THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2018-0208

PETITION OF THE NEW HAMPSHIRE SECRETARY OF STATE AND NEW HAMPSHIRE ATTORNEY GENERAL

BRIEF OF APPELLEES

Attorneys for Respondents League of Women Voters of New Hampshire, Douglas Marino, Garrett Muscatel, Adriana Lopera, Phillip Dragone, Spencer Anderson, and Seysha Mehta

Wilbur A. Glahn, III, NH Bar No. 937
Steven J. Dutton, NH Bar No. 17101
McLANE MIDDLETON, PROFESSIONAL ASSOCIATION
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326

Paul Twomey, NH Bar No. 2589
TWOMEY LAW OFFICE
P.O. Box 623
Epsom, NH 03234

Marc Erik Elias, pro hac vice
John Devaney, pro hac vice
Bruce Spiva, pro hac vice
Amanda Callais, pro hac vice
PERKINS COIE LLP
700 Thirteenth Street, NW, Suite 600
Washington, D.C. 20005-3960

William E. Christie, NH Bar No.11255
S. Amy Spencer, NH Bar No. 266617
SHAHEEN & GORDON, P.A.
107 Storrs Street, P.O. Box 2703
Concord, NH 03302-2703
(603) 225-7262

To Be Argued By: Bruce Spiva

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STATEMENT OF THE CASE

Appellees brought this action to challenge the constitutionality of Senate Bill 3 ("SB 3"), a New Hampshire law enacted on July 12, 2017, which made sweeping changes to New Hampshire's voter registration process by altering the requirements for proving domicile. (App. I 004-23). SB 3 requires—for the first time—that all prospective New Hampshire registrants submit proof of a verifiable act of domicile to register, while simultaneously eliminating the failsafe option of completing a domicile affidavit for individuals without proof of domicile. (App. I 018-19). SB 3 separates prospective registrants into two classes—those registering 31 or more days before an election, and those registering 30 days before/on Election Day—each of which undergoes a distinct process for establishing domicile. (App. I 004-23). This dual process requires the latter group to complete new, complex and confusing registration forms if they are unable to present proof of domicile, potentially subjecting them to civil and criminal penalties where they fail to comply with a paperwork requirement set out in SB 3. (App. I 004-23).

On August 22 and 23, 2017, respectively, the New Hampshire Democratic Party ("NHDP") and the League of Women Voters of New Hampshire ("LWVNH"), along with three individual plaintiffs ("LWVNH Plaintiffs"), filed complaints in Hillsborough Superior Court, Southern District against New Hampshire Secretary of State William Gardner ("the Secretary") and Attorney General Gordon McDonald (collectively, "the

State").[1] (App. I 0024-88). The complaints alleged that SB 3 violates the New Hampshire Constitution by: burdening the equal right to vote guaranteed to New Hampshire domiciliaries, contradicting the domicile requirement therein, denying prospective registrants equal protection under the law, and by being void for vagueness. (App. I 078-82). They also alleged violations of the United States Constitution, seeking declaratory as well as preliminary and permanent injunctive relief against the implementation of SB 3. (App. I 082-88).

On August 23 and 25, 2017, NHDP and the LWVNH Plaintiffs, respectively, filed Motions for Preliminary Injunction seeking expedited preliminary relief because SB 3 was slated to take effect on September 8, 2017, and elections would be taking place as early as September 12, 2017. The Superior Court (Temple, J.) held a hearing on Plaintiffs' request for preliminary relief on September 11, 2017.[2] On September 12, 2017, before the first election took place, the Superior Court issued an order temporarily

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[1] These cases are *League of Women Voters of New Hampshire, et al. v. Gardner, et al.*, No. 226-2017-CV-00433 and *New Hampshire Democratic Party v. Gardner, et al.*, No. 226-2017-CV-00432. They were consolidated on October 11, 2017.

[2] The hearing was originally scheduled for September 6, 2017. On August 31, 2017, however, the State removed the case to the United States District Court for the District of New Hampshire. To ensure that they maintained their expedited preliminary injunction schedule, NHDP and the LWVNH Plaintiffs amended their complaints, dropping their federal claims and moving to remand to Superior Court. (App. I 089). On September 3, 2017, the complaints were remanded. The Superior Court then renoticed the preliminary injunction hearing for September 11, 2017.

restraining the criminal penalties created by SB 3 as "severe" burdens on the right to vote.[3] (S.A. 5-18). The order noted that he "ha[d] serious concerns regarding other parts of SB 3," and denied the State's pending motion to dismiss. (S.A. 13, 17). The Superior Court's restraining order remains in effect.

On October 6, 2017, the LWVNH Plaintiffs filed a Second Amended Complaint adding new individual plaintiffs. (App. I 147). On October 31, 2017, they propounded their first requests for production on the Secretary. (S.A. 19-32). Their requests sought, among other things, production of the current New Hampshire Centralized Voter Registration Database ("the Database") as well as "snapshots" of a limited number of past versions of the Database.[4] (S.A. 26-27). On November 30, 2017, the State objected to the request asserting, in pertinent part, that the Database is irrelevant and not subject to disclosure under RSA 654:45, VI. (S.A. 37-40). After meeting and conferring with the State, the LWVNH Plaintiffs filed an Expedited Motion to Compel on December 22, 2017. (App. VI 212). The State objected on January 16, 2018. (App. II 3-56). The LWVNH Plaintiffs replied on January 29, 2018. (App. II 57-78). On February 20, 2018, the Superior Court heard the motion, with both parties presenting argument in support of their respective briefs. On April 13, 2018, the Superior Court issued an order granting the motion to compel production of the Database

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[3] Due to the extremely expedited nature of the proceedings before the Superior Court, it converted the preliminary injunction hearing to a temporary restraining order hearing. (S.A. 14-15).

[4] A "snapshot" is an iteration of the Database at a specific point in time.

("the Order").[5] (Order at 7). The Order also required that a protective order be filed within ten days. (Order at 8).

On April 20, 2018, the State filed a Petition for Original Jurisdiction with this Court and a Motion to Stay with the Superior Court. The Superior Court has not yet ruled on that motion. On May 3, 2018, Plaintiffs filed a Motion for Summary Affirmance, requesting, among other things, summary affirmance of the Order granting the motion to compel. On May 23, 2018, this Court granted in part and denied in part Plaintiffs' motion, accepting the State's Petition for Original Jurisdiction on the Database.

On June 8, 2018, Judge Temple recused himself from the case due to the State's addition of new counsel. The case was subsequently transferred to Hillsborough North Superior Court (Brown, J). Because this appeal was pending and Plaintiffs' expert, Dr. Michael Herron, would not receive the Database before the scheduled trial date, on June 28, 2018, the Superior Court converted the trial to a preliminary injunction hearing. The hearing took place from August 27 to September 7, 2018. The parties submitted post-hearing proposed findings of fact and rulings of law on September 24, 2018. The Superior Court has not yet issued an opinion.

