

STATE OF NEW HAMPSHIRE

SUPREME COURT

2008 TERM

No. 2018-0208

NEW HAMPSHIRE DEMOCRATIC PARTY,
BY RAYMOND BUCKLEY, CHAIR

v.

WILLIAM M. GARDNER,
in his official capacity as the New Hampshire Secretary of State; and
GORDON MACDONALD,
in his official capacity as the New Hampshire Attorney General

and

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE,
DOUGLAS MARINO,
GARRETT MUSCATEL,
ADRIANA LOPERA,
PHILLIP DRAGONE,
SPENCER ANDERSON, and
SEYSHA MEHTA

v.

WILLIAM M. GARDNER,
in his official capacity as the New Hampshire Secretary of State; and
GORDON MACDONALD,
in his official capacity as the New Hampshire Attorney General

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY
AFFIRMANCE**

This Memorandum supports the Motion of League of Women Voters of New Hampshire,
et al. (“Plaintiffs”) for Summary Affirmance, pursuant to N.H. Sup. Ct. R. 25.

I. INTRODUCTION

Plaintiffs brought the underlying lawsuit against Defendants William Gardner, New Hampshire Secretary of State, and Gordon MacDonald, New Hampshire Attorney General (collectively, “the State”) to enjoin the application of Senate Bill 3 (2017) (“SB 3”) and to protect the fundamental, constitutional right to vote. The lawsuit alleges that SB 3, which requires all new registrants to present documentary evidence of “a verifiable act or acts carrying out” their intent to be domiciled in New Hampshire (and in some cases, *criminalizes* the failure of voters to satisfy these documentary requirements, even if they are otherwise eligible to vote), unduly burdens the right to vote, among several other constitutional violations. Plaintiffs further allege that the burden imposed by SB 3 falls disproportionately on young, low-income, and minority voters. The State disputes these allegations, yet refused (and still refuses) to produce pertinent information from its Statewide Voter Registration Database (“the Database”)—which contains precisely the types of records that are critical to any expert analysis of SB 3’s impact on New Hampshire voters—forcing Plaintiffs to file a motion to compel.

The trial court granted Plaintiffs’ motion on April 13, 2018, and ordered the State to produce the Database, among other discovery that the State had withheld for several months, subject to a Protective Order to be negotiated among the parties. Pursuant to the court’s instructions, Plaintiffs filed a proposed Protective Order that imposes heightened restrictions on the use of, and access to, the Database. The State would not agree to these reasonable measures but appears intent on delaying the August 2018 trial date by seeking to re-argue its discovery objections and to contest a seven-month old ruling on a motion to dismiss in this Court, without seeking reconsideration or an interlocutory appeal from the trial court.

The State’s Petition for Original Jurisdiction (“Petition”) is a particularly poor candidate for certiorari review. It presents no unsettled questions of law, no conflicts regarding any

substantive decisions on the merits of Plaintiffs' claims, and raises no issues of first impression. Instead, it contradicts this Court's well-settled precedents. With the underlying action scheduled for trial in August 2018, the State's compliance with discovery orders is essential to ensure the timely resolution of Plaintiffs' claims—and to protect the constitutional right to vote—before the New Hampshire primary (September 11) and general (November 6) elections. Having resisted key discovery since November 2017, this Court should treat the State's Petition for what it is: yet another delay tactic, and deny it accordingly.

II. ARGUMENT

A. Petitions for Original Jurisdiction are Not Appropriate Means to Address Discovery Disputes.

The State improperly attempts to invoke the Court's original jurisdiction—available only under extraordinary and unusual circumstances—to air grievances about unexceptional discovery rulings that are well grounded in this Court's precedents, and to relitigate standing issues that were first raised and decided over seven months ago. There is no precedent for, or basis under N.H. Sup. Ct. R. 11(1) to support the State's request.

