliminary injunction hearing that she reviewed the election codes of every state and determined that New Hampshire is the only state in the country that criminalizes the failure to return paperwork relating to election registration. (PI Tr. (8/31) at 30, 91–92.) SB 3 is therefore unique in that respect, and by definition imposes harsher penalties on the voter registration process than any other state in the country. In addition, as noted above and in this Court's order on the State's motion for summary judgment, it is easier to be charged with a Class A misdemeanor than a civil penalty under SB 3.

The Court further notes that an individual need not cast a fraudulent vote in order to be subject to the penalties set forth at RSA 659:34, I(h). Even assuming the new voter is entirely truthful about their domicile and is fully eligible to vote in New Hampshire, they could nevertheless be civilly fined \$5,000 and/or face a criminal fine of up to \$2,000 and a sentence of up to a year in prison if they knowingly and/or purposely fail to return paperwork. Holding someone accountable for both a civil fine and criminal penalties for failing to submit a document when that individual is otherwise domiciled in this state and voting in the proper location represents an overreach by the government.

Penalties associated with the failure to return paperwork are particularly unreasonable given the ease with which the State is capable of verifying the vast majority of registrants who lack documentary proof of domicile when they register. As set forth in more detail below, the State is capable of verifying domiciles with a variety of resources, and the number of individuals that require follow-up investigation by the Attorney General's Office after any given election is exceedingly low considering the number of affidavits filed.

Numerous witnesses testified at trial that the penalties would have a deterrent effect on voting. As set forth in more detail below, Dr. Herron testified that exposure to criminal penalties is a cost that will deter potential voters. Deputy Secretary of State David Scanlan testified that the Secretary of State's Office does not instruct local election officials to advise registrants about any of registration penalty provisions due to the potential for the "appearance of intimidation." (PI Tr. (9/6) at 172.) Significantly, while Form B does provide a warning that knowingly or purposely providing false information when registering to vote, or fraudulently registering to vote, could result in criminal and civil penalties, the form does *not* inform a reader that failing to return proof of domicile exposes the registrant to the same penalties. Instead, Option 1 merely says: "Failing to report and provide evidence of a verifiable action will prompt official mail to be sent to your domicile address by the secretary of state to verify the validity of your claim to a voting domicile at this address." (JE 11.) This avoidance of even referencing the penalties further supports the conclusion that exposure to these penalties will likely dissuade someone from voting, or at least from selecting Option 1.

Notably, the State dedicates only a single paragraph of its fifty-one-page post-trial brief to a discussion of the penalties associated with SB 3 and their burden on registrants. In that brief section, the State emphasizes the required mental states under the law and notes that voters have nothing to fear from accidentally forgetting to send in documents. The State argues that “any person dissuaded from voting because he or she would *intentionally* commit one of these offenses is hardly disenfranchised, as that person would not have a right to vote in New Hampshire in the first place.” (State’s Post-Trial Brief at 33.) However, this oversimplifies the statute’s reach. Even assuming one were to register via Option 1 with the intent of not returning the paperwork or intentionally provide false information while attesting that another resides at a certain domicile, these actions may not say anything about that person’s eligibility to vote under the criteria set forth in the State Constitution.

At other times, the State has attempted to address concerns about the penalties by raising the fact that prosecutors will exercise their discretion with respect to prosecuting violations of SB 3’s new penalties. However, the Court finds this to be an unconvincing argument, and one that would be small comfort to the average citizen when deciding whether to subject themselves to such significant penalties. Regardless of the likelihood of being prosecuted, a voter may be dissuaded from voting because they are fearful of any post-election investigation. Whether or not that person is legally correct or intending to defraud, this is a valid reaction. Moreover, such an investigation only occurs when the individual has committed a documented *actus reus*, and no defendant wants to be limited to a defense of state of mind at trial. In addition, even assuming the voter is positive he or she could mount a successful defense, the financial

and social cost of defending against the prosecution is substantial enough to dissuade someone from even participating in the process in the first instance.

