THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0208

PETITION OF NEW HAMPSHIRE SECRETARY OF STATE

AND NEW HAMPSHIRE ATTORNEY GENERAL

BRIEF FOR THE APPELLANTS ON PETITION FOR ORIGINAL JURISDICTION PURSUANT TO SUPREME COURT RULE 11

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QUESTION PRESENTED

Did the trial court err in ruling in its April 13, 2018, Order that the defendants had to produce the New Hampshire Centralized Voter Registration Database and the information contained in it pursuant to civil discovery requests, where RSA 654:45 does not authorize and therefore criminalizes such disclosure?

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

N.H. RSA 654:45 Centralized Voter Registration Database (*before 2018 amendment)*.

I. The secretary of state is authorized to plan, develop, equip, establish, site, and maintain a statewide centralized voter registration database and communications system, hereinafter referred to as the voter database, connecting users throughout the state. The voter database shall include the current information on the voter registration forms, the accepted absentee ballot applications, the voter checklists, and voter actions as recorded on the marked checklist maintained by each city, ward, and town in the state.

II. Any election official in the state authorized by this chapter to have direct access to the voter database may obtain immediate electronic access to the information contained in the voter database related to individuals registered or registering to vote in the election official's jurisdiction. The office of the clerk is hereby designated as a database access point for each town or city. The secretary of state may authorize additional database access points in a town or city, including election day access points at polling places.

III. The voter database shall, upon certification by the secretary of state, be the official record of eligible voters for the conduct of all elections held in this state.

IV. (a) The voter database shall have the following minimum components:

(1) An electronic communications system that provides access for election officials from at least one point in each city and town within the state.

(2) An interactive computer program allowing local election officials access to records contained in the database with a process to add, delete, modify, or print a voter registration record related to the election official's jurisdiction. The system shall be designed so that there can be regular updates to the database, the records reflect the name of each registered voter with no duplication, and the names of ineligible voters are removed. The system shall contain safeguards to ensure that the names of properly registered voters are not removed in error.

(b) Voter database record data shall be verified by matching the records with those of the department of safety and the federal social security administration as are required by law, and with the records of the state agency or division charged with maintaining vital records. For this purpose the voter registration record database may be linked to the state agency or division charged with maintaining vital records and the department of safety, provided that no linked agency or division may save or retain voter information or use it for purposes other than verifying the accuracy of the information contained in the voter database. The link authorized by this subparagraph shall not allow the department of state or election officials direct access to the motor vehicle registration or driver's license records maintained by the division of motor vehicles. The commissioner of safety may authorize the release of information from

motor vehicle registration and driver's license records to the extent that the information is necessary to department of state and department of safety cooperation in a joint notification to individuals of apparent discrepancies in their records and to the extent that the information is necessary to resolve those discrepancies. The commissioner of safety and the secretary of state are authorized to enter into an agreement that establishes the services to be provided by the department of safety and the cost for those services. The department of safety shall not be required to provide any services under this subparagraph unless an agreement is in place and there are sufficient funds in the election fund to pay the cost for the services. The system shall facilitate the identification and correction of voter registration records whenever a registered voter has died or has been disenfranchised pursuant to part I, article 11 of the New Hampshire constitution or RSA 654:5 through RSA 654:6, or when the domicile address does not match the address provided by the same individual to the department of safety.

(c) Access by local election officials to the voter database shall be limited to the supervisors of the checklist, city registrars and deputy registrars, and town or city clerks and their deputies, as determined by the secretary of state. Access by local election officials shall be subject to the limitations of paragraph VI, and shall be limited to the records of individuals who are currently registered to vote in the official's jurisdiction and individuals who are applying to register to vote in the official's jurisdiction.

V. The secretary of state shall:

(a) Specify the employees of the department of state authorized

to access records contained in the voter database, subject to the limitations of paragraph VI.

(b) Provide adequate technological security measures to deter unauthorized access to the records contained in the voter database.

(c) Issue guidelines to implement the voter database.

VI. The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31. The secretary of state is authorized to provide voter database record data to the administrative office of the courts to assist in the preparation of master jury lists pursuant to RSA 500-A and to the clerk of the District Court of the United States for the District of New Hampshire to assist in the preparation of federal court jury lists. The voter checklist for a town or city shall be available pursuant to RSA 654:31. Any person who discloses information from the voter database in any manner not authorized by this section shall be guilty of a misdemeanor.

VII. The city and town clerk shall enter, maintain, and keep up to date election official contact information and polling place information as determined by the secretary of state in the statewide centralized voter registration database for use by the secretary of state in effecting election laws.

VIII. (a) The secretary of state may enter into an agreement to share voter information or data from the statewide centralized voter registration database for the purpose of comparing duplicate voter information with other states or groups of states. The secretary of state shall only provide information that is necessary for matching duplicate voter information with other states and shall take precautions to make sure that information in the

database is secure in a manner consistent with RSA 654:45, VI. The secretary of state may solicit input from the department of safety and the department of information technology and shall ensure that any information or data shared between the agencies that is of a confidential nature remains confidential.

(b) The secretary of state shall investigate any duplicate matches of voters resulting from any comparisons of the statewide centralized voter registration database with other states. If the investigation results in the inability to confirm the eligibility of a person or persons who voted, or there is reason to believe a person or persons voted who were not eligible, the secretary of state shall forward the results to the attorney general for further investigation or prosecution.

(c) Upon completion of any investigation authorized under RSA 654:45, VIII(b), the attorney general and the secretary of state shall forward a report summarizing the results of the investigation to the speaker of the house of representatives, the president of the senate, and the chairpersons of the appropriate house and senate standing committees with jurisdiction over election law.

Senate Bill 527 (2018), Sections 329:7, 329:8, & 329:11

329:7 Purpose. Based on the highly confidential information contained in the voter registration database, including information obtained in the absentee ballot process, the legislature reiterates that this information must be protected and shall not be disclosed except as set forth in RSA 654:45 and never in response to a subpoena or civil litigation discovery request.

329:8 Statewide Centralized Voter Registration Database; Disclosure. Amend RSA 654:45, VI to read as follows:

VI. The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31***, nor shall it or any of the information contained therein be disclosed pursuant to a subpoena or civil litigation discovery request***. The secretary of state is authorized to provide voter database record data to the administrative office of the courts to assist in the preparation of master jury lists pursuant to RSA 500-A and to the clerk of the District Court of the United States for the District of New Hampshire to assist in the preparation of federal court jury lists. The voter checklist for a town or city shall be available pursuant to RSA 654:31. Any person who discloses information from the voter database in any manner not authorized by this section shall be guilty of a misdemeanor.

329:11 Effective Date.

I. Section 8 of this act shall take effect upon its passage.

II. Sections 1 and 9 of this act shall take effect as provided in section 10 of this act.

III. The remainder of this act shall take effect January 1, 2019.

Approved: June 25, 2018

STATEMENT OF THE CASE

The consolidated cases below are challenges to the lawfulness of Senate Bill 3 ("SB 3") under the New Hampshire Constitution. Enacted on July 12, 2017, SB 3 altered the way in which all persons must substantiate their domicile when registering to vote. The procedure registrants employ to confirm their domicile under SB 3 differs depending on whether registration takes place more than 30 days before an election or within 30 days of an election, including on election day.

On August 22, 2017, the New Hampshire Democratic Party ("NHDP") filed a verified complaint in Hillsborough Superior Court, Southern District, against the New Hampshire Attorney General and New Hampshire Secretary of State seeking both a declaration that SB 3 is unconstitutional and a preliminary and permanent injunction against its implementation. The following day, the League of Women Voters of New Hampshire ("LWVNH"), Douglas Marino, Garrett Muscatel, and Adriana Lopera filed a nearly identical complaint in the same court seeking the same relief. They also filed a motion for preliminary injunction.

The complaints each contained nine counts, five arising under federal law and four arising under state law. On August 31, 2017, the defendants removed both actions to the United States District Court for the District of New Hampshire. Shortly thereafter, the plaintiffs amended all of their federal causes of action out of their complaints and sought remand to state court. On September 3, 2017, the federal district court remanded the cases.