Certiorari is an extraordinary remedy, which this Court has issued “sparingly and only where to do otherwise would result in *substantial injustice*.” *In re State*, 162 N.H. 64, 66 (2011) (emphasis added). Rule 11(1) is explicit that “a petition shall be granted only when there are special and important reasons for doing so.” The following non-exhaustive examples, all listed in the Rule itself, are indicative of the highly unusual circumstances under which the Court may exercise its original jurisdiction:

[w]hen a trial court . . . has decided a question of substance not theretofore determined by this court; or has decided it in a way probably not in accord with applicable decisions of this court; or has so far departed from the accepted or usual course of judicial or

administrative agency proceedings as to call for an exercise of this court's power of supervision.

Id. None of these circumstances—or anything remotely analogous to them—are at issue here. The only “substantial injustice” that has occurred is the State’s willingness to ignore basic discovery rules and well-established New Hampshire law, and its insistence on invoking every possible procedural device to delay the adjudication of Plaintiffs’ constitutional right to vote, even to the extent of taking a discovery motion to the Supreme Court. Granting the State’s Petition would essentially convert this extraordinary writ into an extension of trial court motions practice, providing yet another forum to litigate discovery objections and other routine pretrial motions.

B. The Trial Court’s Orders Should Not Be Disturbed.

Notwithstanding the State’s improper use of the Supreme Court’s jurisdiction, rulings from this Court and others have already addressed, and decisively rejected, the arguments that the State advances here. For instance, this Court has held that statutes prohibiting generally the disclosure of confidential records do not create a statutory privilege, *Marceau v. Orange Realty, Inc.*, 97 N.H. 497, 499 (1952), which forecloses the State’s objection to producing the Database. This Court has also held that in response to a constitutional challenge, the State must prove that its asserted interests are genuine, not “invented post hoc in response to litigation,” and “sufficiently weighty” to justify the law, *Guare v. State*, 167 N.H. 658, 665, 668-69 (2015) (quotations omitted)—all of which foreclose the State’s objection to providing communications and other documents bearing on these issues. And the State’s attempt to challenge Plaintiffs’ standing relies on the circular argument that *nobody* has standing to challenge SB 3 because “no one is disenfranchised by [its provisions],” Pet. at 16, which contradicts well-settled law. Because the State’s Petition lacks any plausible legal basis, this Court should summarily affirm the challenged trial court Orders.

1. This Court's Precedent Forecloses the State's Objection to Producing the Database.

The first question-presented in the Petition challenges the trial court's Discovery Order requiring the State to produce snapshots of the Statewide Voter Registration Database, which will allow Plaintiffs to measure the impact of SB 3 on certain groups of voters, and to more accurately assess the burdens imposed by the law. Putting aside the fact that discovery issues are committed to the trial court's "broad discretion," *Laramie v. Stone*, 160 N.H. 419, 426 (2010), and, as a result, are entirely inappropriate for certiorari review, *see Petition of State*, No. 2014-0800, 2015 WL 11077498, at *1 (N.H. Oct. 22, 2015) (denying petition where trial court sentencing fell within the range of its discretion), the State's objection to discovery of the Database is also contrary to settled law.

As the State acknowledges, the Discovery Order relied primarily on this Court's ruling in *Marceau*, which soundly rejects the State's argument that RSA 654:45 creates a statutory privilege. 97 N.H. at 499. In *Marceau*, the Court held that a provision of the Unemployment Compensation Act that penalized the unauthorized disclosure of information obtained from individuals "does not furnish a privilege against production of department records for use in judicial proceedings" *Id.* at 500. The Court further explained that the penalty provision "should be strictly construed[] when invoked for the limitation of judicial inquiry . . ." and that the provision did not provide the clear legislative mandate required to penalize production when required in the course of litigation. *See id.* at 499-500. Similarly, the trial court in this case determined that RSA 654:45 also lacked the clear statutory mandate required to preclude access to the database for use in judicial proceedings. *See* Discovery Order at 5-6. Pointing to no other New Hampshire authority, the State attempts to support its expansive interpretation statutory privileges by citing a Kentucky case, which actually provides an example of the clear legislative mandate that is absent in RSA 654:45.

