THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0208

PETITION OF NEW HAMPSHIRE SECRETARY OF STATE

AND NEW HAMPSHIRE ATTORNEY GENERAL

REPLY BRIEF FOR THE APPELLANTS

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ARGUMENT

I. RSA 654:45, VI, DOES NOT AUTHORIZE DISCLOSURE OF INFORMATION FROM THE DATABASE AND PROHIBIT ONLY REDISCLOSURE OF THAT INFORMATION AS PLAINTIFFS CONTEND.

Before being amended by SB 527 (2018 N.H. Laws ch. 329:8), RSA 654:45, VI, provided that the New Hampshire Centralized Voter Registration Database (the "Database') is "private and confidential." The statute prohibited, through criminal sanction, the disclosure of information from the Database by any person except as authorized "by this section." Defendants' Brief at 10. The only exceptions to this prohibition were – and remain – as follows:

1. Access by designated employees of the Department of State (RSA 654:45, V(a));

2. Providing data to the state and federal courts for the express purpose of preparing jury lists (RSA 654:45, VI); and

3. Providing data to an interstate voter crosscheck system to the extent necessary to detect voting in more than one state in one election (RSA 654:45, VIII(a)).

Certain local election officials also have access to Database information for their town, city, or ward "as determined by" the Secretary of State. RSA 654:45, IV(c).[1]

[1] The municipal voter checklists remain subject to public inspection. RSA 654:45, VI (nothing in Database subject to disclosure under RSA 654:31, but local checklists remain public).

Notwithstanding this straightforward statutory scheme criminalizing disclosure of information from the Database unless that disclosure falls within one of these narrowly drawn exceptions, plaintiffs seek to convince this Court that the statute "authoriz[es] certain access to the Database (mandatory within the Secretary of State's Office and voluntary outside it) and then, by imposing criminal penalties, ensuring that the individuals receiving that information do not further disclose." Plaintiffs' Brief at 34-35. This countertextual construction of the statute rests on a misreading of *Marceau v. Orange Realty, Inc.*, 97 N.H. 497 (1952), and a misapplication of the rules of statutory construction.

A. *Marceau* Is Not Controlling

The superior court described *Marceau* as "instructive" and noted "similarities between the statute in *Marceau* and the one at issue in this case." Defendants' Brief at 50-51. According to plaintiffs, however, "*Marceau* is *controlling*." Plaintiffs' Brief at 27 (emphasis supplied). While there are superficial similarities between the two statutes, the differences between *Marceau* and this case are vast.

Marceau was an action for battery against the plaintiff's landlord. The defendant sought records filed by the plaintiff's employer with the Unemployment Compensation Bureau within the Department of Labor and deposition testimony about those records by a bureau representative. *Marceau*, 97 N.H. at 497. The bureau objected, asserting that a section of the Unemployment Compensation Act ("Section 9G") required such records be "held confidential and shall not be published or be open to public inspection" unless the employer and employee's identity were

protected. *Id.* at 498 (quoting statute). Nothing in the opinion suggests that the plaintiff objected to the discovery sought.

The context and scope of the discovery sought by plaintiffs in this case could not be more different than that sought in *Marceau.* Here, plaintiffs N.H. Democratic Party and League of Women Voters of New Hampshire purport to represent the interests of some classes of potential registrants such as immigrants, the homeless, college students, and the underprivileged. *See, e.g.,* Appendix Vol. I at 027-029, 091-093, and 134-136. Aside from the plaintiff college students, however, plaintiffs have not identified a single person from any of these classes who has even allegedly been prevented or discouraged from registering to vote by SB 3.