[5] A copy of the Order is appended to the State's Brief.

STATEMENT OF FACTS

On October 31, 2017, the LWVNH Plaintiffs propounded their first requests for production on the Secretary. (S.A. 19-32). As is typical in voting rights cases, their requests sought production of the current Database as well as snapshots 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." (S.A. 26-27). The LWVNH Plaintiffs requested the Database and the snapshots to allow their expert, Dr. Herron, to perform individual-voter-level statistical analyses that he could use to provide the Court with information about who is burdened by SB 3 and the scope of those burdens.[6] For example, the Database contains information about when voters register, use of same-day registration, and voting history, all of which will allow Dr. Herron to answer questions such as: who uses same-day registration; whether there are groups of voters who use same-day registration disproportionately and thus might be disparately burdened by SB 3 (*e.g.*, young voters, mobile voters, etc.); which elections SB 3's burdens are most likely to impact; and the intersection of transience and registration changes.[7] (S.A. 177). This type of information—individual-

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[6] Dr. Herron is Plaintiffs' expert on election administration and statistical analysis, providing analysis, among other things, on the burdens imposed by SB 3 on various voters in New Hampshire. He is a tenured professor at Dartmouth.

[7] RSA 654:45 specifically requires the Database to include voting history. *See* RSA 654:45, I ("The voter database shall include . . . voter actions as

level voter information, as well as the fields of information that Plaintiffs asked for in their requests—can only be obtained through the Database and archived versions of it that the Secretary possesses. That type of information is critical to Plaintiffs' analysis and presentation of evidence in this case.[8]

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recorded on the marked checklist"). *See also* (S.A. 37-40) (indicating that registration date, use of same-day registration, and use of domicile affidavits is recorded in the Database); State Br. 20-25.

[8] Indeed, the critical nature of this data is evident from the frequent reliance on it by experts and courts in similar voting rights cases. *See, e.g.*, Order, ECF No. 105, *Lee v. Va. State Bd. of Elections*, 3:15-cv-00357-HEH-RCY (E.D. Va. Nov. 30, 2015) (voter identification law challenge ordering state to produce voter names and social security numbers with appropriate privacy and security measures for use in expert reports); *Veasey v. Perry*, 71 F. Supp.3d 627, 659 (S.D. Tex. 2014), *aff'd in part, vacated and remanded in part on other grounds*, 830 F.3d 216 (5th Cir. 2016) (voter identification law challenge relying upon state databases containing individual voters' information); *Veasey v. Abbott*, 830 F.3d 216, 250 (5th Cir. 2016) (en banc) (crediting district court's factual finding made in reliance upon voter file); *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 372, 385, 398 (M.D.N.C. 2016), *rev'd and remanded on other grounds*, 831 F.3d 204 (4th Cir. 2016) (action challenging restrictions on right to vote relying upon analysis of state databases containing individual voters' information, to estimate the number and demographic characteristics of voters burdened); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016) (crediting district court's factual finding relying upon statewide voter file); *Ohio State Conference of the N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808, 841 (S.D. Ohio 2014), *aff'd*, 768 F.3d 524 (6th Cir. 2014) (action challenging elimination of same-day registration relying upon analyses of state databases containing individual voters' information to estimate the characteristics of voters burdened); *Ohio State Conference of the N.A.A.C.P. v. Husted*, 768 F.3d 524, 544 (6th Cir. 2014), *vacated on other*

On February 20, 2018, the Superior Court heard Plaintiffs' motion to compel. On April 13, 2018, relying on *Marceau v. Orange Realty, Inc.*, 97 N.H. 497 (1952), the plain language of RSA 654, VI, and a review of language in other statutes creating privileges, the Superior Court granted the motion, finding that RSA 654:45, VI did "not create a statutory privilege against nondisclosure in the course of civil litigation." (Order at 7.) The Superior Court also found that the information in the Database was relevant to the litigation "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." (Order at 4). It found that production of the Database was not burdensome and noted that "the Court ha[d] no reason to doubt the sincerity of plaintiffs' representation that [the Database] is critical to their case." (Order at 7). Recognizing the need to protect the Database's confidentiality, the Order required that a protective order be filed. (Order at 8).

Plaintiffs attempted to reach agreement on a protective order with the State. Indeed, despite having been granted production of the full Database, Plaintiffs agreed to limit production only to fields pertinent to their expert analysis, excluding fields such as social security and driver's license numbers. Plaintiffs accepted all of the State's protections for handling and maintaining the Database, including ensuring that the Database was not maintained on devices connected to the Internet, only

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grounds 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (crediting factual finding relying upon voter file).

accessed by attorneys and experts, and returned promptly upon the close of litigation—all of which would have been more than sufficient to ensure the confidentiality and privacy of the information. (S.A. 110-131). Nevertheless, the State would not consent. On April 27, 2018, each party filed its own proposed protective order. (S.A.110-131; 132-176). On April 20, 2018, the proceedings before this Court ensued. *See* discussion *supra* at 3.

Shortly thereafter the same New Hampshire General Court that passed SB 3 in 2017 amended RSA 654.45, VI, to add language stating that the Database "shall [not] be disclosed pursuant to a subpoena or civil litigation discovery request." (App. VII 121). The sequence of events surrounding the passage of SB 527 demonstrate that the General Court enacted SB 527 with the specific intent to interfere with Plaintiffs' attempts to discover information highly probative of their constitutional claims, and to shield SB 3 from meaningful review by the courts.

SB 527 was originally introduced on January 9, 2018, setting forth procedures for verification of absentee voter documents. (S.A. 178-179). It contained no provisions regarding the Database. (S.A. 180-189). The Senate unanimously approved the bill, and sent it to the House, where, on April 25, the House Election Law Committee unanimously recommended it to the full House. (S.A. 190-191, S.A. 192-193). However, that same day—less than two weeks after the Order issued, and only five days after the State filed its petition with this Court—Representative Neal Kurk (R - Hillsborough) unveiled a floor amendment which, for the first time, inserted language regarding disclosure of the Database in civil discovery. (S.A. 194-195). The bill was submitted to a conference committee, which

adopted the version of the bill prohibiting disclosure of the database. (S.A. 196). In sharp contrast to the unanimous bipartisan support for the bill prior to the Kurk amendment, the final vote was split almost entirely along party lines: only three Republican members of the General Court opposed the bill, and only one Democratic member supported it. (S.A. 197-204, 205).