On September 5, 2017, the defendants filed a motion to dismiss the amended complaints for lack of standing. On September 8, 2017, SB 3 went into effect. On September 11, 2017, the superior court (Temple, J.) held a hearing on the pending preliminary injunction requests and the motion to dismiss. Early the following morning[1], the superior court issued an order finding that one of the individual plaintiffs and the NHDP possessed standing and entered a temporary restraining order prohibiting the defendants from enforcing penalties under SB 3 if a person registers to vote within 30 days of an election by agreeing to return documentary evidence of domicile to the clerk's office and then purposely and knowingly fails to return such proof. *See* RSA 659:34, I(h). That order remains in effect.[2]

On October 31, 2017, LWVNH propounded document production requests seeking, in part, the New Hampshire Centralized Voter Registration Database (the "Database") established by RSA 654:45 and screenshots of the Database from various points in time in the past. The defendants objected to this request, in part, on the ground that RSA 654:45, VI, prohibits disclosure or use of the Database except in circumstances specified in the statute, none of which were applicable. The plaintiffs filed a motion to compel. The defendants objected to the motion on January 16, 2018. The plaintiffs filed a reply on January 29, 2018. On April 13, 2018,

[1] There was a special election for a seat in the New Hampshire House that day.

[2] Plaintiffs Phillip Dragone, Spencer Anderson, and Seysha Mehta joined the litigation pursuant to LWVNH's October 6, 2017, motion to amend, which the court granted over the defendants' objection on April 10, 2018.

the superior court (Temple, J.) granted the motion to compel production of the Database.

On April 20, 2018, the defendants filed a Petition for Original Jurisdiction with this Court. They also filed a motion in the superior court to stay that court's April 13, 2018, order. To date, the superior court has not ruled on the motion to stay.

The plaintiffs filed a motion for summary affirmance with this Court on May 3, 2018, requesting summary affirmance of the superior court's April 13, 2018, order. This Court denied the plaintiffs' motion for summary affirmance in an order dated May 23, 2018. It also accepted the Petition for Original Jurisdiction to the extent that it sought review of the superior court's order compelling production of the Database.

On June 8, 2018, Judge Temple recused himself and Chief Justice Nadeau reassigned the case to Hon. Kenneth C. Brown. At plaintiffs' request, Judge Brown scheduled a seven-day preliminary injunction hearing beginning August 27, 2018. That hearing began on August 27 as scheduled.

STATEMENT OF FACTS

Prior to SB 3, all persons had to present documentary evidence of domicile in order to register to vote. RSA 654:7, I-II (2016). However, if a registrant did not possess documentary evidence of domicile at the time of registration, the registrant could sign a domicile affidavit and shift the burden to state officials to verify the registrant's domicile claim. RSA 654:7, III (2016).

Post-SB 3, all persons registering to vote more than 30 days in advance of an election must present documentary evidence of domicile in order to register to vote. Within 30 days of an election, a registrant has three options in order to register to vote: (1) present documentary evidence of domicile; (2) agree to return documentary evidence of domicile to the clerk's office within a specific timeframe, if the registrant knows that he possesses such documentation but did not bring it with him; or (3) sign a sworn statement attesting to the registrant's claim of domicile, if the registrant does not possess, or is not aware of possessing, documentary evidence of domicile at the time of registration. *See*, *generally*, Appendix ("App.") Vol. I at 004-023. The goal of SB 3 is to permit election officials to more objectively assess the registrant's assertion of domicile and to reduce the number of domicile affidavits state election officials must verify post-election, while simultaneously ensuring that everyone who is eligible to vote in New Hampshire gets to register and cast a ballot.

SB 3 sets forth a representative list of documents that persons can use to establish domicile when registering to vote but gives election officials the latitude to accept other forms of documentation that support

the registrant's claim of domicile. RSA 654:12(c)(1)(B) (2017) ("reasonable documentation" includes, *without limitation,* specified forms of documentation); RSA 654:12(c)(2)(A) (2017) (requiring specified forms of documentation "or other reasonable documentation which establishes" the claim of domicile is "more likely than not" true). For those voters who have no such documentation, or do not know if they possess such documentation, SB 3 allows them to register and vote within 30 days of an election or on election day by making that sworn representation and shifting the burden to state officials to verify the domicile claim. RSA 654:12(c)(2)(B) (2017).

The plaintiffs have challenged SB 3 principally on the ground that the State's interests in SB 3 do not justify the burdens the law allegedly imposes on the plaintiffs and the demographic groups they purport to represent, allegedly in violation of Part 1, Article 11 of the New Hampshire Constitution. App. Vol. I at 139-142, 205-207.

On October 31, 2017, LWVNH propounded requests for production of documents on defendants. Among the documents they sought was the New Hampshire Centralized Voter Registration Database (the "Database"). *Id*. at 213. The State objected to producing the Database on the ground that it is irrelevant to this proceeding and that its disclosure is prohibited by RSA 654:45, VI. *Id.*

The LWVNH filed a motion to compel production of the Database. In its December 22, 2017 motion and accompanying memorandum of law, the LWVNH argued that one of its experts, Dr. Michael Herron, required access to the Database to "perform individual-voter-level analyses that he can use to provide the Court with information about who is burdened by SB

3, as well as the scope of those burdens." *Id*. at 223. Specifically, the LWVNH asserted that RSA 654:45 does not constitute a statutory privilege, analogizing to this Court's holding in *Marceau v. Orange Realty, Inc.*, 97 N.H. 497 (1952). App. Vol. I at 225. The LWVNH also argued that the Database was created as an extension of the Help America Vote Act ("HAVA") (52 U.S.C. §20901-21145 (2002)), "a law designed to improve voting systems and voter access," and asserted that there is no "explicit prohibition" on the disclosure of this information in the context of litigation. *Id*. at 227-228. Finally, the LWVNH purported to defend New Hampshire citizens from unnamed harms, arguing that their personal identifying information should be disclosed in litigation when the "lawsuit itself seeks to protect the right to vote" and prohibiting its disclosure will offend public policy as it will become "materially more difficult to vindicate voting rights in New Hampshire." *Id*. at 228.

The defendants objected, arguing principally that Dr. Herron's proposed computations are irrelevant to whether SB 3 imposes impermissible burdens on the right to vote and that RSA 654:45, VI prohibits the defendants from disclosing the Database and the information in it in response to civil discovery requests. *See*, generally, App. Vol. II at 019-054. In order to understand the defendants' objections in context, some background regarding the Database is required.

In 2002, Congress enacted HAVA, 52 U.S.C. §§20901-21145 (2002), Pub. L. No. 107-252 (2002). Section 303 of HAVA mandated that states establish computerized statewide voter registration lists. HAVA authorized federal funds to assist with the implementation of its requirements. *See* 52 U.S.C. §21001. One of HAVA's purposes is to

improve the country's election system. *See, e.g.*, *Colon-Marrero v. Velez*, 813 F.3d 1, 9 & n.13 (1st Cir. 2016); H.R. Rep. 107-329, pt. 1, at 31 (2001), 2001 WL 1579545, at *31.

To implement HAVA, the legislature directed the Secretary of State to establish a "statewide voter registration database and communications system, hereinafter referred to as the voter database, connecting users throughout the state." RSA 654:45, I. The Database contains information that is substantially broader than that contained on public voter checklists. *Compare* 654:45, I ("The voter database shall include the current information on the voter registration forms, the accepted absentee ballot applications, the voter checklists, and voter actions as recorded on the marked checklist maintained by each city, ward, and town in the state.") *with* RSA 654:25 (checklists "shall include the full name, domicile address, mailing address and party affiliation, if any, of each voter on the checklist . . . .").[3]

Unlike paper checklists, *see* RSA 654:31-a ("[t]he information contained on the checklist of a town or city . . . is subject to RSA 91-A"), the Database is strictly "private and confidential and shall not be subject to RSA 91-A," RSA 654:45, VI. Any information about individual voters contained in the Database is similarly private and confidential and cannot be disclosed except in accordance with RSA 654:45.

[3] Public voter checklist information includes the full name, domicile address, mailing address and party affiliation. However, for persons in possession of a valid domestic violence protective order, their information may be made entirely private, nonpublic, and confidential. RSA 654:25.