In *Marceau,* the defendant sought discovery into the plaintiff's employment, presumably because the plaintiff had placed some aspect of her employment at issue in her tort claim. Only the confidentiality interests of the plaintiff and her employer were implicated, and neither of them objected. By contrast, here two partisan organizations and their handpicked plaintiffs have sought records containing personally identifiable information of every registered voter in the State of New Hampshire, only three of whom are actually parties. They seek this information not to advance or defend the interests of any of the individual plaintiffs but to attempt to discern whether some classes of voters whom they claim to represent were more likely in the past[2] to use election-day registration than others. None of the voters in the Database has placed his or her personal

[2] Because the Database only contains information on individuals who are already registered to vote it is of dubious relevance to when and how other individuals will register to vote in the future under SB 3.

information at issue in this case, nor have they been given the opportunity to object to the disclosure of that information to political partisans.

It is true that RSA 654:45, VI, and Section 9G of the statute construed in *Marceau* contain some similar provisions. Under both statutes the records at issue are "confidential." Both statutes impose a penalty for their violation, and neither uses the term "privilege." There the similarities end.

Section 9G prohibited only publication or public inspection of the records if the identity of the employer or employee were not protected. *Marceau*, 97 N.H. at 498. RSA 654:45, VI, prohibits *all* disclosures from the Database, with narrow, specified exceptions. Section 9G had been amended to delete a prohibition on use of the information in any court proceeding. *Id.* at 499. RSA 654:45, VI, has never undergone such an amendment. Section 9G created broad exceptions to the prohibition on public inspection for "employers and public employees in the performance of their public duties." *Id.* at 498. RSA 654:45 provides only four narrowly circumscribed exceptions and expressly prohibits any other unauthorized disclosure. *Ante* at 5.

Marceau, then, is neither instructive nor controlling. It stands for the unremarkable proposition that a party can defeat confidentiality of its own records when that party puts its records at issue in litigation, even if a statute otherwise prohibits public inspection or publication of the records. That proposition has no application where the records are not those of a party and the statute prohibits *all* disclosures, subject only to four carefully tailored exceptions. Accordingly, the plaintiffs' and the superior court's reliance on *Marceau* is misplaced.

B. RSA 654:45, VI, is a Ban on Disclosure of Information From the Database, and That Ban Encompasses Disclosure in Discovery

Plaintiffs also argue that interpretation of RSA 654:45 as authorizing disclosure of the Database, but prohibiting re-disclosure, is consistent with rules of statutory construction. Specifically, plaintiffs observe that (1) the statute does not refer to the Database as "privileged" or otherwise make it beyond "disclosure in the context of civil litigation" (Plaintiffs' Brief at 27); (2) that three other state statutory schemes explicitly prohibit discovery of information produced to a state agency, suggesting that this is the only way in which a statute can prevent disclosure in litigation (*id.* at 31-32); and (3) the enactment of SB 527 in 2018 (2018 N.H. Laws ch. 329:8) amending RSA 654:45, VI, to prohibit disclosure of information from the Database in discovery demonstrates that the prohibition did not exist when the superior court ordered production of the Database (*id.* at 35). These arguments disregard the fact that RSA 654:45, VI, bans *all* disclosures of information from the Database that are not expressly authorized by RSA 654:45.

Plaintiffs expend a good deal of their brief attempting to refute the notion that RSA 654:45, VI, creates a statutory privilege. The fundamental question before the Court, however, is the meaning and effect of the statute, not whether one such effect can be classified as a privilege.

What plaintiffs overlook is that a statutory privilege against discovery of information is a ban on disclosure only in the context of litigation. *See In re "K"*, 132 N.H. 4, 17 (1989) (statutory privilege "bars the discovery and admissibility of a limited category of evidence . . .").

While the legislature can certainly enact such a ban, if it prohibits disclosure in *all* circumstances there is no need to add the specific term "privileged" because litigation is just one context in which disclosure could take place.