While SB 527's sponsors publicly asserted that it was a response to complaints related to the request for the Database by the since-disbanded Presidential Advisory Commission on Election Integrity (the "Commission"),[9] these assertions are not credible. Public complaints over the request for the Database by the Commission occurred almost a year prior to the SB 527 amendment.[10] Moreover, the Commission's request for the Database was not made pursuant to a subpoena or during litigation; it was made pursuant to the Right-to-Know law, which RSA 654:45, VI already prohibited.[11] Indeed, as the legislative record reflects the opposite was true: SB 527 was "'clarified' at the request of the Attorney General's

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[9] *See, e.g.*, John DiStaso, *AG Drafted Bill's Language Barring Release of Voter Database for Civil Litigation Discovery Requests*, WMUR9 (May 15, 2018), https://www.wmur.com/article/ag-drafted-bills-language-barring-release-of-voter-database-for-civil-litigation-discovery-requests/20710056 (quoting Sen. Birdsell). (S.A. 206-211).

[10] *See* New Hampshire Dep't of Justice, Press Release, *Lasky v. The State of New Hampshire Presidential Advisory Commission on Election Integrity* (Aug. 7, 2017), https://www.doj.nh.gov/media-center/press-releases/2017/20170807-lasky.htm. (S.A. 212-213).

[11] See id.

Office," a *Defendant* in this case after the Superior Court issued its Order.[12] Indeed, the Attorney General's Office directly assisted in drafting the language for the amendment.[13] And, outside of this litigation, has stated that SB 527 constitutes a "change" to the law.[14] SB 527 went into effect on June 25, 2018. (App. I 120).

Since the Order issued, a full preliminary injunction hearing has occurred, and the importance of the Database to answer fully key questions about the burdens imposed by SB 3, and for Plaintiffs to defend themselves from attack, has become increasingly more evident. While Dr. Herron was able to utilize regression analyses to provide expert evidence regarding SB 3, he could only do so on an aggregate level by comparing same-day

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[12] House Session, 11:17:38AM, SB 527-FN-LOCAL, http://sg001-harmony.sliq.net/00288/Harmony/en/PowerBrowser/PowerBrowserV2/20180503/-1/16287#agenda (last visited Oct. 12, 2018). The Attorney General's Office, perhaps recognizing the precariousness of its position, has attempted to walk back its involvement in the drafting process, *see* McDermott, *infra* n. 12, but the legislative record is clear that the change was added at their direction.

[13] *See* Casey McDermott, N.H. Pub. Radio (@caseymcdermott), Twitter (May 16, 2016 10:42 AM) https://twitter.com/caseymcdermott/status/996762874591825921 (emphasis added) (S.A. 214-215); *see also* John DiStaso, *supra* n. 6; Ethan DeWitt, *Capital Beat: A Voting Law, a Court Case and a Legislative Wrench*, Concord Monitor (May 26, 2018), https://www.concordmonitor.com/Capital-Beat-A-voting-law-a-court-case-and-a-legislative-wrench-17759457 (S.A. 216-219).

[14] McDermott, *supra* n. 12.

registration rates to Census data, and by making partial inferences from the limited version of the Database provided to NHDP.[15] As Dr. Herron explained, while this data was informative and allowed him to draw conclusions that strongly supported Plaintiffs' contention that SB 3 severely burdens many voters (*e.g.*, young voters, mobile voters, etc.), it is limited and cannot fully answer all questions about the scope of the burden. (S.A. 220-225).

Moreover, a substantial line of questioning in the State's cross-examination of Dr. Herron criticized him for not conducting the types of empirical studies that, as he explained, he could only conduct by having access to the Database. (S.A. 232-238). The State's rebuttal expert, Dr. Hood, also made similar criticisms in his rebuttal report, *see* (S.A. 239-245), and all but conceded in his deposition the importance of the Database and the individual level data it contains.[16] (S.A. 246-249). These questions

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[15] Under RSA 654.31, IV, NHDP can receive a limited version of the Database, which specifically includes "name, domicile address, mailing address, town or city, voter history, and party affiliation." Voter history in this context is defined as "whether the person voted and, for primary elections, in which party's primary the person voted, in each state election for the preceding 2 years." *Id.* Notably, this information *does not* include birth dates—information critical to Dr. Herron's report, as the claims in this suit allege that SB 3 will disproportionately burden young voters; any information about how or when a voter registers; or a complete voter history. NHDP does not have snapshots of the Database before 2016, which the LWVNH Plaintiffs specifically requested.

[16] The State's expert, Dr. Hood, submitted a report in this case and appeared for a deposition. Nevertheless, on the day before he was

and criticisms can be more precisely answered by providing Dr. Herron with access to the Database pursuant to a protective order.

SUMMARY OF ARGUMENT

The Superior Court correctly ordered that the Database be produced pursuant to protective order, because RSA 654:45, VI (2017) did not create a statutory privilege and the information in the Database is not only relevant, but critical to the analysis in this case.

First, the plain language of the version of RSA 654:45, VI considered by the Superior Court did not include the type of clear and precise language required to demonstrate that a statutory privilege was created. Rather, at best, it merely expressed an intention to ensure that the Database is confidential and exempt from voluntary public disclosure. This is further demonstrated by the fact that the legislature needed to subsequently add language to the statute in an effort to create a privilege. Thus, no statutory privilege existed, and the Superior Court was correct in ordering the Database's production.

Second, even if a statutory privilege does exist, a balancing of the interests at stake in this litigation favors piercing the privilege and producing the Database. The Database and information within it is relevant to the evaluation of the burden imposed by SB 3 and is critical to fully evaluating the extent of the burden. There is no other source of information capable of providing such complete evidence. The Database is not

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scheduled to testify, the State decided not to call him as a testifying witness at the preliminary injunction hearing.

burdensome to produce and the protective order mandated by the Superior Court will ensure its privacy and confidentiality. Absent production, voting laws, including SB 3, would be insulated from meaningful challenge and review, which is inconsistent with the New Hampshire Constitution's strong protection of the right to vote.

Third, the amended version of RSA 654:45, VI does not apply to this case. The amendment was passed by an interested party specifically in an attempt to thwart discovery and interfere with this litigation. Because of the nature of its passage, and the fact that its adoption and application here would prevent Plaintiffs from being able to fully assess the burdens of SB 3 and allow the legislature to insulate itself from review, any retroactive application of the law would impact both procedural and substantive rights. Thus, the application of the amended statute to this case would be unconstitutional and fundamentally unfair.

LEGAL STANDARD

New Hampshire law favors liberal discovery, and the Superior Court has broad authority to order discovery of any matter relevant to the subject matter of the case before it and not privileged. *Johnston by Johnston v. Lynch*, 133 N.H. 79, 94 (1990); *see also* N.H. R. Super. Ct. Civ. 21(b). Defining the scope of discovery and ordering discovery of confidential information are squarely within the discretionary and inherent authority of the court. *See, e.g.*, *State v. Laux*, 167 N.H. 698, 701–02 (2015) (superior court has the inherent power to compel discovery if the interests of justice so require); *Garabedian v. Donald William, Inc.*, 106 N.H. 156, 157 (1965)

(courts of general jurisdiction have inherent authority to issue "rules [and] to regulate their proceedings 'as justice may require'"); *McDuffey v. Boston & Me.R.R.*, 102 N.H. 179, 181–82 (1959).