The legislature prescribed just three narrowly-tailored exceptions to this unequivocal prohibition on disclosure of voters' personal information. RSA 654:45, VI permits disclosure of Database information to the New Hampshire state and federal court systems for the preparation of jury lists. RSA 654:45, VI also permits the disclosure of certain Database information in accordance with RSA 654:31. The Database information disclosed under RSA 654:31 is the information that is already publicly available via the city or town public checklists. RSA 654:31; RSA 654:25.

RSA 654:45, VIII permits the Secretary of State to "enter into an agreement to share voter information or data from the statewide centralized voter registration database for the purpose of comparing duplicate voter information with other states or groups of states." The statute rigorously controls this process to prevent disclosure of Database information for any other purpose. Specifically, in furtherance of this type of agreement, the legislature has authorized the Secretary of State to "only provide information that is necessary for matching duplicate voter information with other states and [requires the secretary to] take precautions to make sure that information in the database is secure in a manner consistent with RSA 654:45, VI." RSA 654:45, VIII(a).

The Database is maintained and supported by a third-party contractor, PCC Technology, Inc. App. Vol. II at 124.[4] It contains the personally identifiable information of registered New Hampshire voters and

[4] The affidavit of David Scanlan was originally submitted to the superior court in conjunction with the defendants' objection to the plaintiff's expedited motion to compel production of the Database. The defendants' objection is included in the second volume of the Appendix at 003 to 056.

other private information related to a person's voting history and status and the party in whose primary a voter participated. *Id.* The Database contains the following information about individual registered voters:

1. First name, middle name or initial when provided, last name, suffix (if any);

2. Domicile address (street number, suffix a, suffix b, street name, unit, address line 2, address line 3, residing city/town, state, postal city/town, postal state, postal/zip code, geo code longitude, geo code latitude);

3. Mailing address, if any;

4. Date of birth (a default date of birth is used for voters who registered prior to the requirement for providing a date of birth and who have not subsequently volunteered their date of birth);

5. Driver's license number (if any);

6. Last four digits of a social security number (only where the applicant for voter registration does not have a driver's license number);

7. A system-generated voter ID number;

8. Party affiliation (includes undeclared for those voters who are not affiliated with a political party);

9. Ward (only for voters in jurisdictions that have more than one ward or polling precinct);

10. A yes/no value for whether the voter registered 30 days or less prior to an election or on election day;

11. A yes/no value for whether the voter provided evidence of domicile when registering or subsequently;

12. The date when the voter registered (completed and submitted the form, which may be different from the date of the vote by the Supervisors of the Checklist to approve the application and place the voter onto the checklist);

13. A yes/no value for whether the voter initialed a verifiable action of domicile obligation (if yes, whether the voter provided evidence of domicile);

14. A yes/no value for whether a voter who did not provide proof of domicile initialed the voter registration form indicating they were not aware of having any evidence of domicile;

15. Place of birth (city/town, state/province, county, born abroad to US/naturalized citizen checkbox, yes/no indicator as to whether a naturalized citizen);

16. Naturalization information (name of court where naturalized, city/town, state, date naturalized, qualified voter affidavit – citizenship on file checkbox);

17. The place the voter was last registered to vote if provided by the voter (street number, Suffix A, Suffix B, Street name/PO Box, Unit, Address line 2, Address line 3, city ward/town, ward number, state, postal/zip code);

18. The name under which the voter was previously registered to vote, if different (last name, first name, middle name, suffix);

19. Type of registration (in person, election day registration, absentee);

20. Voter status (pending, incomplete, active);

21. Party (Democratic, Libertarian, Republican, Undeclared);

22. Form of ID- Proof of Identity (qualified voter affidavit-identity only, armed services ID, other photo ID, US passport, out of

state DL#, photo ID issued by Gov. – US or state or local, verified by nursing home official, issuing state, ID number);

23. A yes/no value for whether the voter is a Uniformed and Overseas Citizens Absentee voter ("UOCAVA"), UOCAVA state date, UOCAVA end date;

24. For military and/or spouse or dependent whether the voter is domestic or overseas;

25. A yes/no whether the voter is qualified for a federal office only ballot;

26. Absentee ballot address (street number, suffix A, suffix B, street name/PO box, unit, address line 2, address line 3, city/town, state/province, postal/zip code, country, e-mail address, optional information);

27. The gender of the voter;

28. Whether the voter is a poll worker;

29. A yes/no value for a record with incomplete data;

30. A yes/no value for do not call;

31. For absentee ballot voters – the election date and name, date requested, request type (email facsimile, facsimile, in-person, mail), military, spouse, and dependents (domestic (residing in the US), overseas (residing outside the US)) memo (local officials notes), date mailed/e-mailed/handed to voter, party choice, ballot mailing address (local official selects from: Use the domicile address/handed to voter, use the mailing address, use the absentee ballot address, use the absentee ballot e-mail (for UOCAVA), street number, suffix A, suffix B, street name/PO Box, unit, address line 2, address line 3, city, state, country, postal/zip code, e-mail, a yes/no whether to update the absentee ballot record in the voter record, date absentee ballot

returned, a yes/no if a federal write-in absentee ballot ("FWAB") was returned, a yes/no and reason from the post office if an absentee ballot was returned as undeliverable, and the undeliverable reason (addressee deceased, addressee unknown, damaged by US postal service, email – email server unavailable, email – mailbox full, email – mailbox unknown, email – message undeliverable, forwarding address time expired, insufficient address, invalid post office, invalid street, invalid street number, invalid zipcode, refused, unable to forward – moved left no address, unable to forward – vacant, unable to forward – attempted not know, unable to forward – no mail receptacle);

32. A yes/no value for whether the absentee ballot was rejected at the election, rejected reason (absentee ballot challenged by another voter at the polls on election day, absentee ballot received after election day, affidavit on the absentee ballot envelope not signed, affidavit signature does not match request, already voted by absentee ballot, ballot missing from envelope, envelope rec'd other than by mail, voter, spouse, parent, sibling or child, incomplete absentee registration affidavit, incomplete voter registration form, invalid signature on application for absentee ballot, missing affidavit, multiple ballots returned in the same envelope, no absentee registration affidavit envelope returned, no written application for absentee ballot submitted, not a registered voter, spoiled ballot, voted in person, voter indicated they are no longer eligible for absentee ballot, voter is deceased, wrong ballot);

33. A yes/no whether the absentee ballot was challenged, challenge reason (already voted, disqualified for election law conviction, (do not use) – challenged other, (do not use) – contains wrong ballot, (do not use) – missing affidavit, (do not use) – not a registered voter, (do not use) – received late, (do not use) – Signature mismatch, does not reside at address on checklist, incarcerated convicted felon, individual is not the voter, ineligible to vote pursuant to statute or constitutional provision, not a declared member of the affiliated party, not a United States

citizen, not domiciled in town or ward, under eighteen years of age), and challenged by;

34. Voting history (local officials scan or enter the voter ID) party choice, absentee, challenged voter affidavit;

35. For voters who register and do not provide proof of domicile when registering a yes/no value for whether: (a) the voter used the verifiable action of domicile section of the voter registration form; (b) the voter initialed that he or she possesses proof of domicile and will provide the proof after the election; (c) whether the voter provided the evidence; or (d) whether the voter initialed that he or she was not aware of possessing any proof of domicile.

App. Vol. II at 124-129. The Database also contains the information of persons whose personal identifying information has been removed from the public checklist under RSA 654:25 because they are victims of domestic violence.

Much of the above information is private as to each individual in the Database. Again, to protect this private, personal information aggregated in the Database, RSA 654:45, VI states in part: "The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31 . . . ." To emphasize the seriousness of any breach of this obligation, the legislature provided that "[a]ny person who discloses information from the voter database in any manner not authorized by this section shall be guilty of a misdemeanor." *Id*.

The defendants argued that the statute by its own language prohibits disclosure of the Database and that other courts had construed similar language as creating an absolute privilege against disclosure. App. Vol. II at 033-034. The superior court disagreed, concluding that RSA 654:45, VI

did not create a privilege or otherwise prohibit disclosure of the Database or the information in it pursuant to civil discovery requests. *See post* at 49-53. The defendants promptly filed their Petition for Original Jurisdiction with this Court seeking review of whether RSA 654:45 prohibits disclosure of the Database and the information it in response to civil discovery requests.