Finally, the Court finds the State's argument that Plaintiffs have failed to identify anyone who decided not to vote as a result of the penalties is somewhat disingenuous. As noted above, the penalties were enjoined less than a week after the law became effective. Therefore, at no time has any voter been subject to or even been made aware of these potential penalties while voting.

As noted by Dr. Herron, all of the foregoing falls disproportionately on certain groups of individuals who use same-day registration more frequently than others. Young, mobile, low-income, and homeless voters will all encounter SB 3 and be exposed to its penalties at a higher rate than other voters. Therefore, the burdens imposed by the law are discriminatory, in addition to being unreasonable.

The State argues that because SB3 does not burden *all* voters, it has a plainly legitimate sweep and therefore must survive a facial challenge. In support, the State cites *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016), and *Brakebill v. Jaeger*, 932 F.3d 671 (6th Cir. 2019). All of those cases state some variation of: "[E]ven assuming that a plaintiff can show that an election statute imposes excessively burdensome requirements on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters." *Brakebill*, 932 F.3d at 678. However, each of those cases involved a voter identification law that required all voters in the state to have some form of official identification to cast a vote. Here, in contrast, SB 3 only applies to and imposes burdens on unregistered voters, already a minority of the voting population

in New Hampshire. Even fully enforced, SB 3 would, by definition, only apply to *some* voters. Therefore, partial or full invalidation of the statute would not have the sweeping impact mentioned in the cases above. The Court is also concerned by the State's apparent position that so long as it only affects a small portion of the population, the State is entitled to enact targeted legislation that disenfranchises that population with impunity.

Moreover, the State's overarching argument that Plaintiffs' failed to identify any individual that was prevented from voting due to the implementation of SB 3 largely misses the point. The problem with SB 3 is not that it creates a system that encourages voters to be actively turned away from the polls or physically prevents individuals from registering by, for example, requiring specific types of documentation that are impossible for one group to obtain. The burdens imposed by SB 3 are more subtle; the new process establishes enough hurdles, the forms contain enough complexity, and the penalties present enough risk that they tend to dissuade a specific type of voter from even engaging with the process. In this regard, the State's constant refrain that nobody was prevented from voting rings hollow. SB 3 does not stop someone at the polls from casting a ballot; it discourages them from showing up in the first place.

Relying in part on the discredited testimony of Dr. Hood, the State argues that the increased turnout for younger voters in the 2018 midterm election indicates that SB 3 does not have a deterrent effect on this population. However, the Court finds two predominant factors contributed to the increased turnout independent of SB 3. First, although Dr. Hood did not account for it in his analysis, the Court finds it cannot ignore the current political climate when evaluating the data from 2018. Overall turnout was

increased in 2018 over prior midterm elections, both in New Hampshire and nationally. (JE F-1, F-2, F-3.) Dr. Herron testified that he analyzed the census data on this matter and determined that the increases in New Hampshire were qualitatively the same as those seen nationwide. (Trial Tr. (12/4) at 294-95.) As SB 3 only exists in New Hampshire, one cannot conclude that SB 3 had any particular effect on voter turnout.

Second, a consistent theme in the testimony of Plaintiffs' witnesses was the assistance of third-party organizations in voter education outreach, get-out-the-vote efforts, and assistance with the registration process itself. In direct response to SB 3, both the League of Women Voters of New Hampshire and the New Hampshire Democratic Party expended significant time and effort on voter outreach and education campaigns expressly focused on SB 3. Elizabeth Tantarelli, president of the League, testified that the League generated fliers intended to educate voters on SB 3. (See Trial Tr. (12/10) at 1021-22.) Lucas Meyer, president of the Young Democrats of New Hampshire, testified that his organization undertook voter education efforts both on and off campus, and devoted 45% of its time to addressing SB 3 leading up to the 2018 midterm elections. (See Trial Tr. (12/9) at 895-98, 906.) Meyer testified that these efforts were undertaken with a focus on keeping lines moving quickly on election day.