As the State's Petition fails to acknowledge, the statutory provision in *Commonwealth v. Chauvin*, 316 S.W.3d 279, 287 (Ky. 2010) "expressly prohibit[ed] '[d]isclosure to any person or entity' . . . including 'disclosure in the context of a civil action where the disclosure is sought either for the purpose of discovery or for evidence.'" *Id.* (quoting KRS 218A.202(6) (emphasis added)).

But even assuming the State's interpretation of RSA 654:45 were correct (which it is not), this Court has been clear that where a statutory privilege against disclosure actually exists, such privileges are not absolute, and trial courts may, in their discretion, order discovery of otherwise privileged material after conducting a careful balancing of interests. *See, e.g., 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 other words, the trial court has always had the authority grant Plaintiffs access to the database notwithstanding any statutory privilege, and there is no reason to expect a different outcome even if the State's interpretation of the statute were to prevail on appeal. *See Petition of State*, 2015 WL 11077498, at *1-2. The trial court's ruling was clearly "within the range of its reasonable discretion," the exercise of which does not warrant a writ of certiorari. *See id.* (denying the State's petition for writ of certiorari challenging the trial court's interpretation of criminal statute because the trial court's decision "fell within the range of its reasonable discretion") (citation omitted).

Finally, this Court should reject the State's assumption that Plaintiffs will not adequately protect the voters' privacy. Plaintiffs have already submitted a proposed protective order that goes

well above and beyond standard confidentiality measures by incorporating special protections for the Database, to which the State would not agree. *See* Ex. 1, Proposed Protective Order, at 7. Because the State's lacks any legal basis for withholding the Database, the trial court's ruling should be affirmed.

2. The State's Communications and Meetings Relating to SB 3 are Plainly Relevant and the Trial Court's Discovery Order Requiring Production of Such Materials Was Within the Court's Reasonable Discretion.

The second question-presented challenges yet another discovery ruling, and asserts arguments that are similarly foreclosed by this Court's precedents. In requiring the State to produce documents relating to meetings and communications concerning SB 3, the trial court correctly relied on this Court's recent decision in *Guare*, 167 N.H. at 665, 668, which held that the State's asserted interest in response to a constitutional challenge to its election laws must be "genuine" and not "hypothesized or invented *post hoc* in response to litigation," and establishes that Plaintiffs are not required to take the State at its word, but may test the veracity and importance of those interests. *See id.*; *see also Akins v. Sec'y of State*, 154 N.H. 67, 72 (2006) (considering testimony from the Secretary of State in applying the constitutional balancing test).

Guare and *Akins* have resolved any dispute as to whether the State's asserted interested are immune to evidentiary challenge (they are not), and the decision upon which the State relies, *Libertarian Party N.H. v. State*, 154 N.H. 376 (2006), does not suggest otherwise. Unlike the instant case, the State's interests in *Libertarian Party* were subject only to rational basis review based on the court's finding that the challenged laws imposed "reasonable, nondiscriminatory restrictions upon the plaintiff[s'] rights" *Id.* at 381 (quotations omitted). Here, to the contrary, the trial court has already determined that portions of SB 3 (imposing civil and criminal penalties for failing to return paperwork with proof of domicile) likely impose "'severe' restrictions on the

right to vote,” and has temporarily enjoined those provisions. *See* Sept. 12, 2017 Order at 11. Thus, the State’s generalized regulatory interests, will not suffice. When subject to heightened scrutiny, as is likely the case here, the State must assert an interest that is genuine, “not invented post hoc in response to litigation,” and “sufficiently weighty” to justify the law. *See Guare*, 167 N.H. at 655, 669; *cf. Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass’n*, 159 N.H. 627, 644-45 (2010) (balancing the state’s interests against the impairment of rights protected by the Contract Clause and recognizing that although “weight is given to the legislature’s own statement of purposes for the law . . . a court must undertake its own independent inquiry to determine . . . the importance of the purpose behind it.” (quoting *Mercado-Boneta v. Administracion del Fongo de Compensacion al Paciente Through Ins. Comm’r of P.R.*, 125 F.3d 9, 13 (1st Cir. 1997))). It would make little sense to impose such requirements on the State, yet preclude Plaintiffs from obtaining discovery to contest the State’s assertions.