The New Hampshire Senate swiftly responded to the superior court's April 13, 2018, order with a floor amendment to Senate Bill 527. App. Vol. II at 121. The floor amendment gave as its purpose: "Based on the highly confidential information contained in the voter registration database, including information obtained in the absentee ballot process, the legislature reiterates that this information must be protected and shall not be disclosed except as set forth in RSA 654:45 and never in response to a subpoena or civil discovery request." *Id*. To accomplish this purpose, the floor amendment proposed modifying the first sentence of RSA 654:45, VI to read: "The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31, ***nor shall it or any of the information contained therein be disclosed pursuant to a subpoena or civil litigation discovery request***." *Id*. (bold italics in original to illustrate new text). The senate adopted the floor amendment to the bill. *Id*. at 119. The General Court passed Senate Bill 527 as amended by the senate. *Id*. at 120. The governor signed Senate Bill 527 into law, with an effective date of June 25, 2018. *Id*.

SUMMARY OF THE ARGUMENT

RSA 654:45, VI creates a prohibition on disclosure that functions as a privilege and prevents the Secretary of State's Office from producing the Database and the information in it pursuant to civil discovery requests. The statute mandates that the Database "shall be private and confidential" and prohibits the Secretary of State's Office from disclosing it or the information in it in any manner not specifically authorized by RSA 654:45. RSA 654:45 authorizes disclosure of Database information only to certain persons or entities and only for certain specified purposes. RSA 654:45, V(a), VI, VIII(a). RSA 654:45 criminalizes all other unauthorized disclosures. RSA 654:45, VI. No provision of RSA 654:45 authorizes disclosure of the Database or the information in it pursuant to civil discovery requests.

Applying long-standing principles of statutory construction, RSA 654:45's text and structure reflect an unambiguous legislative intent to prohibit the Secretary of State from disclosing the Database or the information contained in it in response to civil discovery requests. *See, e.g., N.C. v. N.H. Board of Psychologists*, 169 N.H. 361, 366 (2016); *In re Robyn W.*, 124 N.H. 377, 379 (1983); *Silva v. Botsch*, 120 N.H. 600, 602 (1980). To hold otherwise would require this Court to write an exception into the statute that does not exist, an approach this Court has long rejected. *See, e.g., State v. Bernard*, 158 N.H. 43, 45 (2008); *Debonis v. Warden, N.H. State Prison*, 153 N.H. 603, 605 (2006); *Remington Investments, Inc. v. Howard*, 150 N.H. 653, 654 (2004); *Johnson v. City of Laconia*, 141 N.H. 379, 380 (1996).

The case law in other jurisdictions construing statutes similar to RSA 654:45 holds the same and rejects the conclusion reached by the superior court in this case. *See, e.g.*, *Baldrige v. Shapiro*, 455 U.S. 345, 360-62 (1982); *In re England*, 375 F.3d 1169, 1177-81 (D.C. Cir. 2004) (Roberts, J.); *Chowdhury v. Nw. Airlines Corp.*, 226 F.R.D. 608, 611 (N.D. Cal. 2004); *Stewart v. McCain*, 575 S.W.2d 509, 512 (Tex. 1978).

Moreover, Senate Bill 527 now makes it unmistakably clear that the Database and the information in it cannot be disclosed pursuant to civil discovery requests. Senate Bill 527 therefore cures the perceived deficit that the superior court erroneously believed authorized it to compel production: RSA 654:45 did not specifically state that the Database and the information in it could not be obtained in civil discovery.

Accordingly, the Database and the information in it cannot be obtained by the plaintiffs in civil discovery. The superior court's order to the contrary must therefore be reversed.

STANDARD OF REVIEW

Resolution of the question presented requires this Court to interpret RSA 654:45, VI, particularly in light of the passage of Senate Bill 527. " 'Statutory interpretation is a question of law that [this Court] review[s] *de novo*.' " *Appeal of Mullen*, 169 N.H. 392, 402 (2016) (quoting *Appeal of Niadni, Inc.*, 166 N.H. 256, 260 (2014)). "*De novo* review means that the reviewing court decides the matter anew, neither restricted by nor deferring to decisions made below." *Town of Hinsdale v. Town of Chesterfield*, 153 N.H. 70, 73 (2005).

"In matters of statutory interpretation, [the supreme court is] the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." *Petition of Carrier*, 165 N.H. 719, 721 (2013). This Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." *Id.* This Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* "Absent an ambiguity, [this Court] will not look beyond the language of the statute to discern legislative intent." *segTEL, Inc. v. City of Nashua*, 170 N.H. 118, 120 (2017).

ARGUMENT

I. RSA 654:45, VI Prohibits Disclosure Of The Database And The Information In It Pursuant To Civil Discovery Requests; The Superior Court's Order Must Be Reversed.

RSA 654:45, VI creates an unambiguous ban on disclosure that prohibits the Secretary of State from providing the Database and the information in it to the plaintiffs in response to civil discovery requests. The statute states that the "voter database *shall* be private and confidential and shall not be subject to RSA 91-A and RSA 654:31." (emphasis supplied). Under this Court's decisional law, "the word 'shall' is a command which requires mandatory enforcement." *In re Robyn W.*, 124 N.H. at 379. "This principle is particularly forceful when the command is addressed to a public official," *Silva*, 120 N.H. at 602, like the Secretary of State. The legislature's inclusion of a criminal penalty for a violation of RSA 654:45, VI fortifies the conclusion that the legislature was emphatic about compliance with the prohibition on disclosure. RSA 654:45, VI; *see Kibbe v. Town of Milton*, 142 N.H. 288, 292 (1997) (concluding that the statute's inclusion of remedies for its violation reflected the legislature's intent to ensure compliance with the statute); *State v. Darcy*, 121 N.H. 220, 225-26 (1981) (recognizing deterrence of particular conduct as one of the important concerns of the criminal law).

The directive that the Database remain "private" and "confidential" is not ambiguous. "Private" means "confined to or intended only for the persons immediately concerned; confidential" and "removed from or out of public view or knowledge; secret." *Random House Webster's Unabridged Dictionary* 1540, "Private" (2nd ed., 2001). "Confidential" means "intended

to be held in confidence or kept secret." *Black's Law Dictionary* 269, "Confidential" (5th ed. 1979); *see also Random House Webster's Unabridged Dictionary* 428, "Confidential" (2nd ed., 2001), (defining "confidential" as "spoken, written, acted on, etc., in strict privacy or secrecy, secret"). These terms are neither ambiguous nor unclear: The Database and its information is not to be disclosed except in the narrow, authorized instances expressly permitted by the statute.

That this was its intent is fortified by the fact that the legislature has authorized disclosure of information in the Database only to certain persons or entities for certain specified purposes, *see* RSA 654:45, V(a), VI, VIII(a), but has criminalized all other disclosures not authorized under the statute, RSA 654:45, VI. When the legislature itemizes exceptions in this way and acts to exclude all other exceptions, the list of enumerated exceptions is treated as exclusive and the judiciary is without the authority to add exceptions into the statute. *See, e.g.*, *Silva*, 120 N.H. at 602 ("Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive."); *In re Gamble*, 118 N.H. 771, 777 (1978) ("Normally the expression of one thing in a statute implies the exclusion of another."); *State v. Wilton R.R. Co.*, 89 N.H. 59, 61 (1937) ("Specified exceptions usually exclude others.").

As this Court has firmly and repeatedly explained, it must "interpret legislative intent from the statute as written and will not consider what the legislature might have said or *add language that the legislature did not see fit to include*." *N.C.*, 169 N.H. at 366 (emphasis supplied). This Court will not "read an exception into a statute that the legislature did not see fit to include." *State v. Bernard*, 158 N.H. at 45; *see also Debonis*, 153 N.H. at

605; *Remington Inv.*, 150 N.H. at 654; *Monahan-Fortin Props. v. Town of Hudson*, 148 N.H. 769, 771-72 (2002); *Johnson*, 141 N.H. at 380.

Moreover, RSA 654:45 does not purport to contain a list of representative authorized disclosures, nor does it employ language that would lead one to conclude that the disclosures it authorizes are merely representative in nature. *See Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 538-39 (1994) (explaining that a representative list in a statute preceded by the language "including but not limited to" permits extension of the statute to items not on the list, but that are of the type of items particularized in the statute). Rather, RSA 654:45 contains a finite, exclusive number of authorized disclosures, defines those disclosures narrowly, and prohibits any person from disclosing information from the Database in any manner not authorized by RSA 654:45.

