THE STATE OF NEW HAMPSHIRE
SUPREME COURT

MANUEL ESPITIA, JR. AND DANIEL WEEKS
v.
SECRETARY OF STATE AND ATTORNEY GENERAL
AND
603 FORWARD, OPEN DEMOCRACY ACTION, LOUISE SPENCER, AND EDWARD R. FRIEDRICH
v.
SECRETARY OF STATE AND ATTORNEY GENERAL

DOCKET NO. 2023-0701

Rule 7 Mandatory Appeal
From Hillsborough Superior Court Southern Division
Docket Nos. 226-2022-CV-00236 and 226-2022-CV-00233

REPLY BRIEF OF MANUEL ESPITIA, JR. AND DANIEL WEEKS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

Appellants submit this reply to make three points in response to the briefs filed by the Secertary of State and Attorney General ("Appellees") and the Intervenor New Hampshire Republican State Committee ("NHRSC"). *First*, the Appellees' reading of Part I, Article 8 to focus on whether a bill is a "specific act" or "appropriates" money would narrow the meaning of that constitutional provision into a nullity. Indeed, under the 2018 amendments to Part I, Article 8, a plaintiff need only show that a state or local public body "has spent … public funds in violation of a law, ordinance, or constitutional provision." In other words, all a taxpayer needs to show is that taxpayer money has been spent in furtherance of an unconstitutional regime.

Second, Appellees' policy arguments that taxpayer standing, properly understood, would lead to judicial review of too many executive actions are addressed to the wrong forum. Setting aside the fact that New Hampshire courts do not appear to have been inundated with excessive taxpayer lawsuits since 2018, this policy argument is one that could have been presented to the voters in 2018. But it is not the role of this Court to second guess policy decisions made by the voters in adopting a constitutional amendment. *Third*, contrary to NHRSC's argument, taxpayers can challenge SB 418 because it does include specific expenditures and spending actions directly in furtherance of an unconstitutional invasion of privacy.

New Hampshire has a rich history of taxpayer standing for over a century. The 2018 amendments to Part I, Article 8 reflect the intent of Granite Staters to overrule *Duncan* and merely bring New Hampshire law

back in line with those precedents. In allowing taxpayer standing here in this case, this Court simply would be following its prior precedent that the voters have asked this Court to uphold.

A. APPELLEES' READING WOULD RENDER TAXPAYER STANDING A NULLITY

The Appellees' proposed interpretation of Part I, Article 8 would turn the doctrine of taxpayer standing—adopted by the voters in 2018 and enshrined in the State Constitution—into a nullity. By focusing on whether a bill is a "specific act" or "appropriates" money, Appellees seek to rewrite the provision to narrow the doctrine beyond what the voters would have intended.

Appellees say taxpayers cannot challenge SB 418 because "is not a discrete spending action," that it "does not appropriate any funds," that it "does not require the Secretary of State to purchase personal property or construct real property," and that it "does not require the Secertary of State to contract with third parties." Appellees' Brief, p. 23. Rather, they suggest, SB 418 "is just one of many laws governing election procedure in this State."[1]

Appellees are wrong. Under the 2018 amendments to Part I, Article 8, a plaintiff need only show that a state or local public body "has spent …

[1] Appellees also suggest that "Plaintiffs' complaint does not include any mention of Part I, Article 8" and that "Plaintiffs did not assert in their complaint that they were challenging SB 418 as an allegedly unconstitutional spending action." Appellees' Brief, p. 19. This is wrong. *See* Appellants' Appendix 35, ¶¶3, 4 (describing plaintiffs as residents, voters, and taxpayers, and noting each "has standing pursuant to RSA 491:22 and Part I, Article 8 of the New Hampshire Constitution.").

public funds in violation of a law, ordinance, or constitutional provision." While a plaintiff does need to allege that money has been spent in furtherance of an unconstitutional regime, the voters have made clear that there is no requirement for a specific appropriation, nor is there a *de minimis* exception to a taxpayer suit. *Accord Animal Legal Def. Fund v. State*, 140 So. 3d 8, 20 (La. Ct. App. 2013) ("The fact that the taxpayer's interest may be small and insusceptible of accurate determination is not sufficient to deprive him of that right. Thus, when a taxpayer seeks to restrain action by a public body, he is afforded a right of action upon a mere showing of an interest, however small and indeterminable."); *Chapman v. Bevilacqua*, 42 S.W.3d 378, 383-84 (Ark. 2001) (noting that "the theory of illegal exaction does not have a 'de minimis' exception"). Appellees easily meet this low threshold where they allege that taxpayer funds have been spent in furtherance of SB 418's unconstitutional provisions. SB 418 contains precisely the type of spending action the citizens of this State envisioned when they added taxpayer standing to the Constitution in 2018.