Colleges have also undertaken efforts to assist their students. Elizabeth McClain testified that the Office of Residential Life at Dartmouth College has a close relationship with the supervisors of the checklist and sends staff to the polls to confirm the domiciles of students, removing the need for these students to complete Form B. (Trial Tr. (12/4) at 401-02.) For the same purpose, UNH developed an app that allowed on-campus students to prove their domicile. (Trial Tr. (12/5) at 551-53.) Plymouth State College

created a student portal, and Keene State College provided a list of students and their addresses to prove domicile. (Trial Tr. (12/10) at 1199-1200; Trial Tr. (12/11) at 1344-45.)

At least one court has acknowledged the existence of third-party assistance in the context of voting rights in its analysis of whether an election law imposed a burden on voters. In *Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3D 808, 812-13 (S.D. Ohio 2014), Ohio enacted legislation that reduced the number of days that voters could participate in early in-person (“EIP”) voting, including allowing EIP voting on only a single Sunday before the election. Among other arguments, the plaintiffs sought to enjoin the law because it would unlawfully burden black voters that participated in an initiative called “Souls to the Polls,” in which voters would be driven to the polls after Sunday church services. *Id.* at 816. Many of these voters were low income and lacked access to transportation and therefore relied on the transportation offered by Souls to the Polls. *See id.* at 832. The Federal District Court for the Southern District of Ohio found that “[g]iven evidence of long lines occurring when only one Sunday with limited hours was available during the early-voting period, . . . Directive 2014-17’s limitation of Sunday voting to a single day with limited hours burdens the voting rights of African Americans who have come to rely on Souls to the Polls initiatives.” *Id.* at 842.

Here, the Court is not persuaded that the extraordinary efforts by third parties to address concerns raised by SB 3 can be discounted in the analysis of the law’s effect on voter turnout. While it may not stand on its own as evidence of an unreasonable or severe burden on the right to vote, the Court finds that these efforts, at a minimum,

helped prop up the voter turnout numbers in 2018, and that similar efforts will need to continue going forward in order to ameliorate the burdens imposed by SB 3. In fact, both Dr. Yang and Ann Shump testified that they believed the UNH app helped to significantly reduce the percentage of voters who lacked proof of domicile in Durham in 2018. (Trial Tr. (12/10) at 1048, 1051; Trial Tr. (12/5) at 553.) The Court finds this reliance on the beneficence of third parties to be fraught with risk, as there is no guarantee and no requirement that such efforts continue.

In evaluating the constitutionality of election laws, courts look at the statute's language, its implementation, its impact on voters, and the legislature's justifications for the law. *See generally, Burdick v. Takushi*, 504 U.S. 428 (1992); *Guare v. State*, 167 N.H. 658 (2015); *Akins v. Secretary of State*, 154 N.H. 67 (2006). This Court is unaware of any case in which the efforts of third parties were taken into account as a factor curing a constitutional defect in a law. Moreover, to conclude that an otherwise unconstitutional burden is lawful because of the actions of third parties would be a dangerous precedent to set. Legislation must be constitutional as written; the legislature cannot enact laws with the expectation that private individuals or entities will undertake the effort and expense of addressing its constitutional infirmities.

Based upon the foregoing, the Court finds that SB 3 imposes an unreasonable and discriminatory burden on the rights of voters in New Hampshire. As a result, the State must meet its burden under intermediate scrutiny to demonstrate that the law is "substantially related to an important government objective." *Guare*, 167 N.H. at 665. "[T]he State must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually



addresses, the interest set forth.” *Id.* at 667. As noted above, “[t]o meet this burden, the government may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations.” *Id.* at 665 (quoting *Cmty. Res. for Justice v. City of Manchester*, 154 N.H. 748, 762 (2007)).

In its requests for findings of fact and rulings of law following the preliminary injunction hearing, the State articulated the following interests in support of SB3: (1) assessing the eligibility and qualifications of voters; (2) ensuring that only those individuals qualified to vote under Part I, Article 11 of the New Hampshire Constitution are registering and voting in the proper location; (3) safeguarding voter confidence in the election system; (4) protecting public confidence in the integrity of the State’s elections; and (5) preventing and protecting against wrongful voting and/or voter fraud. In its post-trial brief, the State reiterated these interests. However, at the bench trial, the State also articulated a new basis for the law: reducing the number of sworn statements of domicile that state officials must investigate after an election, thus reducing the financial burden.