The plaintiffs' motion invited the superior court to disregard these well-settled principles of statutory construction and to create a judicial exception to RSA 654:45 for disclosure pursuant to civil discovery requests. The superior court erred by accepting that invitation and disregarding the mandatory provisions that prohibit disclosure of the Database and the information in it except in certain, prescribed circumstances. If the legislature had intended for the personal identifying information of registered voters to be generally discoverable in civil litigation, it would have said so in the statute. Indeed, the legislature's swift amendment to and passage of Senate Bill 527 in the wake of the superior court's order compelling production of the Database serves to confirm the original intent of RSA 654:45, VI to preclude disclosure "in any manner not authorized by" RSA 654:45.

Accordingly, the superior court's order compelling production of the Database and its contents constitutes error and must be reversed.

A. The Case Law In Other Jurisdictions Is In Accordance With The Above Analysis And Conclusion.

Numerous cases have held that broad, statutory prohibitions on disclosure like RSA 654:45, VI create statutory privileges that cannot be judicially overridden. *See, e.g., Baldrige*, 455 U.S. at 360-62; *In re England*, 375 F.3d at 1177-81; *Chowdhury*, 226 F.R.D. 608; *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383 (E.D.N.Y. 2001); *Stewart*, 575 S.W.2d 509.

In *In re England*, for example, then-circuit court justice John G. Roberts, Jr. concluded that 10 U.S.C. § 618(f) created a statutory privilege and reversed the district court's conclusion to the contrary. 375 F.3d at 1177-81. Section 618(f) provided in full:

> Except as authorized or required by this section, proceedings of a selection board convened under section 611(a) of this title may not be disclosed to any person not a member of the board.

Id. at 1177. Justice Roberts observed that the statute used "the language of command – 'may not be disclosed' – in a context in which commands are to be obeyed." *Id.* He explained that "[t]here is no inherent ambiguity in the phrase 'may not be disclosed' that would justify departing from those plain terms pursuant to a judicially-crafted exception." *Id.* He further explained that the existence of "an express exception to the otherwise categorical ban on disclosure" fortified the court's conclusion because no express

exception existed for disclosure pursuant to civil discovery requests. *Id.* at 1177-78.

In reaching his decision, Justice Roberts relied in part on the United States Supreme Court's decision in *Baldrige*, 455 U.S. 345, which is instructive in this case as well. In *Baldrige*, two municipalities sued the Department of Commerce in an attempt to obtain from the Census Bureau raw census data – including individual respondents' questionnaires – to challenge the results of the 1980 census. *Id.* at 348-52. Section 8(b) of the Census Act provided in part that "the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose information reported by, or on behalf of, any particular respondent." *Id.* at 354. Section 9(a) provided further that:

> Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in Section 8 of this title --
>
> (1) Use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) Make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) Permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

Id. at 354-55. While the United States Supreme Court recognized that the discovery rules "encourage open exchange of information," *id.* at 360, it

nevertheless held that the unambiguous statutory language of the Census Act created a privilege that barred discovery of the protected information, despite the need demonstrated by the litigant. *Id.* at 362.

Baldridge and *In re England* both involved broad, statutory prohibitions on disclosure of specific information, like RSA 654:45, VI. Those federal statutes did not specify that the information subject to the statutory prohibitions could not be discovered in civil litigation. Nonetheless, the courts in *Baldrige* and *In re England* concluded that Congress did not need to act with that level of specificity. Rather, it sufficed that the plain, unambiguous language of the statutes evinced a broad, legislative intent to prohibit disclosure of the information requested.

RSA 654:45, VI functions similarly. It mandates that the Secretary of State keep the Database "private and confidential," provides certain narrow, authorized exceptions, and states that: "Any person who discloses information from the voter database in any manner not authorized by this section shall be guilty of a misdemeanor." The direct legislative command is to prohibit any disclosure by persons with access to the Database in any manner the legislature has not specifically authorized. In RSA 654:45, the legislature did not authorize disclosure pursuant to civil discovery requests. Thus, similar to the statutes at issue in *Baldrige* and *In re England*, RSA 654:45, VI functions as a broad prohibition on disclosure that should be given its full effect and should not be judicially re-written to limit its application and undermine its core purpose, *i.e.*, to facilitate the State's election system while securing and protecting the personally identifiable and private information of registered New Hampshire voters.

Baldrige is particularly persuasive because the statute at issue, the Census Act, was designed to help the federal government carry out an important, constitutional, regulatory function while encouraging persons to participate in the census. If individuals believed that their personal, individual-level information was not protected from disclosure, they might not participate in the census, which would imperil the federal government's ability to obtain accurate census figures. 455 U.S. at 361.

RSA 654:45, and the nature of the information contained in the Database, compels even more adherence to the strict confidentiality the legislature has imposed. Unlike participating in the census, the right to vote is a fundamental constitutional right. If people fear the disclosure of the private, personally identifiable information they reveal as part of the voter registration process to future (potentially partisan) litigants, they may well choose not to register to vote and forgo exercising one of the most important constitutional rights they have. In this regard, the superior court's decision places potential registrants in a difficult position: relinquish their right to privacy to register to vote or forgo their right to vote to preserve their privacy. This is exactly why the legislature went to such lengths in the statutory language to proscribe disclosure and ensure public confidence in the confidentiality of the Database and its contents. *See In re Brenda H.*, 119 N.H. 382, 387 (1979) (recognizing that " '[t]he real purpose of any privilege is not to exclude relevant evidence, but simply to facilitate activities which require confidence.' ") (quoting Richard B. McNamara, *The Hierarchy of Evidentiary Privilege in New Hampshire*, 20 N.H.B.J. 1, 27 (1978)).

Consequently, under RSA 654:45, VI as it existed prior to Senate Bill 527, the personally identifiable and private voting information contained in the voter database could not be disclosed in response to civil discovery requests and is absolutely privileged. Senate Bill 527 serves only to confirm this unambiguous legislative intent and places the privileged nature of the database and the information contained in it beyond dispute.

B. This Court's Decision In *Marceau v. Orange Realty, Inc.*, 97 N.H. 497 (1952), Is Inapposite.

In ruling against the defendants, the superior court erroneously relied on this Court's opinion in *Marceau*. In *Marceau*, a pre-digital era decision, the defendant sought information about the plaintiff from an officer of the Unemployment Compensation Bureau. The officer refused to testify and produce documents about the plaintiff based on a statute deeming such information "confidential" and stating that such information "shall not be published or open to public inspection . . . in any manner revealing the individual's or employing unit's identity." *Id.* at 498. The statute imposed a penalty for violating the section. *Id.* The statute also permitted employers to inspect all of the records without restriction and to use the information in those records in whatever way they wanted, including in resisting claims by employees at common law or under the Workmen's Compensation Law. *Id.* at 498-99. On these facts, the New Hampshire Supreme Court held that the statute at issue did not create a privilege as to civil discovery because the statute prohibited only voluntary disclosure of information about the plaintiff. *Id.* at 500.

Marceau is inapposite for at least three reasons. First, the statute in *Marceau* did not categorically ban the persons with access to the records

and information contained in them from disclosing them in any manner not in accordance with the statute. Rather, the statute at issue in *Marceau* simply prohibited publication and open public inspection of those records "in any manner revealing the individual's or employing unit's identity." The prohibition on disclosure contained in RSA 654:45, VI is not so narrow.[5]

Second, the legislative history of the statute at issue in *Marceau* revealed that a prior iteration of the statute expressly precluded the information protected by it from being used "in any court in any action or proceeding therein unless the commissioner or the state is a party . . . ." *Marceau*, 97 N.H. at 499 (emphasis omitted). The legislature later amended the statute to remove that language. *Id.* This Court regarded that amendment as effectively removing the restriction on the use of the protected information in court proceedings. *Id.* No similar, prior legislative history exists with respect to RSA 654:45 from which this Court could reach the same conclusion.