Notwithstanding the State’s reliance on inapt rulings (including some from other jurisdictions), the trial court’s Discovery Order correctly relies on straightforward applications of *this* Court’s precedents, and none of the discovery-related disputes raised in the State’s Petition warrant the exercise of this Court’s original jurisdiction.

3. Plaintiffs Need Not Prove the Merits of Their Case Just to Establish Standing.

The third question-presented in the State’s Petition challenges a trial court Order, issued on September 12, 2017, which held that Plaintiffs had established the requisite standing to maintain this lawsuit. The State opted not to appeal that ruling when it was issued more than seven months ago, and instead filed a renewed motion to dismiss on the same grounds. Now, the State seeks to bypass the traditional appeal process and invoke this Court’s jurisdiction to contest a ruling that it could have challenged last September. *But see State v. Laporte*, 157 N.H. 229, 231 (2008) (granting

review where certiorari was the only avenue for relief). Like the discovery rulings, the trial court's denial of the State's motion to dismiss is not only correct on the merits, it also provides no basis to grant the extraordinary remedy of certiorari review.

The State's argument, in a nutshell, is that *nobody* has standing to challenge voter registration laws: not unregistered voters who must navigate SB 3's confusing and burdensome documentation requirements in order to register and vote, *but see Portsmouth Hosp. v. Indem. Ins. Co. of N. Am.*, 109 N.H. 53, 55-56 (1968) (finding that a declaratory judgment proceeding is intended to determine a controversy "*before* obligations are repudiated and rights invaded" (emphasis added)); not registered voters who were subjected to SB 3 requirements and potentially to its threat of criminal sanctions, *but see Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) ("For purposes of standing, a denial of equal treatment is an actual injury even when the complainant is able to overcome the challenged barrier"); not even organizations like the Plaintiff, the League of Women Voters of New Hampshire, which must now reallocate resources from its regular activities to combat the threats to its core mission created by SB 3's burdensome provisions, *but see, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding diversion of resources is a "concrete and demonstrable injury to the organization's activities"); or even the Plaintiff, the New Hampshire Democratic Party ("NHDP"), which alleged, with supporting data, that SB 3's changes to same-day voter registration requirements disproportionately affect groups of voters that tend to vote Democratic. *See* NHDP Compl. ¶¶ 63-64. The underlying lawsuit includes several plaintiffs that allege each of these categories of harm, all of which are plainly sufficient for standing. *See Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 504 (2007) (at least one plaintiff with standing sufficient).

It is clear to see why the trial court rejected—on two separate occasions—the argument that *none* of these Plaintiffs have standing. The State’s Petition appears to rely on its own subjective belief that “[n]o one is disenfranchised by SB 3” and that “[n]o one’s right to vote is impeded in any way . . .,” Pet. at 16, which is why the State demands that the trial court “test[] the factual allegations against SB 3 itself to determine if . . . SB 3 will imperil or prejudice [] personal legal rights.” Pet. at 20. But these arguments improperly conflate standing with the merits of the case so as to require Plaintiffs to prove their allegations before they even set foot in court, and before they obtain the very discovery that would prove their allegations—which, coincidentally, is the same discovery that the State has resisted since last November. *See Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 52 (1st Cir. 2014) (“[I]n order to establish standing, a plaintiff does not need to show that her rights have actually been abridged: such a requirement ‘would conflate the issue of standing with the merits of the suit.’”). Notably, the State does not point to any decision—either in New Hampshire state court or in federal court—that adopts such a restrictive and circular view of standing.