A Superior Court's decision on the management of discovery and admissibility of evidence is therefore reviewed under an unsustainable exercise of discretion standard. *Boissy v. Chevion*, 162 N.H. 388, 397 (2011). "To establish that the Superior Court erred, the plaintiff must demonstrate that the [] ruling was clearly untenable or unreasonable to the prejudice of his case." *Kurowski v. Town of Chester*, 170 N.H. 307, 315 (2017). Where the resolution of such issues requires statutory interpretation, review of such interpretations is *de novo*. *Id.* at 310 (citing *Dolbeare v. Laconia*, 168 N.H. 52, 54 (2015). The New Hampshire Supreme Court is "the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." *Id.*

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN ORDERING PRODUCTION OF THE DATABASE AS IT IS NOT PRIVILEGED AND HIGHLY RELEVANT TO THE ANALYSIS AND EVIDENCE IN THIS CASE

The State's argument that the pre-amendment version of RSA 654:45, VI creates a statutory privilege against disclosure is meritless.[17] The plain language of RSA 654:45, VI does not categorically ban disclosure of the information therein, much less contain the unequivocal language necessary to create a privilege. Indeed, such a ban would directly conflict with the purpose of the statute—improving voting systems and voter access—as it would inhibit New Hampshire voters from accessing a valuable and critical source of evidence to protect their right to vote against unconstitutional voting laws. Even if a statutory privilege did exist, given the highly relevant nature of the information in the Database, the lack of viable alternatives from which such information can be gathered, and the severe inequities wrought upon citizens' ability to protect their rights, piercing the privilege and ordering production of the Database is wholly appropriate.

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[17] Unless otherwise noted, all references to RSA 654:45, VI herein refer to the pre-amendment version of the statute, which is the version that the Superior Court analyzed and that was in place at the time that it compelled production of the Database. Moreover, for the reasons discussed *infra*, it remains the operative version of the statute for this case.

A. RSA 654:45, VI Does Not Create a Statutory Privilege

To determine whether a statute creates a privilege, this Court interprets the statute's words. *See Marceau*, 97 N.H.at 498. In doing so, the Court gives the words in the statute their plain meaning. *Opinion of the Justices*, 135 N.H. 543, 545 (1992). It also construes the language in the context of the statute as a whole. *Great Lakes Aircraft Co., Inc. v. City of Claremont*, 135 N.H. 270, 277–78 (1992). Extrinsic evidence is used only to resolve ambiguities on the face of the statute. *See Chroniak v. Golden Inv. Corp.*, 133 N.H. 346, 350–51 (1990). While these principles of interpretation apply to all statutes, they are particularly true for statutory privileges, which are strictly construed. *See, e.g.*, *Marceau*, 97 N.H. at 499 (1952); *see also Melvin*, 132 N.H. at 310; *In re Brenda H.*, 119 N.H. 382, 385 (1979). Because a statutory privilege limits judicial inquiry and is "subject to the right of every litigant to call for and produce evidence affecting his substantial rights," this Court has explained that "[i]t should plainly appear that the benefits of secrecy were thought to outweigh the need for the correct disposal of litigation." *Marceau*, 97 N.H. at 499 (citations omitted). "The obligation [to disclose information] should not be limited without a clear legislative mandate." *Id.* at 500.

RSA 654:45, VI provides, in pertinent part, that "[t]he voter database shall be private and confidential and shall not be subject to RSA 91-A [New Hampshire's Right-to-Know law] and RSA 654:31 [New Hampshire's law governing the availability of voter checklists and information]." RSA 654:45, VI. The subsection specifically authorizes the Secretary to provide information from the Database to courts for jury list

creation. *Id.* Other subsections provide for disclosure of the information in the Database to other states to investigate duplicate voting, and to public agencies to ensure the Database's accuracy. *Id.* (IV(b), VIII). RSA 654:45, VI also provides 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.*

Notably, nothing in the statute states that the Database is privileged, nor are there statements indicating that the information therein should be withheld from disclosure in the context of civil litigation. Indeed, as discussed herein, unlike other cases relied on by the State, there is no blanket prohibition on disclosure in RSA 654: 45. These omissions are fatal to the State's statutory privilege argument. This Court has been clear that it will not find a statutory privilege absent such plain and precise language. *See, e.g.*, *Marceau*, 97 N.H. at 499; *State v. Willis*, 165 N.H. 206, 212 (2013) ("It is well settled that statutory privileges should be strictly construed."); *State v. Melvin*, 132 N.H. 308, 310 (1989); *State v. LaRoche*, 122 N.H. 231, 233 (1982). Indeed, to find otherwise would "add language that the legislature did not see fit to include[,]" which is precisely what this Court's precedent cautions against. *N.C. v. N.H. Bd. of Psychologists*, 169 N.H. 361, 366 (2016)

This Court's ruling in *Marceau* is controlling. In *Marceau*, the Court considered whether a provision of the Unemployment Compensation Act that provided that the information in question "shall be held confidential and shall not be published or be open to public inspection," and penalized the unauthorized disclosure of such information created a statutory privilege. 97 N.H. at 498-500. The Court explained that the plain language

of the statute made it clear that the records in question were not intended to be public, open for public inspection, and should be kept confidential, *e.g.*, not voluntarily disclosed. *Id.* at 498-98. It stated that "[i]t is by no means plain however that use of [the information] in evidence in judicial proceedings was intended to be forbidden." *Id.* at 499. The Court found that the statute "d[id] not furnish a privilege against production of department records for use in judicial proceedings." *Id.* at 500.

Here, like the statute in *Marceau*, RSA 654:45, VI, also contains language concerning confidentiality and restricts the *general public's* access to the information by ensuring that it is not subject to the Right-to-Know law. Contrary to the State's argument, such language does not plainly indicate that the Database should be privileged and exempt from discovery. As *Marceau* instructs, at most, such language indicates that the Database "was clearly intended [] not to be public records . . . [and] also 'confidential,' at least in the sense that they are not to be voluntarily disclosed." 97 N.H. at 498-99. Like the statute in *Marceau*, RSA 654:45, VI does not expressly prohibit use in the context of litigation, making it "by no means plain . . . that use [of the Database] was intended to be forbidden" in judicial proceedings. *See id.* at 499. Finally, as in *Marceau,* it is of no consequence to the privilege determination that RSA 654:45, VI provides for misdemeanor penalties where information from the Database is disclosed. As the *Marceau* Court explained, "[t]he evil intended to be forestalled and prevented by this clause of the statute was the voluntary imparting by state employees of information[,]" and not protected disclosure in the context of civil discovery as was issued here. *Id.* at 500. Thus, RSA 654:45, VI does not create a statutory privilege.