Appellees warn that to run an election and the Department of State, the Secertary "will of course have to allocate appropriated funds and employee resources. But the Secretary of State's allocation of appropriations and other government resources to enforce this State's election laws does not transform each election law" into one which may be challenged by taxpayers. Appellees' Brief, pp. 23-24. In making this argument, the Appellees elide the very real and specific expenditures mandated by this law. SB 418 requires the Secretary of State to purchase pre-paid overnight envelopes to be placed in a packet to be given to each affidavit voter. The Secretary of State estimated it could need thousands of

such packets, and the fiscal note appended to the bill estimated it would cost the Secertary over $100,000 over the next several fiscal years. The bill does not merely authorize the Secertary to spend this money, it *requires* him to do so. The Secretary of State himself testified before the House Election Law Committee that this bill would cost his office "hundreds of thousands of dollars."[2] These costs do not just include staff overtime, but also covers $26.95 in postage for each overnight mailer the Secertary is mandated to procure by the law.

The Appellees press on and suggest that this Court should reject standing here because SB 418 is not a "discrete" spending action. *See e.g.* Appellees' Brief pp. 19-20. This seems to be in reference to *Carrigan v. N.H. Dep't of Health and Human Servs.,* 174 N.H. 362, 370 (2021) and its warning that the voters who ratified the 2018 Constitutional amendment enshrining taxpayer standing in Part I, Article 8 would not have intended to authorize taxpayers to challenge "a governmental body's overall management of its operations and functions, including its allocation of appropriations, as opposed to one or more discrete acts or decisions approving spending." But the challenge asserted in this case is not like the one asserted in *Carrigan*.[3]

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[2] To the extent that Appellees dispute the amount SB 418 will cost and claim the Department of State's estimate in the fiscal note was "artificially high," that is a matter for discovery and fact-finding. On appeal from a motion to dismiss, this Court accepts well pleaded allegations (including the cost of SB 418) as true.

[3] Appellees do not explain what they mean when they argue that SB 418 is not a "discrete" spending action, and Appellants reject that contention. But to the extent that Appellees argue SB 418 is not a discrete spending action

The Plaintiff in *Carrigan* alleged "that the State has failed to abide by its mandatory, substantive, and procedural obligations to respond to and protect children who are subject to child abuse and neglect." *Id.* at 364 (ellipsis omitted). By contrast, the taxpayers here are not challenging the State's entire election codes. They are not even challenging the State's entire voter identification regime. Rather, they are challenging one specific legislative enactment and the specific associated spending required by the law and described in the fiscal note and in the Secretary of State's testimony. In that respect, the challenge in this case is much more akin to the very type of taxpayer standing cases that were previously allowed in New Hampshire courts for decades before *Baer v. Dep't of Educ.*, 160 N.H. 727 (2010).

Next, Appellees suggest that there is no taxpayer standing in this case because SB 418 does not appropriate money. *See* Appellees' Brief, p. 22. But there is no such requirement found in the text of RSA 491:22 or Part I, Article 8. RSA 491:22 allows a taxpayer to challenge "conduct that is unlawful or unauthorized" while the Constitution allows challenges when the government "has spent, or has approved spending, public funds in violation of a law." Neither limits the rights of taxpayers to challenge only appropriations bills. Moreover, such a focus on form over substance would limit the taxpayer standing doctrine to a nullity. The Appellees' proposed

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because it contains other legislative directives, such an argument is easily dispatched. Otherwise, the legislature could free from judicial scrutiny by taxpayers of any spending action simply by including other legislative text. That cannot be what the voters intended when they adopted the 2018 amendment.

limitation (which is untethered from the text of the Constitution) would effectively limit taxpayer cases to the biennial state budget and a handful of other bills that formally appropriate money while excluding the much more common scenario where a bill does not appropriate specific funds but nonetheless requires the government to spend money to do something.