At the preliminary injunction stage, the State argued that the most reliable source of legislative intent, aside from the language of the statute, is the majority report of the committee recommending the adoption of the legislation. In this case, that report reads as follows:

This bill, as amended by the committee, is designed to strengthen the public confidence in the integrity of our elections by closing the domicile loophole. Under current New Hampshire law, to be qualified to vote individuals must establish their domicile in the town or ward where they seek to register. Many new registrants satisfy this requirement by signing a “domicile affidavit” in which they attest under penalty of perjury that they are domiciled in the town or ward. The use of only an affidavit to prove domicile creates opportunities for voter

fraud because election officials must take the applicant at his or her word. Furthermore, because the standard for domicile under RSA 654:1, I, is entirely subjective . . . , it is virtually impossible to prove that an individual has misrepresented domicile in the affidavit. . . . [This bill creates] an important change in the law because it makes false representations of domicile much more difficult and makes enforcement of the law much easier if there are misrepresentations. . . . The minority argues that the law should not be changed because there is not serious voter fraud. The majority rejects this as the standard the legislature should apply when considering election law reform. If current law creates opportunities for voter fraud the majority believes that the law should be changed to eliminate those opportunities regardless of whether anyone can demonstrate that the vulnerability in the law has been exploited.

(JE 3 at CHR 4.) Furthermore, Senator Regina Birdsell, one of the bill's sponsors, stated:

This legislation has been in the making for a long time. Some people believe there is rampant voter fraud, while others believe that voter fraud is widespread enough to bother not doing anything about it. However almost no one believes that voter fraud does not exist at all and how could they? The secretary of state testified that in every election at least one case is discovered and prosecuted. As with all other kinds of crime, it is hard to know how many undiscovered cases occur. With our incredibly lax honor system voting we let people who vote simply because they say they are domiciled here. We have no way to know how many improper votes are cast by those not truly domiciled in the state each election. Mister President, we owe it to our constituents to balance two equally important ideas. One; we want to make voting and access to the polls easy enough that not one single qualified voter is turned away and denied the right to cast a legal ballot. Two; we want to make our voting system secure enough that not one single qualified voter has his or her vote cancelled out by ballots cast by someone who is not legally domiciled here. . . . If we continue to turn a blind eye to the fact that this happens in every election without making any effort to assure that only legal voters are casting ballots in our elections, then we are not doing right by our constituents.

(JE 2 at CSR 15–16.) Senator Andy Sanborn, another sponsor of the bill, stated:

I would hope that . . . if you truly believe that every eligible voter has a right to vote, that you have an equally strong requirement to make sure their vote counts. . . . Some people in this room have had exceptionally close races. So shouldn't we be trying just as hard to

make sure that we know we have done all in our power to make sure that every vote was eligible, and that every vote counted? Because if one person slips in to decide a race who is not eligible, it has disenfranchised every person who showed up who was eligible. So when we talk about fraud, . . . because we don't have any protection on fraud, because we are one of the most lax states in America. . . . Additionally, while I don't think there is widespread fraud and abuse, we received testimony from the secretary of state himself . . . that said that in every single election in recent history, they have brought someone up on voter fraud. . . . [I]f we do not ensure integrity, integrity of the process, that beyond any other measure will discourage people from voting.

*(Id. at CSR 25–26.)*

Although the legislative record is practically overwhelmed with references to voter fraud, the reality is that voter fraud is virtually non-existent in this state, a fact that the State conceded at trial. In its opening statement, the State said: “[L]et me clearly state that there is no widespread voter fraud in New Hampshire. The State has never taken the position that there is.” (Trial Tr. (12/3) at 45.) Consistent with this concession, Dr. Lorraine Minnite testified that her research into voter fraud in New Hampshire revealed less than one confirmed case per year over the past twenty years. Put into more concrete numbers, Dr. Herron testified that there was a single case of voter fraud in 2016, representing a fraud rate of 0.0166% when compared to the number of domicile affidavits signed (6,033), and 0.00013% compared to the number of total ballots cast that year (755,850). Prior elections had similarly low rates of fraud: 0.00076% in 2006 (3 investigations out of 393,056 ballots cast), 0.0014% in 2008 (10 investigations out of 719,403 ballots cast), and 0.00087% in 2010 (4 investigations out of 461,423 ballots cast).