The State's attempts to distinguish *Marceau* do not undermine this conclusion. *First*, the statutory prohibition on disclosure in *Marceau* is not narrower than the prohibition contained in RSA 654:45, VI. State Br. 37-38. Rather, as demonstrated *supra*, the disclosure provisions contained in the two statutes are remarkably similar, with little differentiation in their scope or breadth. Accordingly, it is clear that RSA 654:45, VI, like the statute in *Marceau*, does not create a categorical ban on disclosure, nor can it, considering that it is missing the precise language necessary to create such a ban. *Second*, while it is true that as part of its analysis the *Marceau* Court considered a prior iteration of the statute which did contain such plain language, State Br. 38, the earlier language alone was not determinative. Rather, the Court looked first to the plain language of the statute and then at the prior version to "satisfy" itself that its understanding was correct. *Marceau*, 94 N.H. at 499.

Finally, it is of no consequence that *Marceau* was decided "pre-digital era." State Br. 37. Indeed, the State provides no reason to believe that the Court's insistence on "a clear legislative mandate," and a clear showing that the "benefits of secrecy. . . outweigh the need for correct disposal of litigation," has evolved with technology. *See Marceau*, 94 N.H. at 499-500. It is typical for large databases of electronic information to be produced pursuant to protective order in the context of litigation.[18]

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18 *See, e.g.*, *Rosas v. McDonnell*, 2:12-cv-00428 (C.D. Cal. June 17, 2016) (applying protective order to prison personnel records and prisoner medical and mental health records); *Bond v. Utreras*, 1:04-cv-02617 (N.D. Ill. Feb. 2, 2005) (ECF No. 33) (applying protective order to database of police misconduct investigations); *N.A.A.C.P. v. Acusport Corp.*, 210 F.R.D. 268,

Likewise, it is common for statewide voter files to be produced and relied upon in the context of voting rights cases nationwide.[19] Indeed, what is rare

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270 (E.D.N.Y. 2002) (ordering disclosure of federal database of crime gun traces subject to protective order); N.*A.A.C.P., Bos. Chapter v. Bos. Hous. Auth.*, 723 F. Supp. 1554, 1557 (D. Mass. 1989) (ordering production of class members' personal identifying information from municipal housing authority); *Marcus v. Bowen*, No. 85 C 453, 1989 WL 39709, at *9 (N.D. Ill. Apr. 18, 1989) (ordering production of class members' personal identifying information from federal disability benefits program); *Johnson v. Heckler*, 604 F. Supp. 1070, 1077 (N.D. Ill. 1985) (same).

19 *See, e.g.*, *Ariz. Democratic Party v. Ariz. Sec'y of State*, 2:16-cv-01065 (D. Ariz. Feb. 1, 2017) (ECF No. 252) (applying protective order to production of voter file data); *Fish v Kobach*, 2:16-cv-02105 (D. Kan. March 29, 2016) (ECF Nos. 54, 55) (same); *Lee v. Va. State Bd. of Elections*, 3:15-cv-00357 (E.D. Va. Nov. 30, 2015) (ECF No. 105) (same); *N.C. State Conf. of NAACP v. McCrory*, No. 1:13-CV-658 (M.D.N.C. Jan. 3, 2014) (ECF No. 47) (same); *Frank v. Walker*, 11-CV-1128 (E.D. Wis. Oct. 8, 2013) (ECF No. 152) (same); *Veasey v. Perry*, 2:13-CV-193 (S.D. Tex. Dec. 5, 2013) (ECF No. 105) (same); *Texas v. Holder*, 1:12-cv-128 (D.D.C. Mar 30, 2013) (ECF No. 65) (same); *Mi Familia Vota v. Detzner*, 8:12-cv-01294 (M.D. Fla. Mar. 1, 2013) (ECF Nos. 46, 47) (same*); South Carolina v. United States*, 1:12-CV-203 (D.D.C. Apr. 12. 2012) (ECF No. 51) (same); *LULAC of Wis. v. Deininger*, 2:12-cv-00185 (E.D. Wis. Mar. 30, 2012) (ECF No. 15) (same); *Common Cause of Colo. v. Coffman*, 1:08-cv-02321 (D. Colo. Nov. 4, 2008) (ECF No. 20) (same); *Fla. NAACP v. Browning*, 4:07-cv-00402 (N.D. Fla. Oct. 23, 2007) (ECF No. 36) (same); *Crawford v. Marion Cty. Election Bd.*, 1:05-cv-00634 (S.D. Ind. Aug. 1, 2005) (ECF Nos. 33, 34) (same). *See also Ohio A. Phillip Randolph Inst. et al. v. Husted*, 2:16-cv-00303-GCS-EPD (S.D. Ohio April 5, 2017) (ECF No. 103) (protective order applied to driver's license data).

is what the State argues for here, a categorical ban on limited disclosure of such information.[20]

Beyond *Marceau*, a review of the language that the General Court *does* use when creating a statutory privilege also makes it clear that RSA 654:45, VI fails to do so. When creating a privilege, the legislature either plainly states that information in question is "privileged," or it states that information shall not be used in discovery, subject to subpoena, or used in civil or criminal actions. *See, e.g.*, RSA 410:18, II(A) (2014) ("*shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence*" (emphasis added)); RSA 408-D:14, V(A) (2010) ("shall be *privileged* and confidential and shall not be a public record under RSA 91-A and *shall not be subject to discovery or subpoena*") (emphasis added); RSA 417:30 (2008) (same); RSA 151:13-a, II (2003) ("confidential and

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20 Virtually every other state allows for public disclosure of the voter database. *See, e.g.*, Ala. Code § 17-4-38; Alaska Stat. Ann. §§ 15.07.127, 15.07.195; Ariz. Rev. Stat. Ann. § 16-168; Cal. Elec. Code § 2194; Del. Code Ann. tit. 15, § 304; Ga. Code Ann. § 21-2-225; Haw. Code R. 3-172-31; Idaho Code Ann. § 34-437A;10 Ill. Comp. Stat. Ann. 5/5-7, 5/4-8, 6-35; Iowa Code Ann. § 48A.38; Kan. Stat. Ann. § 25-2320; Ky. Rev. Stat. Ann. § 117.025; 31 La. Admin. Code Pt II, 105; Me. Rev. Stat. tit. 21-A, § 196-A; Md. Code Ann., Elec. Law § 3-506; Mich. Comp. Laws Ann. §§ 168.522, 168.522a.; Minn. Stat. Ann. § 201.091; 1 Code Miss. R. Pt. 10, R. 7.2; Mo. Ann. Stat. §§ 115.157; 115.158; Mont. Code Ann. 13-2-122; Neb. Rev. Stat. Ann. § 32-330; Nev. Rev. Stat. Ann. § 293.440; N.J. Stat. Ann. § 19:31-18.1; N.D. Cent. Code Ann. § 16.1-02-15; 2017 Or. Rev. Stat. 247.945; 25 Pa.C.S.A. Elections § 1404; S.D. Admin. R. 5:04:06:06-07; Tenn. Code Ann. § 2-2-138; Tex. Elec. Code Ann. § 18.066; Utah Code Ann. § 20A-2-104; Vt. Stat. Ann. tit. 17, § 2154; Wash. Rev. Code § 29A.08.720; W. Va. Code § 3-2-30; Wyo. Stat. Ann. § 22-2-113.

privileged and . . . . *protected from direct or indirect means of discovery, subpoena, or admission into evidence*" (emphasis added)).[21] Thus, when the legislature wants to create a privilege, it knows how to do so in clear and unequivocal language. No such language is present in RSA 654:45, VI.