The plaintiffs also overlook the fact that the language of the statute permits disclosure of information from the Database in only four prescribed circumstances, *ante* at 5, none of which applies to the present case.[3] This fortifies the conclusion that, aside from the exceptions, RSA 654:45, VI, is a comprehensive ban on disclosure. *See Ettinger v. Town of Madison Planning Bd.*, 162 N.H. 785, 791 (2011) ("Exceptions are not to be implied . . . . Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied." (Brackets and citation omitted.)). The courts cannot "consider what the legislature might have said or add language that the legislature did not see fit to include," and yet the plaintiffs ask the Court to do just that by

[3] Plaintiffs also cite statutes and miscellaneous orders from other jurisdictions for the proposition that it is "common" for courts to require disclosures of statewide voter files in litigation. Plaintiffs' Brief at 30-31, n. 19 and 20. Many of these statutes, however, merely permit disclosure of voter records associated with the public checklist, just like RSA 654:31, III, and others permit disclosure of sensitive voter data in only limited circumstances. *See, e.g.,* Alaska Stat. Ann. 15.07.127 (any person may obtain a list including the "names and addresses" and political party affiliation of registered voters; under Section 15.07.195 of the election code, however, a voter's place of birth and age (among other things) are not open to public inspection); Haw. Code R. 3-172-31(c) (non-public voter registration information is available for "election or government purposes"). Similarly, many of the orders cited in the plaintiffs' papers are protective orders agreed upon by the litigants. *See* Reply Appendix at 3-33. There is no such agreement here, principally because New Hampshire law criminalizes any disclosure not contemplated by the statute.

recognizing an implied exception for disclosure of the Database in the context of civil discovery. *See also Polonsky v. Town of Bedford*, No. 2016-0354, slip op. at 8 (N.H. June 28, 2018) (interpretation of statute cannot conflict with its plain meaning).

Furthermore, the four disclosures authorized by RSA 654:45 share similar characteristics. First, Database access is limited to *government* actors. RSA 654:45, IV(c) (allowing limited access to certain enumerated local election officials as determined by the secretary of state), V(a) (limiting access to specified employees within the Department of State), VI (authorizing disclosure of Database data to state and federal courts for the purpose of preparing jury lists), and VIII(a) (authorizing limited disclosure to other states to detect duplicate voting).

The exceptions to the ban on disclosure do not give the recipients unfettered access to the Database. Even the language of the authorized exceptions themselves reveals the care with which Database information must be handled. Local election officials, for example, may only access "records of individuals who are currently registered to vote," or who are applying to register to vote, in the official's jurisdiction. RSA 654:45, IV(c). The courts are not granted access to the entire Database; rather, the "secretary of state is authorized to provide voter database record data" to the administrative offices of the courts for the purpose of preparing jury lists.[4] RSA 654:45, VI. Finally, to crosscheck with other states to detect

[4] Although RSA 654:45 unequivocally prohibits disclosures beyond the enumerated exceptions, the fact that the legislature prescribed the specific use to which the courts could put the information from the Database implies that no other use is lawful.

double voting, the Secretary of State may "only provide information that is necessary for matching duplicate voter information with other states." RSA 654:45, VIII(a).

It is inconsistent with the legislature's evident concerns about the privacy implications of creating the Database and the care with which it limited the use of the Database in RSA 654:45 to hold that *any* litigant purporting to represent certain demographic groups in an election law case may have access to the Database. Because the superior court's order cannot be reconciled with the language and purpose of the statute, it should be vacated.

C. The 2018 Amendment to RSA 654:45 Was a Lawful Response to the Superior Court's Order, Implies Nothing About the Meaning of the Statute Before It Was Amended, and Is Not an Impermissible Retroactive Law.

Notwithstanding the plain language of RSA 654;45, VI, the superior court construed the statute to allow litigants access to the Database in discovery. Where the legislature disagrees with the courts' interpretation of a statute, "it is free, subject to constitutional limitations, to amend them." *Polonsky*, slip op. at 8, *citing Hogan v. Pat's Peak Skiing, LLC*, 168 N.H. 71, 75 (2015). That is precisely what occurred here. The superior court's order created a threat that voters' private information would be disclosed, and the legislature acted swiftly to prevent that disclosure. The 2018 amendment, then, does not imply that such disclosures were permissible under RSA 654:45 beforehand as plaintiffs suggest. It was merely a response to a court's construction of a statute with which the legislature disagreed.