Finally, the State has failed to prove that the restrictions imposed by SB 3 are actually necessary to address voter fraud. Although additional hurdles have been put in

place, the fact remains that new voters may register by affidavit without proof of domicile and cast a valid vote. Notably, the ballots filled out by voters registering via affidavit are not provisional; there is no way of distinguishing between ballots once they have been cast. Therefore, any individual intent on casting a fraudulent vote will be able to do so by selecting Option 2, for which there are no additional penalties under SB 3. Even assuming a fraudulent voter faced greater penalties under SB 3, the State presented no evidence that these would be a deterrent to a fraudulent voter. Therefore, to the extent the legislature enacted SB 3 with the purpose of combating voter fraud, the Court is not convinced that it succeeded.

The State also articulates justifications about ensuring the integrity of New Hampshire elections and boosting voter confidence. However, the Court agrees with Plaintiffs that these are simply arguments about voter fraud in disguise. As the court (Brown, J.) noted in its preliminary injunction order, “[a]ll remarks regarding improving confidence in and the integrity of the State’s elections were made in the context of closing ‘loopholes’ and tightening up the ‘lax’ system that supposedly enables ineligible voters to cast ballots throughout the State.” (PI Order at 20; *see generally* JE 2.) Moreover, Dr. Herron testified that voter confidence is already very high in this state, as indicated by the high rate of participation in elections. New Hampshire boasts some of the highest voter turnout numbers in the country, ranking third overall in the 2016 general election. In addition, Dr. Herron testified that the most significant factor for voters with respect to the perception of election integrity is the “winner effect”: an individual is more likely to believe that the election process is fair when their preferred candidate wins, and vice versa. Finally, because SB 3 does not in fact impede

fraudulent voters, any perceived increase in the integrity of New Hampshire's elections is illusory.

The Court finally addresses the State's argument that SB 3 serves the important government interest of reducing the administrative cost of post-election investigation. First, as noted by plaintiffs, this administrative convenience justification is particularly recent; it was not until the final bench trial that the State began to articulate administrative convenience as a justification for the law. Moreover, the legislative record contains only one single reference to this concept. On June 1, 2017, during a debate on the House floor, Representative Barbara Griffin stated:

Currently, the state does send out letters or cards as provided in law, but using that information to make any factual conclusion as to the validity of a domicile assertion is a nearly impossible task and over the years the volume and lack of follow up with thousands of voters would make that task a difficult ongoing and very costly use of state resources. SB 3 is intended to and does shift from the state to the voter the responsibility of proving where they are domiciled by requiring a production of a piece of paper or documentary evidence in support of the assertion that the person lives where he or she says she does. . . . [D]ocumentary evidence of domicile will dramatically reduce the number of new registrants whose claim of domicile must be investigated by the state. This will result in more focused investigations and greater likelihood of timely prosecution of voter fraud where it occurs . . . .

(JE 48 at 133.) Given the fact that of the dozens of pages of minutes from debates and speeches in both the Senate and the House, the above quote is the only reference to the administrative cost of voter registration, the Court finds this was not a focus of the legislature. Nevertheless, even assuming the foregoing is sufficient to make administrative convenience an official justification for the law, the Court finds the State has failed to meet its burden to establish that it is an important governmental objective that is actually addressed by SB 3.

Chief Investigator Tracy testified that for 2016, the Attorney General's Office utilized the internet, made phone calls, and/or visited the domicile address provided in order to verify affidavits submitted. Investigator Tracy testified that the vast majority of domiciles were verified using the internet and phone calls. The Attorney General's investigators spent 817 hours verifying domicile affidavits and qualified voter affidavits submitted from May 2016 to January 2017. (PI Tr. (9/5) at 230.)