These statutes are also helpful in understanding the flaws in the State's proffered RSA 654:45, VI interpretation. For example, the State argues that the terms "private" and "confidential" in RSA 654:45, VI, create a categorical ban making it clear that information in the Database cannot be disclosed outside of the exceptions set out therein. State Br. 30-31. Nevertheless, almost all of the statutes above plainly state that documents "shall be privileged and confidential," indicating, at a minimum, that "confidential" does not carry the same meaning as "privileged," and that merely stating that documents are "confidential" is not sufficient to create a privilege. *Merrill v. Great Bay Disposal Serv., Inc.*, 125 N.H. 540,

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21 *See also* RSA 401-B:8 (2017) ("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"); RSA 401-C:8 (2015) (same); RSA 408-D:7 (2010) (same); RSA 402-H:4 (2006) (same); RSA 400-A:16 (2012) (same); RSA 401-D:6 (2017) (same); RSA 402-J:15 (2001) (same); RSA 410:4, I(D)(8) (2014) ("shall be kept 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"); RSA 400-A:37, IV-a(A) ("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."); RSA 402-M:4, I (2017) ("confidential and 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").

543 (1984) ("[t]he legislature is presumed not to [] use[] superfluous or redundant words."). *See also Pino v. Beech Hill Hosp.*, No. CIV. 98-516-B, 1999 WL 814348, at *1–2 (D.N.H. May 21, 1999) ("[T]he legislature intended that the word 'confidential' and [] 'privilege' be afforded different meanings . . . While every privileged document is confidential not every confidential document is privileged. . . . not all confidential matters are free from discovery.").

Indeed, Webster's Third International Dictionary defines "confidential," as "communicated, conveyed, acted on, or practiced in confidence: known only to a limited few: not publicly disseminated," similarly, it defines "private," the other modifier used in RSA 654:45, VI, as "intended for or restricted to the use of a particular person or group of persons: not freely available to the public." Webster's Third Int'l Dictionary, 476, 1805 (2002). Neither definition suggests that information may *never* be discoverable, and both are consistent with the provision in RSA 654:45, VI that the Database is not subject to the Right-to-Know law. That law does not prevent the discovery of confidential information. Rather, it "ensure[s] both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. Accordingly, at most, RSA 654:45, VI simply assures that the Database is not generally available to the public. Further, the aforementioned statutes also state, consistently, that documents "shall not be a public record under RSA 91-A and *shall not be subject to discovery or subpoena*." RSA 408-D:14, V (2010) (emphasis added); *see also, e.g.*, RSA 417:30 (2008) (similar). Thus, the mere exclusion from

RSA 91-A (which is all that RSA 654:45, VI provides) is also insufficient to create a privilege.

The cases the State relies on do not dictate otherwise.[22] In particular, the State relies primarily on *In re England*, 375 F.3d. 1169 (D.C. Cir. 2004) and *Baldrige v. Shapiro*, 455 U.S. 345 (1982)—neither of which interprets New Hampshire law—to support its claim that RSA 654:45, VI creates a statutory privilege and bars disclosure outside of the exceptions listed in the statute. State Br. at 33-35. In both instances, before reaching the question of how the exceptions to the statutes functioned, the courts determined that the statutory language protecting information from disclosure was "broad and absolute," and as such the court could provide no additional exceptions, including in the context of civil discovery. Here, however, there is no language in RSA 654:45, VI that creates such a "broad and absolute" protection. As explained *supra*, the very language needed to create such a protection under New Hampshire law is missing from that statute and to read such language into it would run afoul of accepted principles of statutory interpretation. It is more appropriate (and more in

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[22] The State also cites *Silva v. Botsch*, 120 N.H. 600, 602 (1980), *In re Gamble*, 118 N.H. 771, 777 (1978), *State v. Wilton R.R. Co*., 89 N.H. 59, 61 (1937), *Kibbe v. Town of Milton*, 142 N.H. 288 (1997), and *State v. Darcy*, 121 N.H. 220 (1981), in support of its interpretation of RSA 654:45, VI. But these cases are largely unhelpful. None of these cases interprets a statutory privilege. Thus, while the principles of interpretation might be informative, their application in the statutes at issue in those cases is markedly different, as statutory privileges must be strictly construed and courts require precise language before information can be excluded from litigation.

keeping with the plain text of the statute) to read RSA 654:45, VI as authorizing 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. As a result, the holdings in *England* and *Baldrige* provide no guidance in the interpretation of RSA 654:45, VI. Moreover, to the extent these cases could be read to bar disclosure, they should be disregarded as they are in direct conflict with this Court's command in *Marceau* that statutory privileges cannot be created except where the legislature has done so in express terms.

Finally, the passage of SB 527, the 2018 amendment to RSA 654:45, VI, confirms that the version of RSA 654:45, VI at issue in this case did not create a statutory privilege. Specifically, given that the legislature is presumed not to use superfluous language, *Merrill*, 125 N.H. at 543, if the categorical ban that the State claims existed in RSA 654:45, VI was present in the pre-SB 527 version of the law, there would have been no need for the legislature to add the very plain language that the Superior Court found to be missing. Contrary to the State's argument, the addition of this language does not clarify or confirm the original intent of the drafters of RSA 654:45, VI. Rather, it presented a *change* in the law.[23] As demonstrated *supra*, the lack of precise language creating a privilege in RSA 654:45, VI was unambiguous and, as such, demonstrated that the legislature did not intend for the original version of the statute to create a privilege. *See, e.g.*,

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[23] *See* McDermott, *supra* n.12 (noting that the legislature *changed* the law) (emphasis added).