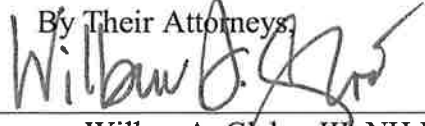
III. CONCLUSION

In sum, certiorari review is an extraordinary remedy that this Court has exercised only sparingly, “where to do otherwise would result in substantial injustice.” *Laporte*, 157 N.H. at 230. As Rule 11 makes clear, the Supreme Court exercises its original jurisdiction only “when there are special and important reasons for doing so,” and not to resolve the types of grievances raised in the State’s Petition, which consist of objections to discovery rulings and far-fetched theories of standing that the State should have raised many months ago, and may still raise through traditional methods of appeal. *See* N.H. Sup. Ct. R. 11(1). This Court should therefore deny the State’s Petition, or, in the alternative, summarily affirm the trial court’s Orders.

Respectfully submitted,

LEAGUE OF WOMEN VOTERS OF NEW
HAMPSHIRE, DOUGLAS MARINO, GARRETT
MUSCATEL, ADRIANA LOPERA, PHILLIP
DRAGONE, SPENCER ANDERSON, and
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Dated: May 3, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2018, the foregoing pleading was served via electronic mail and first class mail to counsel of record:


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EXHIBIT 1

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2017-CV-00433

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE,
DOUGLAS MARINO,
GARRETT MUSCATEL,
ADRIANA LOPERA,
PHILLIP DRAGONE,
SPENCER ANDERSON, and
SEYSHA MEHTA

v.

WILLIAM M. GARDNER,
in his official capacity as the New Hampshire Secretary of State; and
GORDON MACDONALD,
in his official capacity as the New Hampshire Attorney General

and

Docket No. 226-2017-CV-00432

NEW HAMPSHIRE DEMOCRATIC PARTY,
BY RAYMOND BUCKLEY, CHAIR

v.

WILLIAM M. GARDNER,
in his official capacity as the New Hampshire Secretary of State; and
GORDON MACDONALD,
in his official capacity as the New Hampshire Attorney General

PROTECTIVE ORDER

IT IS ORDERED:

1. Scope. All documents produced in the course of discovery, including initial disclosures, all responses to discovery requests; all deposition testimony and exhibits, other

materials which may be subject to restrictions on disclosure for good cause and information derived directly therefrom (hereinafter collectively "document(s)"), shall be subject to this Order concerning confidential information as set forth below. This Order is subject to the Rules of Superior Court of the State of New Hampshire.

2. Form and Timing of Designation. A party may designate documents as confidential and restricted in disclosure under this Order by placing or affixing the words "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER" on the document in a manner that will not interfere with the legibility of the document and that will permit complete removal of the designation. Documents shall be designated prior to or at the time of the production or disclosure of the documents. The designation "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER" does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order.

The Statewide Voter Registration Database established by RSA 654:45 and all of the data, files, and information in it ("Statewide Voter Registration Database Information") shall be considered documents within the scope of this protective order and shall be designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER – AUTHORIZED PERSONS' EYES ONLY INFORMATION. Provided, however, that aggregate summaries, compilations, charts, tables, or analyses of data obtained or derived from Statewide Voter Registration Database Information ("Aggregated Data"), so long as such Aggregated Data does not disclose personally identifiable information (including, individually identifiable Social Security Number, Name, Driver's License Number, or Address) of any voter, shall not be considered Statewide Voter Registration Database Information subject to this Protective Order. Authorized persons shall be limited only to: (1) the law firms who have filed an appearance in this action on behalf