Between July and December 2018, 1,669 individuals registered to vote without providing documentary evidence of domicile. (JE 59.) 1,104 of those used Option 1, promising to return documentation. (*Id.*) However, only 289 of those actually submitted documentation; 815 did not. (*Id.*) As a result, the State investigated 1,380 voters (the 815 that did not return documentation plus the 565 that selected Option 2), 1,307 of whom were verified using online databases. (*Id.*) The Secretary of State mailed letters to the remaining 73 addresses, 66 of which were delivered as addressed. (*Id.*) The final 7 were forwarded to the Attorney General's Officer for further investigation. (*Id.*) The State provided no information on how much time was spent investigating any of these individuals.

The State also appears to completely gloss over the fact that under a fully implemented SB 3 regime, it is not enough to verify the addresses of those who selected Option 1 and failed to return documentation. Assistant Attorney General Nicholas Chong Yen, current head of the election law office, testified that if SB 3's penalties were not enjoined, the Attorney General's office would have to conduct an analysis and follow-up to assess whether each of the 815 people who did not return documentation in 2018 could be criminally charged or civilly fined under the statute.

(Trial Tr. (12/9) at 989-90.) While the State may employ its discretion in choosing not to ultimately prosecute some or all of these individuals, under SB 3 the State *must* conduct these preliminary investigations; to do otherwise would render the penalty provision either entirely meaningless or would result in completely arbitrary enforcement. SB 3 therefore creates potential for significant costs that, at a minimum, would match the cost of the verification system pre-SB 3. Moreover, due to the penalties being enjoined, Attorney Chong Yen testified that the Attorney General's office has not yet developed any enforcement plan. (*Id.* at 987.) Therefore, the State is unable to address the cost of SB 3's implementation; as a result, it has failed to demonstrate that SB 3 actually addresses the stated goal of reducing the administrative cost of running elections.

For all of the foregoing reasons, the Court finds the State has failed to meet its burden under intermediate scrutiny. In light of this finding, the State argues the proper remedy is not to strike down the statute in its entirety, but to merely excise the offending language and leave the remainder intact, as the Supreme Court did in *Guare*. As the State acknowledges, "[i]n determining whether the valid provisions of a statute are severable from the invalid ones, we are to presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved." *Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 217 (1999). "We must also determine, however, whether the unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure." *Id.*

Here, because the unreasonable burden imposed by the statute is largely due to the language on Form B and the VAD, those forms must be stricken in their entirety.

Form B and the VAD are the centerpieces of SB 3, without which much, if not all, of the legislation ceases to make sense. The penalties enacted rely on words defined in or actions take pursuant to forms that no longer exist, and the two-tiered registration system no longer functions, as there is no longer an affidavit to submit within thirty days of an election and on election day.

The State argues that it is free to alter the language in the forms because RSA 657:7, IV(c), as modified by SB 3, provides that “[t]he secretary of state shall prescribe the form of the voter registration form . . . , which shall be in substantially the following form.” However, Deputy Secretary Scanlan testified that the language contained within the forms was mandated by the legislature, and that the only discretion the Secretary of State had was to alter the form’s physical layout. (Trial Tr. (12/11) at 1420-21.) The Court finds this to be the proper reading of the statute. This is, therefore, not a problem the Secretary of State’s office can fix; repair of SB 3 must be undertaken by legislative action. As a result, the unconstitutional provisions of the statute are so integral and essential to the general structure of SB 3 that the act must fail in its entirety.

Accordingly, for the foregoing reasons, the Court finds in Plaintiffs’ favor on Count I of their complaint and finds that SB 3 in its entirety is facially unconstitutional.

## **II. Equal Protection**

“In considering an equal protection challenge under our State Constitution, we must first determine the appropriate standard of review by examining the purpose and scope of the State-created classification and the individual rights affected.” *In re Sandra H.*, 150 N.H. 634, 637 (2004). As noted in the previous section, “[a]lthough the right to vote is fundamental, we do not necessarily subject *any* impingement upon that right to



strict scrutiny.” *Guare*, 167 N.H. at 663. The Court “must balance the legislature’s right to regulate elections with citizens’ rights to vote and be elected.” *Akins*, 154 N.H. at 72. Because the burdens here are the same as in Section I, the Court will apply the same intermediate scrutiny standard in reviewing whether SB 3 violates the equal protection clause.