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[5] Justice Roberts distinguished a case similar to *Marceau* in *In re England.* In that case, Justice Roberts examined the court's decision in *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968), which involved a statute that prohibited the publishing of certain information. The majority opinion in *Freeman* held " 'that disclosure in civil discovery was not 'publishing' of the sort prohibited by [the statute]; Congress was concerned with 'widespread dissemination of information not otherwise available to the public, and not with disclosure in judicial proceedings.' " *In re England*, 375 F.3d at 1180 (quoting *Freeman*, 405 F.2d at 1349). Justice Roberts distinguished *Freeman*, concluding that "Section 618(f) does not merely prohibit 'publication,' it categorically bars mere disclosure to anyone not a member of the promotion selection board." *Id.* *Marceau* should be distinguished on the same basis.

Third, this is not a case where a defendant is seeking relevant information about the plaintiff who initiated the action and can only obtain that relevant information through non-public, governmental paper records and oral testimony. Rather, the plaintiffs in this case are seeking the aggregated, private, non-public, confidential information of *every registered voter* in New Hampshire – the overwhelming majority of whom are not involved in this proceeding – in electronic format.

It is well-settled today that collecting and disseminating mass amounts of private, personally identifiable information about individual citizens poses significant risks to those citizens that were not present in 1952 when *Marceau* was decided.[6] *See, e.g.*, *Remsburg v. Docusearch, Inc.*, 149 N.H. 148, 155 (2003) ("Identity theft, *i.e.*, the use of one person's identity by another, is an increasingly common risk associated with the disclosure of personal information, such as a SSN."); *Galaria v. Nationwide Mut. Ins. Co.*, 663 Fed. Appx. 384 (6th Cir. 2016) (recognizing the increased risk that identity theft will occur once personally identifiable information is compromised or stolen as a cognizable legal injury for which redress may be sought); *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015) (same); U.S. Gov't Accountability Office, GAO-07-737, Report to Congressional Requesters: Personal Information 29 (2007) (concluding that, once personally identifiable information is exposed and

[6] Technology is not the only thing that has changed in the 66 years since *Marceau* was decided. In that time, this Court has developed an extensive body of case law regarding the rules of statutory construction (*see supra* at 30-33, citing recent cases regarding statutory interpretation). *Marceau* must therefore be considered in light of the technological and jurisprudential developments that have occurred in the last several decades since it was decided.

posted on the Internet, fraudulent use of that information may continue for years).

RSA 654:45 rigorously controls the security and disclosure of Database information in light of the special risks and dangers that unauthorized, inadvertent, or malicious disclosure of this information might pose to the State's registered voters. Indeed, a breach of this special trust with respect to the handling of this private, personal information could very well damage public confidence in state government generally and in New Hampshire's electoral system more specifically. The same facts, circumstances, and concerns were simply not present in *Marceau* in 1952. The superior court's reliance on *Marceau* in reaching its conclusion was therefore error.

CONCLUSION

Prior to Senate Bill 527, the plain, unambiguous language of RSA 654:45, VI prohibited disclosure of the Database and the information in it in civil discovery. The legislature's intent was not in question, and the superior court erred in holding otherwise by creating a judicial exception to that statute. Senate Bill 527 now confirms beyond doubt that RSA 654:45, VI bars disclosure of the Database and the information contained in it in response to civil discovery requests. Thus, regardless of the plaintiffs' purported need for the Database and the information contained in it, the plaintiffs cannot obtain it. Accordingly, the superior court's April 13, 2018, order compelling the defendants to produce the Database and the information in it in response to civil discovery requests must be reversed.

STATEMENT REGARDING ORAL ARGUMENT

The defendants respectfully request 15 minutes of oral argument to be presented by Anthony J. Galdieri, Esq.

CERTIFICATION REGARDING THE APPEALED DECISION

I hereby certify that the appealed decision is in writing and is appended to this brief.

Respectfully submitted,

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

By their attorneys,

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August 28, 2018

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RULE 26(7) CERTIFICATE OF SERVICE

I hereby certify that pursuant to guidance from the court clerk's office, the brief and appendix have been sent via e-mail to:

William E. Christie, Esq. and S. Amy Spencer, Esq.
Steven Dutton, Esq. and Henry Klementowicz, Esq.
Paul J. Twomey, Esq.
John Devaney, Esq., Bruce Spiva, Esq., Marc Elias, Esq., and Amanda Callais, Esq.

I also certify that courtesy copies have also been sent via e-mail to:

James S. Cianci, Esq.
Richard J. Lehmann, Esq.

August 28, 2018 /s/ Anthony J. Galdieri

CERTIFICATE AS TO COMPLIANCE WITH WORD LIMIT

I hereby certify that the within document complies with the word limit for opening briefs and contains 8,763 words.

August 28, 2018 /s/ Anthony J. Galdieri

DECISION BEING APPEALED OR REVIEWED

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
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http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

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***

Enclosed please find a copy of the court's order of April 13, 2018 relative to:

ORDER ON PLAINTIFFS' EXPEDITED MOTION TO COMPEL DISCOVERY

April 13, 2018

Marshall A. Buttrick
Clerk of Court

(564)

C: Henry R. Klementowicz, ESQ; 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

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 2017-CV-00432

New Hampshire Democratic Party

v.

William M. Gardner, New Hampshire Secretary of State
Gordon MacDonald, New Hampshire Attorney General

Docket No. 2017-CV-00433

League of Women Voters of New Hampshire; Douglas Marino; Garrett Muscatel; Adriana Lopera; Phillip Dragone; Spencer Anderson; and Seysha Mehta

v.

William M. Gardner, New Hampshire Secretary of State
Gordon MacDonald, New Hampshire Attorney General

ORDER ON PLAINTIFFS' EXPEDITED MOTION TO COMPEL DISCOVERY

The plaintiffs bring these consolidated actions challenging the constitutionality of Senate Bill 3 ("SB 3"), a recently enacted law governing voter registration. Currently pending before the Court is the plaintiffs' expedited motion to compel discovery, to which the defendants object. The Court held a hearing on this motion on February 20, 2017, at which all parties appeared through counsel. After considering the arguments, the applicable law, and the record, the Court finds and rules as follows.

Legal Standard Governing Discovery

New Hampshire courts "have long recognized that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information." Murray v. Developmental Servs., 149 N.H. 264, 267 (2003) (citation omitted). To that end, "New Hampshire law favors liberal discovery." Id. (citation

omitted). "Although discovery rules are to be given a broad and liberal interpretation, the trial court has discretion to determine the limits of discovery." N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429 (2009) (citation omitted). "A party's request for information must appear relevant and reasonably calculated to lead to the discovery of admissible evidence." Id. at 429–30 (quotation and citation omitted). "The trial court, therefore, is permitted to keep discovery within reasonable limits and avoid open-ended fishing expeditions or harassment to ensure that discovery contributes to the orderly dispatch of judicial business." Id. at 430 (citations omitted). As such, deciding whether to compel pretrial discovery is a matter left to the sound discretion of the trial court. See, e.g., Desclos v. S. N.H. Med. Ctr., 153 N.H. 607, 610 (2006); RAL Auto. Grp., Inc. v. Edwards, 151 N.H. 497, 499 (2004).

Analysis

The plaintiffs seek to compel the production of four broad categories of information: (1) snapshots from the New Hampshire Centralized Voter Registration Database (the "Database"); (2) documents related to meetings and communications concerning SB 3; (3) documents related to the monetary effects of SB 3; and (4) data concerning voter registration wait times. The Court will address each category of information in turn.

I. The Database

Pursuant to RSA 654:45, I, the Secretary of State maintains a "statewide voter registration database and communications system." The Database is statutorily-required to contain "the current information on the voter registration forms, the accepted absentee ballot applications, the voter checklists, and voter actions as recorded on the

marked checklist maintained by each city, ward, and town in the state." RSA 645:45, I. Relevant to the issues in this case, the Database contains a significant amount of information regarding registration and domicile, including:

> (1) "whether the voter registered 30 days or less prior to an election or on election day"; (2) "whether the voter provided evidence of domicile when registering or subsequently"; (3) "whether the voter initialed a verifiable action of domicile obligation (if yes, whether the voter provided evidence of domicile)"; (4) "whether a voter who did not provide proof of domicile initialed the voter registration form indicating they were not aware of having any evidence of domicile"; and (5) "[f]or voters who register and do not provide proof of domicile when registering a yes/no value for whether: (a) the voter used the verifiable action of domicile section of the voter registration form; (b) the voter initialed that he or she possesses proof of domicile and will provide the proof after the election; (c) whether the voter provided the evidence; or (d) whether the voter initialed that he or she was not aware of possessing any proof of domicile."