of the League of Women Voters of New Hampshire ("LWVNH") and the New Hampshire Democratic Party ("NHDP");(2) the defendants' attorneys in this action;(3) Dr. Michael Herron; and (4) any expert the defendants may disclose who may respond to Dr. Michael Herron's report and conclusions. Attorneys for the LWVNH plaintiffs, NHDP, or the defendants may add additional, specifically-identified persons to this list, but only after consultation with opposing counsel and only with opposing counsel's agreement. All persons authorized by law to have access to the Statewide Voter Database shall continue to have access to the database on that basis and this Protective Order is not intended in any way to override that statutory authority. Each authorized person provided access to the Statewide Voter Registration Database, its data, its files, or any of its information shall be provided with a copy of this Protective Order and shall be instructed that they may not publicly disclose or use Statewide Voter Registration Database Information for any purpose other than this litigation. A log will be maintained of authorized persons who receive the Statewide Voter Registration Database Information identifying such persons' full name, address, and telephone number and whether such persons were permitted to retain a copy of Statewide Voter Registration Database Information. The requirements in this order to return or destroy Statewide Voter Registration Database Information shall apply equally to any and all copies or duplicates of this information. The log will be provided to the other parties within fifteen days after dismissal or entry of final judgment not subject to further appeal or any other order or action terminating the case and will itself be a public document available to any person.

3. Documents Which May be Designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER. Any party may designate documents as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER but only after review of the documents by an attorney or a party

appearing pro se who has in good faith determined that the documents contain information protected from disclosure by statute or that should be protected from disclosure as confidential personal information. The designation shall be made subject to the standards of Rule 7 and the sanctions of Rule 21(d) of the Rules of Superior Court. Information or documents that are available in the public sector, including information and documents containing only data publicly available on the checklist pursuant to RSA 654:25 and RSA 654:31, III may not be designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER.

4. Depositions. Deposition testimony shall be deemed CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER only if designated as such. Such designation shall be specific as to the portions to be designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER. Depositions, in whole or in part, shall be designated on the record as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER at the time of the deposition. Deposition testimony so designated shall remain CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER until ninety (90) days, after delivery of the transcript by the court reporter. Within forty-five (45) days after delivery of the transcript, a designating party may serve a Notice of Designation to all parties of record as to specific portions of the transcript to be designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER. Thereafter, those portions so designated shall be protected as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER pending objection under the terms of this Order. The failure to serve a Notice of Designation shall not waive the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation made on the record of the deposition. Instead, the designation shall be presumed to apply as stated on the record, subject thereafter to appropriate objection and challenges, unless expressly withdrawn by counsel who made the designation.

5. Protection of Confidential Material.

A. General Protections. Documents designated CONFIDENTIAL - SUBJECT TO PROTECTIVE under this Order shall not be used or disclosed by the parties, counsel for the parties or any other persons identified in ¶5.b. for any purpose whatsoever other than to prepare for and to conduct discovery, hearings and trial in this action, including any appeal thereof. Statewide Voter Registration Database Information shall not be used or disclosed by the parties, except in accordance with ¶ 2 above and ¶ 6 below. None of the provisions of ¶ 5 shall apply to Statewide Voter Registration Database Information.

B. Limited Third-Party Disclosures. The parties and counsel for the parties shall not disclose or permit the disclosure of any CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents to any third person or entity except as set forth in subparagraphs i-vi. Subject to these requirements, the following categories of persons may be allowed to review documents that have been designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER:

1. Counsel. Counsel for the parties and employees of counsel who have responsibility for the preparation and trial of the action;
2. Parties. Parties and employees of a party to this Order, but only to the extent counsel determines that the specifically named individual party or employee's assistance is reasonably necessary to the conduct of the litigation in which the information is disclosed.
3. Court Reporters and Recorders. Court reporters and recorders engaged for depositions;
4. Contractors. Those persons specifically engaged for the limited purpose of making copies of documents or organizing or processing documents but only after each such person has completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

5. Consultants and Experts. Consultants, investigators, or experts (hereinafter referred to collectively as “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of this action but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound; and

6. Others by Consent. Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

C. Control of Documents. Counsel for the parties shall make reasonable efforts to prevent unauthorized disclosure of documents designated as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of six years from the date of signing.