The history of the amendment shows why this argument by Appellees is wrong. The constitution was amended by the voters, in part, in response to *Duncan v. State*¸ 166 N.H. 630 (2014) where this Court held that the declaratory judgment statute authorizing taxpayer suits was unconstitutional. The enactment challenged in *Duncan* was 2012's SB 372,[4] which became 2012 Laws 287 and which created an education tax credit program. The bill did not formally appropriate any money, and in fact established tax credits (returning money to taxpayers) rather than spending state money directly on programming or services. After the Court rejected an attempt by taxpayers to challenge the enactment on standing grounds, the voters amended the Constitution to make clear that they wanted a robust ability to challenge, as taxpayers, illegal and unconstitutional laws that require money to be spent.

NHRSC argues that the 2018 amendment did not restore that old line of cases. This is incorrect. In addition to looking at the text of an amendment, this Court has explained that, "[r]eviewing the history of the constitution and its amendments is often instructive, and in so doing, it is the court's duty to place itself as nearly as possible in the situation of the

[4] https://www.gencourt.state.nh.us/legislation/2012/SB0372.pdf.

parties at the time the instrument was made, that it may gather their intention from the language used, viewed in light of the surrounding circumstances." *State v. Mack*, 173 N.H. 793, 801 (2020). Representative Berch's testimony[5] as to the intent of the amendment is corroborated not only by the broad text used in the amendment, but also by the history which demonstrates that the amendment was enacted in response to *Baer* and *Duncan*.

B. APPELLEES' POLICY ARGUMENTS ARE DIRECTED TO THE WRONG FORUM

The Appellees also argue that the interpretation of Part I, Article 8 we advance is "not reasonable" and that, "[i]f every governmental action that requires *any* incidental expense constituted a discrete spending action under Part I, Article 8, then it is hard to envision any government action that would not be subject to challenge." Appellees' Brief, pp. 24-25. They continue: "Such a broad reading . . . would create standing for any citizen to challenge virtually all government acts, thereby transforming the courts into a forum in which citizens could air generalized grievances about all State government conduct." *Id*., p. 25.

This is an argument that the State or its organs could have put to the voters in 2018. It is, perhaps, a cogent policy argument—and maybe to

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[5] Representative Berch was not the only legislator to make this point. According to the notes of the House Judiciary Committee, Representative Hagan explained that the amendment was in response to this Court's *Duncan* decision. *See* http://gencourt.state.nh.us/BillHistory/SofS_Archives/2018/house/CACR15H.pdf, p. 11 ("Rep. J. Hagan, prime sponsor Introduced the bill to the committee. This bill was in response to the Duncan decision.").

some voters, it would have been a persuasive one—against adding the right of taxpayers to bring suit into the Constitution. Perhaps the State could have explained that it would be bad policy to allow taxpayers to challenge State action without a particularized injury. But it is not an argument for how this Court should interpret Part I, Article 8 now that the voters have spoken. In interpreting constitutional provisions, this Court looks at the text of the provision, the legislative and social history of the provision at the time of its adoption, and occasionally looks at the interpretations of comparable provisions by other states. *See Mack*, 173 N.H. at 802 (describing methods and tools of interpreting State Constitution). But when the meaning of a provision is clear (as it is here—namely, to return to the line of cases before *Baer* and *Duncan*) it is not the role of this Court to second guess the policy choices made by the voters in choosing to adopt a provision.

C. SB 418 CONTAINS SPENDING IN FURTHERANCE OF AN UNCONSTITUTIONAL INVASION OF PRIVACY

NHRSC disputes that the prepaid return envelopes are sufficiently intertwined with the absentee ballot review scheme the Appellants have challenged. *See* NHRSC brief, pp. 16-17. According to NHRSC, it does not matter that the Department of State will have to spend money on the prepaid envelopes because "there is no connection between removing an incomplete affidavit ballot … and expenditures on postage, document creation and distribution, or training." *Id.* at 16. But the high threshold NHRSC seems to impose under Part I, Article 8 does not exist under this amendment's plain terms. Here, the spending on this postage is integral to the privacy violation—a violation that cannot occur without affidavit ballot

packets being given to voters in the first place. Indeed, the prime sponsor of SB 418 explained that the prepaid envelopes are in important part of the bill:

> Senator Guida: I'm not targeting anyone. I'm specifically saying that you can vote by affidavit. But you, as a citizen of the state, do have obligations, one of which is to provide documentation. And we give you that opportunity. *We pay for you to send it back*. We have 10 days.