(Scanlan Aff. ¶ 6.) The Database is "private and confidential" and its contents are not subject to disclosure pursuant to the Right-to-Know law. RSA 654:45, VI. While some of the information from the Database is publically accessible at "the state records and archives center during normal business hours," members of the public are prohibited from "print[ing], duplicat[ing], transmit[ting], or alter[tering] the data." RSA 654:31, III.

Here, the plaintiffs seek production of "complete versions" of the Database "as of April 1, 2009, 2011, 2013, 2015, 2017, or the date on which the Database contained the complete voter history following the 2008, 2010, 2012, 2014, and 2016 General Elections." (Pls.' Mot. Compel Ex. A at 8.) The plaintiffs maintain that this data is "critical to [their] analysis and presentation of evidence in this case." (Pls.' Memo. Supp. Mot. Compel at 6.) Specifically, the plaintiffs represent that one of their expert witnesses, Dr. Michael Herron, will use the Database information "to perform individual-voter-level analyses that he can use to provide the Court with information about who is

burdened by SB 3, as well as the scope of those burdens." (Id.) The plaintiffs further claim that the type of information they seek "can only be obtained through the Database and any archived versions of the Database that the Secretary possesses." (Id. at 7.) For their part, the defendants contend that this information is: (1) "irrelevant to this litigation"; (2) protected by "an absolute statutory privilege"; and (3) the plaintiffs' expert can use other information "that is already publicly available . . . to perform whatever analysis he believes is relevant in this case." (Defs.' Obj. ¶¶ 1, 3.) The Court will address each of these proffered justifications for non-disclosure in turn.

A. Relevance

The defendants first argue that the information the plaintiffs seek from the Database is irrelevant. The Court disagrees. Although the Court has found that the allegations in the complaints are sufficient to survive a motion to dismiss, the Court ruled that the New Hampshire Democratic Party ("NHDP") must prove its standing at trial. One of the ways NHDP can do so is to demonstrate that SB 3 suppresses "voters likely to support Democratic candidates." Lee v. Va. State Bd. of Elections, 188 F. Supp. 3d 577, 584 (E.D. Va. 2016), aff'd on other grounds 843 F.3d 592 (4th Cir. 2016). To that end, NHDP alleges that: (1) SB 3 makes same-day voter registration more difficult; and (2) same-day registrants tend to support its candidates. The information from the Database is directly related to those standing allegations—that is it "would almost certainly allow [the plaintiffs' expert] to characterize precisely the types of [voters] who use [same-day registration]." (Herron Aff. ¶ 130.) Simply put, because the identities and voting patterns of same-day registrants are at issue, and because the information from the Database will shed light on those issues, the Court finds the

requested information to be relevant. See generally Morlock v. Shepherd, No. 99C637, 1999 WL 1054254, at *1 (N.D. Ill. Nov. 10, 1999) (where plaintiff "maintain[ed] (and her expert [ ] stated by affidavit) that she" needed records in defendant's possession in order to perform expert analysis, court found that "the material sought [was] reasonably calculated to lead to the discovery of relevant and admissible evidence").

B. Privilege

Next, the defendants contend that the Database information is protected from disclosure based on an "absolute statutory privilege." (Defs.' Obj. at 25.) In making this argument, the defendants point to RSA 654:45, VI, which provides, in pertinent part: "The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31. . . . Any person who discloses information from the voter database in any manner not authorized by this section shall be guilty of a misdemeanor." The Court, however, disagrees that this language creates a statutory privilege.

The New Hampshire Supreme Court's decision in Marceau v. Orange Realty, Inc. is instructive. In that case, the defendant subpoenaed the Department of Labor to obtain the plaintiff's employment records. 97 N.H. 497, 498 (1952). The Department of Labor refused to provide the records, asserting that they were exempt from disclosure pursuant to a statutory provision of the Unemployment Compensation Act. Id. Like RSA 654:45, VI, that statute provided that employee records "shall be held confidential and shall not be published or be open to public inspection . . . ." 97 N.H. at 498 (quotation omitted). And, similar to RSA 654:45, VI, the statute "impose[d] a penalty for violation of the section by department employees." Id.

In interpreting the statute, the court recognized that the records at issue were clearly meant to be "*confidential*, at least in the sense that they are not to be voluntarily disclosed by the department or its employees." Id. at 498–99 (emphasis in original). However, it was "by no means plain . . . that use of the records in evidence in judicial proceedings was intended to be forbidden." Id. at 499. Thus, absent such "a clear legislative mandate," the court held that the "statute [did] not furnish a privilege against production of department records for use in judicial proceedings." Id. at 500. The court also rejected the argument that the penalty provision would apply to the judicially-forced disclosure of the records, noting:

> Production of the records and testimony concerning them, under the circumstances of this case will not expose the witness to the penalties provided by the section. The evil intended to be forestalled and prevented by this clause of the statute was the voluntary imparting by State employees of information so acquired. It was not intended to impede the administration of justice in the courts by the suppression of pertinent testimony.

Id. (ellipses and quotation omitted).

Based on the similarities between the statute in Marceau and the one at issue in this case, the Court likewise holds that RSA 654:45, VI does not create a statutory privilege against nondisclosure in the course of civil litigation. Had the legislature intended to create such a privilege, it easily could have done so using the clear language required by Marceau, as it has in other statutes. See, e.g., RSA 151:13-a, II (records of quality assurance committee "shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or administrative proceeding") (emphasis added); RSA 400-A:37, IV-a, (a) (providing that documents "shall not be made public by the commissioner

or any other person and shall be confidential by law and privileged, shall not be subject to RSA 91-A, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action") (emphasis added).

C. Availability of Other Data

Finally, the defendants maintain that "the plaintiffs have other ways to access the information they seek."[1] (Defs.' Mot. at 35.) The general rule is that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action." Super. Ct. R. 21(b) (emphasis added). Here, the Court has ruled that the information in the Database is both relevant and not privileged. "Absent [ ] privilege or irrelevance, a party may not limit the scope of an adverse party's discovery request." Breagy v. Stark, 138 N.H. 479, 482 (1994). Thus, the fact that the information *may* be available from other sources is simply of no moment here, because the availability of other sources is generally only considered when the target information is privileged. Cf. Desclos, 153 N.H. at 615–16 (court may pierce evidentiary privilege where "the targeted information is unavailable from another source and [ ] there is a compelling justification for its disclosure"). Moreover, the defendants have not argued that production of the information would be burdensome. Indeed, as the plaintiffs point out, "the Database is maintained electronically, and its contents can be copied and transferred" without "undue burden or expense." (Pls.' Memo. Supp. Mot. Compel at 10.) Having found the defendants' objections to the production of the Database information unpersuasive, the plaintiffs' motion to compel its production is GRANTED.

[1] The Court is somewhat skeptical regarding this bald assertion. While it may be possible for Dr. Herron to perform some type of analysis using other data, the Court has no reason to doubt the sincerity of the plaintiffs' representation that this particular data is critical to their case. The plaintiffs also stated at the hearing that the other information—some of which is not in electronic format—is far less useful.

The only issue giving the Court pause is the significant amount of private information contained in the Database. However, this concern can be remedied with an appropriate protective order and/or an agreement of the parties. See Winfield v. City of New York, No. 15-cv-05236, 2017 WL 2880556, at *3 (S.D.N.Y. July 5, 2017) ("Given the City's stated concerns about the confidential nature of the affordable housing data—which includes sensitive personal data about affordable housing applicants—and misuse or public disclosure of such data, as well as this Court's desire to reduce conflicts about and expedite production of confidential information and to manage discovery in carefully planned stages, this Court [has] found there was good cause for the issuance of the Protective Order governing discovery in this case."). The parties are therefore ORDERED to meet and confer regarding the scope and language of a protective order. The parties shall file a protective order with the Court within ten days of the clerk's notice of decision.

II. Documents Related to Meetings and Communications Concerning SB 3

Next, the plaintiffs seek the production of "all documents related to any meeting [the defendants] participated in regarding SB 3, including but not limited to, meeting agendas, presentations, notes, minutes and recordings." (Citation omitted.) The plaintiffs also seek production of any communications regarding SB 3 between the defendants and: (1) local election officials; (2) the General Court, and (3) amongst themselves. The defendants object on the bases of relevance, privilege, and burden.