D. Copies. Prior to production to another party, all copies, electronic images, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as “copies”) of documents designated as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER under this Order, or any individual portion of such a document, shall be affixed with the designation “CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” as the case may be, if the word does not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term “copies” shall not include indices, electronic indices, or lists of documents, provided these indices, electronic indices, or lists do not contain substantial portions or images of the text of confidential documents or otherwise disclose the substance of the confidential information contained in those documents.

6. Special Protections for the Statewide Voter Registration Database (“SVRS”) Snapshots

- A. Authorized persons seeking compressed SQL backup copies of the Statewide Voter Registration Database Snapshots or copies of Statewide Voter Registration Database Information in any other format shall provide the defendants’ counsel with a new, unused, and unopened external hard drive or usb thumb drive of no less than 16 gigabits in size.
- B. The data copied onto the external hard drive or thumb drive shall be encrypted. The state will provide the decryption key on a separate printed document.
- C. The snapshot of the database (or the data, files, or information provided from the database, regardless of format) shall have the following data redacted, which is unrelated to voters and their voting history:
 - i. Data related to the users of the system, including the names of local election officials and their associated data, users authorized to access the system and their associated data, all encrypted passwords, activity logs, login logs, and any other similar information.
 - ii. All data related to individual voters who are victims of domestic violence whose name and address do not appear on the public checklist by reason of his or her presentation a valid protective order pursuant to RSA 654:25. The Secretary of State’s office believes this exclusion to apply to approximately 60 voters. Defendants agree not question the accuracy or reliability of any expert report, analysis, or conclusion on the basis that such report, analysis, or

conclusion does not account for voters whose data has been redacted pursuant to this paragraph.

- iii. Specific information on individual voters, described below:
 - a. Social Security Numbers (the database contains only the last four digits of the social security number of a small percentage of voters). All last four SSN shall be changed to NULL.
 - b. Voter's Absentee Ballot address, the address provided by a voter who had an absentee ballot mailed to an address other than the voter's mailing address for his or her voting domicile. All absentee ballot mailing addresses to other than their domicile or mailing address shall be changed to "REDACTED."
 - c. Voter's Driver or non-driver ID number.
- D. Parties seeking to receive the external hard drive or thumb drive with the encrypted SQL compressed backup copy, or Statewide Voter Registration Database Information in any other format shall designate an agent who shall pick up the hard drive or thumb drive and a sealed envelope with the decryption key from the Office of the Secretary of State at the New Hampshire State House, at a date and time agreed to by the parties. The agent receiving the hard drive or thumb drive and envelope containing the decryption key shall sign a receipt to be retained by the State.

- E. All use of Statewide Voter Registration Database Information shall be restricted and may only be used on standalone computers that are “air gapped,” in no way connected to the internet or any networks (including Wi-Fi networks) at any time not just during the accessing of the data at any law firms, expert’s facilities, or other facilities or places. The standalone computer must be “air gapped” prior to hooking the Statewide Voter Registration Database into it and must remain “air gapped” so long as the Statewide Voter Registration Database or any of its data, files, or information is present on or connected to the standalone computer. The Statewide Voter Registration Database itself, shall not be conveyed electronically between persons or entities in any manner, whether by e-mail or through electronic file transfer or by or through any other form of electronic transmission. No more than five (5) copies of the Statewide Voter Registration Database may be made. All copies must be encrypted and tracked, including by listing the person who holds copy, the date on which they received, the date on which they transferred it to any other authorized person, and the date on which the copy was returned or destroyed in accordance with this Protective Order. The number of copies permitted may be expanded with the assent of the defendants.
- F. Every movable device on which Statewide Voter Registration Database Information is used shall itself be encrypted.
- G. Authorized persons who have access to the Statewide Voter Registration Database Information pursuant to this Protective Order shall not use Statewide Voter Registration Database Information for any purpose other than this

litigation. Non-public Statewide Voter Registration Database Information may not be used or cited for academic research papers or otherwise disclosed in any manner to the public. The requirements for return or certification of destruction of all data from the Statewide Voter Registration Database shall apply to all authorized persons who are provided with or have access to copies of any Statewide Voter Registration Database Information pursuant to ¶ 2 of this Protective Order.