Appellants' Appendix, p. 121 (emphasis added). SB 418 requires voters to mail back proof of identity, or else their ballots will be examined, and their votes removed which would cause election officials to associate a specific voter with how they voted, thus violating the constitutional privacy guarantees. The legislature made a conscious choice to expend state funds to give each voter a prepaid envelope. In other words, the expenditures challenged in this case are directly in furtherance of the unconstitutional ballot review.

But beyond the postage, the bill authorizes and requires other spending which directly implements SB 418's unconstitutional ballot scheme. For example, the Secretary of State would be required to create and distribute an affidavit verification letter listing the documents the voter must return to the Secretary *to prevent their vote from being removed from the tally*. *See id.*, p. 46; RSA 659:23-a, II(b). The bill's fiscal note also predicts $3,000 in staff overtime pay incurred by the Department of State employees, some of which may be incurred as employees in that office review unverified affidavit ballots and subtract the voters cast. This is all that Part I, Article 8 requires.

Finally, though Appellants' taxpayer standing claim *does* directly implicate the alleged expenditure of funds under this unconstitutional law, the State's and Intervenors' continued reliance on out-of-state cases—like the Superior Court's similar reliance—continues to be inapposite. Many of these cherry-picked states, unlike New Hampshire, adopt standing as a judge-made, prudential doctrine and do *not* even have explicit taxpayer standing provisions in their respective Constitutions. *See Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) (noting that "[s]tanding is a judicially developed test"); *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 692 (Mich. 2010) (noting that "standing historically developed in Michigan as a limited, prudential doctrine that was intended to 'ensure sincere and vigorous advocacy' by litigants"); *Rudder v. Pataki*, 93 N.Y.2d 273, 277 (N.Y.1999) (interpreting State Finance Law § 123-b in evaluating taxpayer standing); *In re Biester*, 409 A.2d 848, 852 (Pa. 1979) (explaining the judge-made creation of the taxpayer standing exception to traditional standing rules); *Cabinet for Health & Family Servs. v. Sexton*, 566 S.W.3d 185, 194 (Ky. 2018) ("Kentucky courts have seemingly created a judicially—as opposed to constitutionally—imposed standing requirement."); *City of Appleton v. Town of Menasha*, 419 N.W.2d 249, 252 (Wis. 1988) (explaining judge-made standing doctrine). These cases have little bearing on how to interpret the text of Part I, Article 8 or what Granite Staters intended when these provisions were enacted in 2018.

Furthermore, Appellants can just as easily identify—consistent with this Court's pre-*Duncan* case law—other states with expansive taxpayer standing allowing cases like this one to proceed where expenditures of

money would occur in violation of the law, including even for staff salaries, and general operations. *See Chapman*, 42 S.W.3d at 383-84 ("[T]he only standing requirements we have imposed in public-funds cases is that the plaintiff be a citizen and that he or she have contributed tax money to the general treasury. *We have not required the plaintiff to trace his or her individual tax contribution to the tax money that is allegedly being spent in an illegal manner, nor have we required the plaintiff to establish a significant tax contribution to the state treasury*,") (quotation omitted) (emphasis added); *Animal Legal Def. Fund*, 140 So. 3d at 20 ("A taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their legal duties") (citations omitted); *Chambers v. Lautenbaugh*, 644 N.W.2d 540, 548 (Neb. 2002) ("A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.").

CONCLUSION

For the reasons explained above, the decision of the trial court to grant Defendants' motion to dismiss should be *reversed*, and the case *remanded*.

Respectfully Submitted,

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By and through their attorneys,

/s/ Henry Klementowicz

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STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no reply brief (or response thereto) shall exceed 3,000 words… exclusive of pages containing the table of contents, tales of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 3,000 words (including footnotes) from the "Argument" to the "Conclusion" sections of the brief.

/s/ Henry Klementowicz
Henry Klementowicz, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 21st day of May, 2024 through the electronic-filing system on all counsel of record.

/s/ Henry Klementowicz
Henry Klementowicz, Esq.