Part 1, Article 11 of the New Hampshire Constitution guarantees that “[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.”

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.

*Bush v. Gore*, 531 U.S. 98, 104–05 (2000). “The equal protection provisions of the State Constitution are designed to ensure that State law treats groups of similarly situated citizens in the same manner.” *McGraw v. Exeter Region Co-op. School Dist.*, 145 N.H. 709, 711 (2001). “The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently.” *LeClair v. LeClair*, 137 N.H. 213, 222 (1993).

Relying upon Dr. Herron’s research, Plaintiffs argue that SB 3 impacts certain voters more than others. Specifically, as indicated above, young voters, college students, mobile voters, low-income voters, and Democrats<sup>5</sup> are more likely to be

<sup>5</sup>While the Court does not specifically rely on the alleged partisan nature of SB 3, the Court finds it worth noting that a statute governing elections that targets a specific political party may be particularly problematic under an equal protection analysis.

impacted by SB 3. These voters are similarly situated with all other voters in New Hampshire in that they are domiciled here and, pursuant to the State Constitution, have an equal right to vote. Unlike situations where voters are in different geographic areas that are operating under different forms of government, SB 3 impacts the act of voter registration which functions the same throughout the State. *Cf. McGraw*, 145 N.H. at 713 (“We have previously upheld different treatment of voters based upon their residence in separate, geographic communities operating under different forms of government.”). While all new registrants who lack proof of domicile must fill out Form B and otherwise navigate the hurdles set up by SB 3, those in the demographics noted above are demonstrably impacted by the negative effects of SB 3 at a greater rate due to their increased use of same-day registration.

The Court notes that the State did not separately analyze Plaintiffs’ equal protection claims in its post-trial memorandum. That being said, the State briefly argues that Plaintiffs have failed to establish that SB 3 disproportionately burdens certain groups of voters more than others. (State’s Post-Trial Mem. at 3.) Specifically, the State argues that young voter turnout was noticeably increased in 2018, and college students and other identified demographics at the polls were able to vote without incident, despite SB 3 being partially in effect. (*Id.*) In addition, the State argues that “[c]ollege students, more than other groups of people, have many advantages that enable them to more easily register to vote.” (*Id.*) However, the State’s position is not supported by these arguments, and was in fact contradicted by the evidence submitted at trial.

Dr. Hood did not challenge Dr. Herron's conclusion that certain groups utilize same-day registration more than others. To the contrary, he conceded that that conclusion is supported by the political science literature and was empirically established by Dr. Herron's data. (Trial Tr. (12/9) at 804-05.) Instead, Dr. Hood simply challenged the cause-and-effect conclusion that increased exposure to SB 3's forms resulted in an increased burden on the right to vote. (*Id.* at 805.) The Court again notes that it did not find Dr. Hood to be a credible witness. Moreover, as noted above, turnout among young voters increased nationally in 2018 at qualitatively the same levels, a point not addressed by Dr. Hood at all. This indicates that the turnout in 2018 was a reflection of the political climate rather than anything that can be attributed to SB 3.

Moreover, multiple witnesses testified to their belief that the ease with which college students voted in 2018, at least in Durham and other college towns, was due in large part to the efforts of the colleges themselves to supply proof of domicile. The Court has already expressed its position that such third-party efforts do not represent a valid alleviation of the unconstitutional burdens imposed by SB 3. In addition, the fact that college students and others who went to the polls were able to register and vote does not undermine Plaintiffs' position. Plaintiffs have never maintained that SB 3 would prevent *all* members of certain groups from being able to vote. Rather, Plaintiffs have maintained that SB 3 will dissuade people from attempting to vote and will ultimately suppress voter turnout. This position was supported at trial by the credible testimony of Dr. Yang and Dr. Herron, as well as numerous other lay witnesses. The evidence at trial indicates that SB 3 imposes an unreasonable burden on the right to vote, which will be felt most by those who utilize same-day registration. Because

specific, identifiable groups utilize same-day registration at demonstrably higher rates than others, SB 3 disproportionately burdens those individuals.