State Farm Mut. Auto Ins. Co. v. Laforet, 658 So.2d 55, 62 (Fla. 1995) (noting that while a "clarifying amendment to a statute that is enacted soon after controversies as to the interpretation of a statute arise may be considered as a legislative interpretation of the original law and not as a substantive change. It would be absurd, however, to consider legislation enacted more than ten years after original act as a clarification of original intent"); *Kaisner v. Kolb*, 543 So.2d 732, 738 (Fla. 1989) ("[s]ubsequent legislatures, in the guise of 'clarification,' cannot nullify retroactively what a prior legislature clearly intended"). Moreover, the assignment of an effective date that post-dated the Superior Court's Order, the absence of any statement that the amendment should apply retroactively, as well as the fact that SB 527 was passed by a self-interested party, *see* discussion *infra* at 23-25, all indicate SB 527 fundamentally changed RSA 654:45, VI, not that it clarified it. *See State v. Sage*, 180 A.3d 1098, 1104 (N.H. 2018) (an effective date set in the future supported finding that amendment changed, rather than clarified, the original statute). Thus, there can be no question that the prior version of the statute did not create a statutory privilege and, as such, that the Superior Court correctly found that no statutory privilege against disclosure existed.

B. Even If RSA 654:45, VI Did Create a Statutory Privilege, Production of the Database Was Rightly Ordered in This Case

Even if RSA 654:45, VI created a statutory privilege or, if the amended version of the law applies,—(which the State has not seriously argued and Plaintiffs dispute, *see* discussion *infra*)— the Order would still be sound as the Database is not only highly relevant, but critical to

discovery here. Under New Hampshire law, even where a statutory privilege against disclosure exists, such privileges are not absolute, and Superior Courts may, in their discretion, order discovery of otherwise privileged material after conducting a careful balancing of interests. *See, e.g.*, *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275 (1966) (ordering discovery of attorney work product after conducting a balancing of interests); *In re State*, 162 N.H. 64, 70 (2011) (ordering discovery of information protected by physician/psychotherapist-patient privilege after balancing test); *State v. Pelletier*, 149 N.H. 243, 248 (2003) (ordering discovery of material protected by marital privilege after balancing test); *see generally Harper v. Healthsource N.H., Inc.*, 140 N.H. 770, 779 (1996) (citing *McGranahan v. Dahar*, 119 N.H. 758, 764 (1979)) ("We note that there are occasions in which even the most sacred of privileges must fall, such as when there is no available alternative source for the information and there is a "'compelling need for the information.'"); *Opinion of the Justices*, 117 N.H. 386, 388, (1977) ("Even a statutory privilege is not fixed and unbending and must yield to countervailing considerations such as the rights to counsel and confrontation in a criminal case."); *In re Brenda H.*, 119 N.H. at 387 (citing Richard B. McNamara, *The Hierarchy of Evidentiary Privilege in New Hampshire*, 20 N.H.B.J. 1, 27 (1978)) ("Allowing the district court this discretion furthers the purpose of protecting the welfare of the child and recognizes that '(t)he real purpose of any privilege is not to exclude relevant evidence, but simply to facilitate activities which require confidence.'").

Indeed, Superior Court Civil Rule 29(a), on which the Superior Court relied, provides a method for production in this precise situation: "for

good cause shown, the court may make any order which justice requires" and order discovery of private or confidential information "on specified terms and conditions," *e.g.*, under a protective order. Discovery of the Database is supported by good cause here. As the Superior Court already recognized, the information in the Database is relevant and critical to demonstrating SB 3's burden (Order at 4-5). This Court will defer to that finding absent some showing of unsustainable exercise of discretion. Further, the Database is the only available source of such information (Order at 7, n.1). Production of it will not cause the Secretary "undue burden or expense," N.H. R. Super. Ct. Civ. 29(a) (Order at 7), as the Database is maintained electronically, and its contents can be copied and transferred to Plaintiffs' counsel. In fact, the Secretary regularly provides portions of the Database to political parties and candidates pursuant to RSA 654:31, and there is no reason to believe that it would be too burdensome for the Secretary to similarly provide the requested copies of the Database here.[24] Additionally, the request is not overbroad or ambiguous. Plaintiffs requested a limited number of specific snapshots of the data contained in the Database as well as a specified list of fields.

Production is also in line with the legislative intent behind RSA 654:45, which was enacted to comply with the federal Help America Vote Act of 2002, a law designed to improve voting systems and voter access. 42 U.S.C. §§15301-15545; *See also* (S.A. 250-255; 256-259). The dissemination of the Database was limited by the statute to protect voters'

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24 Prior to appealing the Superior Court's Order to this Court, Plaintiffs' counsel met and conferred with the State and determined how to easily transfer the database to Plaintiffs' expert.

privacy interests and to protect against use of the Database by commercial vendors. *See* RSA 654:45, V; RSA 654:31, VI; (S.A. 260-277; 278). There is no explicit prohibition against disclosure in the context of litigation, and certainly not in litigation like this, where the lawsuit itself seeks to protect the right to vote. *See* RSA 654:45.

Public policy also supports production of the Database here. If RSA 654:45, VI is interpreted to bar disclosure of the Database in this litigation—one impacting the fundamental civil rights of New Hampshire voters—it will become materially more difficult to protect voting rights in the future. This is because the Database contains critically important information that is necessary to fully analyze the impact of changes in voting laws on New Hampshire residents, such as the domicile-proof changes at issue here. That simply cannot be the result where the court can enter a protective order to protect privacy interests and prevent reproduction or dissemination of the Database, just as the Superior Court did. Indeed, numerous courts have found that the importance of civil rights cases warrants broad discovery and disclosure, even when a party asserts a recognized privilege against disclosure. *See, e.g.*, *Dunn v. Dunn*, 163 F. Supp. 3d 1196, 1207 (M.D. Ala. 2016) ("[T]he normally predominant principle of utilizing all rational means for ascertaining truth [. . .] is at its strongest in civil-rights cases."); *Floyd v. N.Y.C.*, 739 F. Supp.2d 376, 381–82 (S.D.N.Y. 2010) (finding that an "important factor is whether a lawsuit involves a matter of public concern such as civil rights—a factor that will usually support disclosure [. . . .] The public has a profoundly important interest in giving force to the federal civil rights law.'"); *Hinsdale v. City of Liberal, Kan.*, 961 F. Supp. 1490, 1495 (D. Kan.), aff'd, 981 F. Supp. 1378

(D. Kan. 1997) ("Caution should be especially taken in recognizing a privilege in a federal civil rights action, where any assertion of privilege must overcome the fundamental importance of a law meant to protect citizens from unconstitutional state action."); *Smith v. Alice Peck Day Mem'l Hosp.*, 148 F.R.D. 51, 56 (D.N.H. 1993) ("[T]he overriding public interest in the enforcement of [federal civil rights laws] outweighs any claim that the hospital would be injured by the disclosure of the allegedly privileged documents."); *King v. Conde*, 121 F.R.D. 180, 195 (E.D.N.Y. 1988) ("The interest that without doubt looms largest in these cases is the public interest in giving force to the federal civil rights laws.[. . .] The great weight of the policy in favor of discovery in civil rights actions supplements the normal presumption in favor of broad discovery."); *Wood v. Breier*, 54 F.R.D. 7, 10–11 (E.D. Wis. 1972) ("Each citizen acts as a private attorney general who 'takes on the mantel of the sovereign,' guarding for all of us the individual liberties enunciated in the Constitution. [. . .] Thus, it is of special import that suits brought under [Section 1983] be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden."). Moreover, these concerns are of particular importance with respect to the application of the amended version of RSA 654: 45, VI. Indeed, if this Court were to find that the amended version were to apply to this case and, as a result, that Plaintiffs would lose the access that the Superior Court has already ordered, the Court would effectively be allowing the same legislature that passed SB 3 to insulate itself and the law that it passed from meaningful review by barring access to critical evidence. This Court should uphold the Superior Court's Order and order the Secretary to produce the Database.