Nor are plaintiffs' dark but unsupported allegations of skullduggery and disregard of the separation of powers persuasive in the slightest. Indeed, these conspiratorial speculations appear to be a form of over-compensation for plaintiffs' disregard of New Hampshire authority under which the 2018 amendment to RSA 654:45 provides yet another ground to vacate the superior court's order.

Plaintiffs attempt to make much of whether SB 527 can be called a "change" in the law. Again, they exalt labels over substance. Like any statutory amendment, SB 527 changed the statutory language. What is plain from the legislation, however, is that the legislature did not intend any substantive change in the law. *See* Defendants' Brief at 11 and 26 (legislative purpose to "reiterate[ ]" intention that Database not be disclosed except for as provided for in RSA 654:45). The legislature's use of the term "reiterates" in SB 527 demonstrates that it had always understood and intended the statute to preclude any disclosure other than as enumerated, including in civil discovery proceedings. As a result the plaintiffs never had the right to discover the Database.

The plaintiffs, citing *In re Silk*, 156 N.H. 539 (2007), argue that a statute that adversely affects an individual's substantive rights may not apply retroactively. But the plaintiffs have no substantive rights in the Database. They possess neither the actual Database itself nor a final judgment ordering the Database to be produced to them. They have only an interlocutory discovery order that is under review by this Court. *Contrast Silk*, 156 N.H. at 541-42 (workers compensation statute creates substantive rights arising on date of injury).

In New Hampshire, moreover, "to be vested, a right must be more than a mere expectation based on an anticipation of the continuance of existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand . . . ." *In re Goldman*, 156 N.H. 770, 774 (2005) (citation omitted). It must be absolute, fixed and certain, and cannot be "doubtful or depend[ent] on any contingency." *Id.* The plaintiffs have made no showing that the superior court's order created a right of such character.

Silk also reiterates that "[w]hen the legislature is silent as to whether a statute should apply prospectively or retrospectively. . . . [the] interpretation turns on whether the statute affects parties' substantive or procedural rights." *Id*. at 542; *see also State v. Drew Fuller*, 169 N. H. 154, 159-161 (2016). SB 527 simply clarified that the Database is not discoverable, and discovery is quintessentially procedural. SB 527 therefore applies retroactively.

Finally, plaintiffs contend that application of the amendment in this case would be unfair. Defendants' Brief at 41-42. *Silk*, 156 N.H. at 543 ("[i]n the final analysis, the question of retrospective application rests on a determination of fundamental fairness . . . ."). To the plaintiffs, it is unfair that the legislature changed the statute to protect the Database from discovery in civil proceedings, especially after the superior court order issued. But this Court has emphasized that "the individual citizen, with all his rights to protection, has no vested interest in the existing laws of the state as precludes their enforcement or repeal by the legislature; nor is there any implied obligation on the part of the State to protect any citizens against incidental injury occasioned by change in the law." *In the Matter of*

Robert L. Goldman and Mary E. Goldman, 151 N.H. 770 at 773-74 (2004) (citation omitted). This applies with equal force to the plaintiffs as to anyone else: laws can and do change and no citizen can count on the existence of any current law for any foreseeable time. No citizen therefore has any vested right in the present state of a law, nor is there any fundamental unfairness in its amendment.

CONCLUSION

For the reasons set forth above and in defendants' opening brief, defendants respectfully request that the court vacate the superior court's order compelling production of the Database.

Respectfully submitted,

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By Their Attorneys,

Date: 11/01/18

/s/Signed by Bryan K. Gould w/permission of Anne M. Edwards

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RULE 26(7) CERTIFICATE OF SERVICE

I hereby certify that the within document is being served electronically upon counsel listed below through the court's ECF system:

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I hereby certify that the within document complies with the word limit for reply briefs and contains 2,828 words.

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