The State has not offered any specific justifications for this disparate treatment separate from those already addressed and rejected in Section I. Because the State bears the burden under intermediate scrutiny, the Court finds it has failed to justify the unequal impact that SB 3 has on certain classes of voters in this state. Accordingly, for the foregoing reasons, the Court finds in favor of Plaintiffs on Count III of their complaint.

### **III. Void for Vagueness**

Plaintiffs' final challenge to SB 3 is that it is unconstitutionally vague. "A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality." *State v. Wilson*, 169 N.H. 755, 767 (2017). "A statute can be impermissibly vague for two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* at 770; *see State v. Smagula*, 117 N.H. 663, 666 (1977) ("It is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever reasonably possible."). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Montenegro v. N.H. Div. Motor Vehicles*, 166 N.H. 215, 222 (2014). "The absence of clear standards guiding the discretion of the

public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors.” *Id.*

In their complaint, Plaintiffs argued the statute is void for vagueness in two respects: (1) the penalties imposed by SB 3 contain conflicting mental states; and (2) the statute lacks guidance on what documentation qualifies as valid “verifiable acts of domicile” for purposes of completing Form B. In ruling on the State’s motion for summary judgment, the Court found the competing mental states did not render SB 3 void for vagueness. Therefore, the Court shall only address Plaintiffs’ second argument.

In their post-trial brief, Plaintiffs elaborate on their argument by stating: “SB 3 is unconstitutionally vague because its penalty provisions interact with its documentation requirements in a way that fails to afford ordinary voters a reasonable opportunity to understand what conduct is prohibited, while also promoting arbitrary and discriminatory enforcement that will chill the exercise of the fundamental right to vote.” (Pls.’ Post-Trial Brief at 143-44.) More specifically, Plaintiffs argue that because of the lack of clarity involved in when a voter should select Option 1 over Option 2, and due to the discretion afforded local election officials in determining what qualifies as acceptable proof of domicile, voters in different locations will be subject to arbitrary exposure to SB 3’s penalty provisions by being inconsistently directed toward Option 1.

“Although the [void for vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the United States Supreme Court] ha[s] recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish

minimal guidelines to govern law enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). “Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.” *Id.* at 358. Such is not the case here. As argued by the State, SB 3 *does* give guidance as to the types of documents that are acceptable as proof of a verifiable act of domicile. (See JE 12.) Although the Court has found that the VAD contains confusing language, “perfect clarity and precise guidance has never been required even of regulations that restrict expressive activity.” *United States v. Williams*, 553 U.S. 285, 304 (2008). In order to ensure that otherwise qualified voters are not turned away due to possessing only atypical documentary proof of domicile, some form of discretion by local election officials is required; it would be impossible for the State to create a list of *every* conceivable acceptable document, and making a restrictive list would certainly disenfranchise some individuals who lacked the prescribed documentation. Although imperfectly drafted, SB 3’s forms are a far cry from “standardless,” and provide adequate guidance to both the voter and local officials on what constitutes acceptable proof of domicile for purposes of selecting between Options 1 and 2.

To the extent Plaintiffs argue the statute does not provide an opportunity to understand the conduct it prohibits, the Court also disagrees. The new penalties under SB 3 largely come into play when a new registrant selects Option 1 on Form B, and prohibits (1) the provision of false information related to the registrant’s own domicile or verifiable action of domicile; (2) the provision of a false statement as to someone else’s domicile; and (3) the failure to return documentary proof of domicile. Although the Court

found above that these penalties—specifically the final one—contributed to an unreasonable burden on the right to vote, the penalty itself and the conduct it applies to are clearly set out in the statute.

Accordingly, for the foregoing reasons, the Court finds that SB 3 is not void for vagueness. Therefore, the Court finds in the State's favor on Count IV of Plaintiffs' complaint.

#### **IV. Conclusion**

The Court finds in Plaintiffs' favor on counts I and III, and in the State's favor on IV. In light of its rulings on Counts I and III, the Court strikes down SB 3 as unconstitutional for unreasonably burdening the right to vote and violating equal protection under the New Hampshire Constitution.

**SO ORDERED.**

April 8, 2020

Date



Judge David A. Anderson