C. The 2017 Version of RSA 654:45 Governs This Suit As the 2018 Amendment Was Not Retroactive

As noted above, the State has not seriously argued that the amended version of RSA 654:45, VI should be applied retroactively to this case or that it applies at all. This is so for good reason. Retroactive application of a law is not favored in this State. *See, e.g.*, N.H. Const. Part I, Art. 23 ("[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."); "*Eldridge v. Eldridge*, 136 N.H. 611, 614-15 (1993) (Article 23 "prohibits the enactment of any statute that 'takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'"); *Autofair 1477, L.P. v. Am. Honda Motor Co., Inc.*, 166 N.H. 599, 602 (2014) ("statutes are presumptively intended to operate prospectively."). Moreover, it is exceptionally problematic to apply a law retroactively in a case like this, where a self-interested party *changed* the law to interfere directly with a pending lawsuit, thereby insulating itself and a law it passed—SB 3—from full, meaningful review. And where a Defendant in the case not only requested the change, but actually drafted it. As explained, S.B. 527 was enacted by the same legislature that passed SB 3 after the Superior Court issued the Order compelling the Database's production at the request of the Attorney General, who provided the language for the bill. *See* discussion *supra* at 7-8. The passage of the amendment, and subsequent failure to produce the Database allowed that same Defendant to mount a substantial

part of its defense and critique of Plaintiffs' evidence in this case. *See* discussion *supra* at 8-9.

This type of interference with ongoing litigation is not only problematic from a public policy perspective, it is also problematic from a separation of powers perspective. *See Merrill v. Sherburne*, 1 N.H. 199, 210 (1818) ("But the judiciary would in every respect cease to be a check on the legislature, if the legislature could at pleasure revise or alter any of the judgments of the judiciary."). Moreover, this type of interference demonstrates that the effect of SB 527's change is not merely procedural. It also directly impacts the substantive right of Plaintiffs to protect their fundamental, constitutional right to vote. The State should not be permitted to insulate its laws from review by hiding behind the privacy of the residents whose rights it is burdening. Indeed, "[i]f application of a new law would adversely affect an individual's substantive rights [] it may not be applied retroactively." *In re Silk*, 156 N.H. 539, 543 (2007). Even if that were not the case, "the final analysis, the question of retrospective application rests on a determination of fundamental fairness, because the underlying purpose of all legislation is to promote justice." *Id.* (alterations omitted). Plainly, the application of the amended version of RSA 654:45, VI to this case would not promote justice nor is it fundamentally fair. Accordingly, this Court should find that the amended version of RSA 654:45, VI does not apply or, as explained above, if it finds that it does, pierce the privilege to allow for the limited, protected discovery Plaintiffs requested to take place.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court affirm the Superior Court's Order finding that RSA 654:45, VI does not create a statutory privilege barring production of the Database and ordering the State to produce the Database.

REQUEST FOR ORAL ARGUMENT

The LWVNH Plaintiffs and NHDP respectfully request oral argument not to exceed 15 minutes. Attorney Bruce Spiva will argue.

Respectfully submitted,

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

By Its Attorneys,

McLANE MIDDLETON
PROFESSIONAL ASSOCIATION

Dated: October 12, 2018

By: /s/ Steven J. Dutton

Wilbur A. Glahn, III, NH Bar No. 937
bill.glahn@mclane.com
Steven J. Dutton, NH Bar No. 17101
steven.dutton@mclane.com
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326
Telephone: 603.625.6464

Paul Twomey, NH Bar No. 2589
paultwomey@comcast.net
P.O. Box 623
Epsom, NH 03234
Telephone (603) 568-3254

Marc Erik Elias, *pro hac vice*
melias@perkinscoie.com
John M. Devaney, *pro hac vice*
jdevaney@perkinscoie.com
Bruce V. Spiva, *pro hac vice*
bspiva@perkinscoie.com
Amanda R. Callais, *pro hac vice*
acallais@perkinscoie.com
Elisabeth Frost, *pro hac vice*

efrost@perkinscoie.com
Uzoma Nkwonta, *pro hac vice*
unkwonta@perkinscoie.com
PERKINS COIE LLP
700 Thirteenth Street, NW,
Suite 600
Washington, DC 20005-3960
Telephone (202) 654-6200

AND

NEW HAMPSHIRE DEMOCRATIC PARTY

By Its Attorneys:
SHAHEEN & GORDON, P.A.

By: /s/ William E. Christie

William E. Christie, NH Bar No. 11255
S. Amy Spencer, NH Bar No. 266617
107 Storrs Street, P.O. Box 2703
Concord, NH 03302-2703
(603) 225-7262
wchristie@shaheengordon.com
saspencer@shaheengordon.com

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I served the foregoing BRIEF OF RESPONDENTS by electronic mail, to the following counsel of record:

Anne M. Edwards
New Hampshire Dept. of Justice
Civil Bureau
33 Capitol Street
Concord, NH 03301
anne.edwards@doj.nh.gov

Anthony J. Galdieri
New Hampshire Dept. of Justice
Civil Dept.
33 Capitol Street
Concord, NH 03301
anthony.galdieri@doj.nh.gov

Bryan K. Gould
Cleveland, Waters and Bass, P.A.
2 Capital Plaza
P. O. Box 1137
Concord, NH 03302-1137
gouldb@cwbpa.com

Cooley A. Arroyo
Cleveland, Waters and Bass, P.A.
2 Capitol Plaza
P. O. Box 1137
Concord, NH 03302-1137
arroyoc@cwbpa.com

Callan E. Maynard
Cleveland, Waters and Bass, P.A.
2 Capitol Plaza
P. O. Box 1137
Concord, NH 03302-1137
maynardc@cwbpa.com

Christine Hilliard
Cleveland, Waters and Bass, P.A.
2 Capitol Street
P. O. Box 1137
Concord, NH 03302-1137
hilliardc@cwbpa.com

James S. Cianci
Legislative Office Bldg, Room 405
Concord, NH 03301
james.cianci@leg.state.nh.us

Richard J. Lehmann
Lehmann Law Office, PLLC
835 Hanover Streeet, Suite 301
Manchester, NH 03104
rick@nhlawyer.com

/s/ Steven J. Dutton
Steven J. Dutton