A. Relevance

The defendants first argue that any of their communications to third parties and amongst themselves regarding SB 3 are irrelevant to the issues in the case.

Specifically, they maintain that "[t]he plaintiffs cannot explain how a communication between, for example, an employee of the Secretary of State's Office and any other person occurring sometime prior to or after finalization and passage of SB 3 by the legislature is relevant or reasonably calculated to lead to the discovery of relevant information." (Defs.' Obj. at 36.) The plaintiffs counter that such information may be relevant because it could "speak to the burdens from and justification for [SB 3]." (Pls.' Memo. Supp. Mot. Compel at 16.) The Court agrees with the plaintiffs.

When considering the constitutionality of laws affecting the right to vote, the first step is to determine "the level of scrutiny that applies." Guare v. State, 167 N.H. 658, 663 (2015). When deciding the appropriate level of judicial scrutiny, the Court may consider testimonial evidence.[2] For instance, in Guare, the Court looked to the testimony of the petitioners in determining that the State action at issue was unreasonable and therefore subject to a heightened level of scrutiny. Id. (petitioners "testified that they found the challenged language confusing . . . [and] that they would feel uncomfortable registering to vote in New Hampshire because of the challenged language"). Likewise, in Akins v. Sec'y of State, 154 N.H. 67, 72 (2006), the supreme court cited "[t]he Secretary of State's testimony that the primacy effect can confer an advantage as great as six to ten percent in races where there are numerous candidates demonstrates the potency of the primacy effect," in deciding that a strict scrutiny level of judicial review applied. Indeed, in order to obtain a higher level of judicial scrutiny,

[2] The defendants cite Libertarian Party N.H. v. State, 154 N.H. 376, 381 (2006) for the proposition that "[a]ny evidence of an alleged nefarious legislative purpose would be irrelevant because such a purpose is not a recognized basis for declaring a statute unconstitutional." However, in that case, the court had already determined that "the challenged statutes impose only reasonable, nondiscriminatory restrictions upon the plaintiffs' rights" and therefore statutes were only subject to rational basis scrutiny. Id. at 386 (brackets and citation omitted). Thus, at best, Libertarian Party stands for the proposition that evidence may not be required after it has been determined that rational basis review applies.

courts generally require the plaintiffs to produce evidence. See, e.g., Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 542 (6th Cir. 2014) (holding that "the district court properly concluded that Plaintiffs had presented sufficient evidence that the groups they represent are in fact significantly burdened by Directive 2014-17 and SB 238 such that [ ] rational basis standard does not apply"); Obama for Am. v. Husted, 697 F.3d 423, 431 (6th Cir. 2012) (noting, in a prior case, that "plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting").

Because it is possible that the defendants or their agents could offer testimony related to the level of judicial scrutiny, as in Akins, any of their prior statements or communications regarding SB 3 could be useful for impeachment purposes, or possibly even admitted substantively.[3] Moreover, even if the defendants' prior communications are not ultimately admissible or used at trial, given the broad standard for relevance at the discovery stage,[4] the Court is satisfied that there is at least a possibility that the information sought may be relevant to the constitutionality of SB 3. See N.C. State Conference of the NAACP v. McCrory, No. 1:13CV658, 2015 U.S. Dist. LEXIS 13648, at *18 (M.D.N.C. Feb. 4, 2015) (in deciding discovery dispute, finding that "legislator communications are certainly relevant to the issue of intent tied to the various claims

[3] See, e.g., Victor v. Lawler, No. 3:08–CV–01374, 2010 WL 2804847, at *1 (M.D. Pa. July 14, 2010) (explaining that "evidence which contradicts prior statements by Defendants regarding matters which are relevant to this litigation is properly discoverable both as substantive evidence as well as impeachment evidence in this case"); Newsome v. Penske Truck Leasing Corp., 437 F.Supp.2d 431, 436 (D. Md. 2006) ("A party must disclose impeachment evidence in response to a specific discovery request."); Medford v. Duggan, 732 A.2d 533, 539 (N.J. Super. Ct. App. Div. 1999) ("Providing the cross-examiner with a prior statement of the witness facilitates cross-examination and, therefore, has a salutary purpose.").

[4] See, e.g., Helget v. City of Hays, 300 F.R.D. 496, 499 (D. Kan. 2014) ("Relevance is broadly construed at the discovery stage of the litigation and a request for discovery should be considered relevant if there is any possibility the information sought may be relevant to the subject matter of the action.").

raised in these cases" and noting that defendants "agreed to produce documents in the custody of any State agency reflecting communications with any State legislator or legislative staff" regarding the challenged law). For these reasons, the Court finds that the defendants' communications regarding SB 3 are relevant.

B. Privilege

Next, the defendants object "to [these] requests to the extent it calls for documentation that is subject to the attorney-client privilege, the work product doctrine, the executive privilege, the deliberative process privilege, and/or any other privilege." (Citation omitted.) This type of blanket, unspecific claim of privilege is insufficient to invoke a privilege. Rather, the party asserting a privilege bears the burden of proving that privilege applies. See Hampton Police Ass'n. v. Town of Hampton, 162 N.H. 7, 14 (2011). A party meets that burden "when it produce[s] a detailed privilege log stating the basis of the claimed privilege for each document in question, together with an accompanying explanatory affidavit of its [ ] counsel." Rabushka v. Crane Co., 122 F.3d 559, 565 (8th Cir. 1997); see also Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 696–97 (N.D. Ga. 2007). To the extent the defendants withhold documents based on the basis of privilege, they must complete a privilege log with an accompanying affidavit.[5] Having failed to do so at this point, the Court cannot find that any privilege applies.

C. *Undue Burden*

Finally, the defendants assert that production of this information would be "unduly burdensome." The Court disagrees. Much, if not all, of this information is likely in

[5] The defendants appear to recognize this obligation in their objection, stating "[i]f the Court determines that some of this information is relevant to the claims in this case, the defendants will comply with their discovery obligations, including by creating a privilege log if one is necessary." (Defs.' Obj. at 45.)

electronic format. As is typical in cases involving electronically stored information, the plaintiffs have offered to narrow the scope of their inquiry to certain search terms. The defendants have not demonstrated or explained why this reasonable procedure—used widely in civil cases—would be unusually burdensome. It can be produced in compliance with Superior Court Rule 25.

Having found the defendants' objections to the production of this information unpersuasive, the plaintiffs' motion to compel its production is GRANTED. The Court further ORDERS the parties to meet and confer regarding a list of search terms and appropriate custodians. After the search is complete, the defendants may withhold any clearly irrelevant or privileged documents, but must complete a privilege log and accompanying affidavit as described above.

III. Monetary Effects of SB 3

The plaintiffs seek "documents related to the financial data, budgets, or monetary effects of SB 3." (Pls.' Memo. Supp. Mot. Compel at 3.) The defendants, however, maintain that "they do not [ ] possess responsive documentation" to this request. (Defs.' Obj. ¶ 15.)[6] Given the defendants' representation that they do not have this information, the plaintiffs' motion to compel its production is DENIED. See generally Samsung Elecs. Am., Inc. v. Chung, 321 F.R.D. 250, 299 (N.D. Tex. 2017) (explaining that "a party cannot produce what it does not have, and [therefore] the court cannot compel a party to produce non-existent documents") (quotations omitted); cf. State v. Villeneuve, 160 N.H. 342, 348 (2010) (trial court correctly found that State did not commit discovery violation because it was not required to produce documents it did not possess); State v.

[6] However, at the hearing on February 20, 2018, the defendants represented that they had produced fiscal notes related to SB 3.

Downs, 157 N.H. 695, 698 (2008) (the "duty to disclose exculpatory material does not extend to records not within the control of the prosecutor or police department").

IV. Polling Place Timing Data

The plaintiffs seek production of "data concerning the time that it takes voters to register on Election Day under SB 3." (Pls.' Memo. Supp. Mot. Compel at 3.) However, after the plaintiffs' motion was filed, the defendants have since agreed "to produce documents reflecting that data." (Defs.' Obj. ¶ 16.) Accordingly, the motion to compel as it relates to this information is MOOT.

So ordered.

Date: April 13, 2018

Hon. Charles S. Temple,
Presiding Justice