- H. The Acknowledgement and Agreement to be Bound signed by every person who is provided access to or a copy of the SVRS data shall include a copy of New Hampshire RSA 654:31 and each shall be specifically informed of the provisions of subsection VI. “No person shall use or permit the use of checklist or voter information provided by any supervisors of the checklist or city or town clerk or by the secretary of state for commercial purposes. Whoever knowingly violates any of the provisions of this section shall be guilty of a misdemeanor if a natural person or guilty of a felony if any other person. The secretary of state may insert inauthentic entries into copies of the public checklist provided under this section for purposes of facilitating enforcement of this paragraph.” The provision of this law authorizing the insertion of inauthentic entries into the copy of the Statewide Voter Registration Database Information provided in this disclosure shall apply to the copies provided pursuant to this order. The Secretary of State’s Office, without disclosing the name or full address of the inauthentic voters inserted, shall provide the parties with the age and town/city

of domicile of the inauthentic records inserted to allow exclusion of the inauthentic data from analysis of voters based on age and domicile town/city.

- I. Each recipient of the data from the Statewide Voter Registration Database is required to provide immediate written notice to the Court, the New Hampshire Attorney General's Office, and timely written notice to every person whose private data was or may have been disclosed or compromised in the event that any device holding or connected to Statewide Voter Registration Database Information is the subject of a security breach. A security breach means unauthorized entry into a computer, network, or any other similar device or system on which the Statewide Voter Registration Database is or was in use. A security breach also means the unauthorized acquisition of computerized data from a computer, network, or any other similar device or system on which the Statewide Voter Registration Database is or was in use. The notice to individual voters whose data may have been disclosed or compromised shall, at a minimum, include (a) a description of the incident in general terms, (b) the approximate date of breach, (c) the type of personal information compromised as a result of the security breach, and (d) the telephonic contact information of the law firm, individual expert, or person or entity who had possession of the data that was the subject of the security breach. If the security breach involves data on more than 1,000 voters, the responsible law firm, person, or entity shall also notify, without unreasonable delay, all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined by 15 U.S.C. § 1681(p), of the anticipated date of the notification to voters, the

approximate number of voters who will be notified, and the content of the notice.

7. Filing CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER Documents With the Court.

A. Filing Party's Confidential Documents. In the event that a party seeks to file, or reference in any filing, a document that the filing party designated as CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER—AUTHORIZED PERSONS' EYES ONLY under this Protective order and the filing party seeks to maintain the confidentiality of such document, the filing party must note the existence of the designation under this Order and file the document under seal with the Court.

B. Non-Filing Party's Confidential Documents. In the event that the filing party seeks to file, or reference in any filing, a document that the non-filing party designated as CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER under this Protective order, the filing party shall first consult with the non-filing party to determine whether the non-filing party consents to filing the document in whole or in part on the public docket. If the parties are unable to reach an agreement, the filing party shall prepare two versions of the filings, a public and a confidential version. The public version shall contain a redaction of references to CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER documents and shall be filed with the Court. The confidential version shall be a full and complete version of the filing, including any exhibits, and shall be filed with the court provisionally under seal indicating that the non-filing party seeks to maintain the confidentiality of the redacted material.

8. No Greater Protection of Specific Documents.

No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an order providing such special protection.

9. Challenges by a Party to Designation as CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER.

Any CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation is subject to challenge by any party or non-party (hereafter "party"). The following procedure shall apply to any such challenge.

A. Objection to Confidentiality. After receipt of any document designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or of the refusal to produce a document on the ground of such designation, a party may serve upon the designating party an objection to the designation. The objection shall specify the documents to which the objection is directed and shall set forth the reasons for the objection as to each document or category of documents. CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents to which an objection has been made shall remain CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER until designated otherwise by waiver, agreement or order of the Court.

B. Obligation to Meet and Confer. The objecting party and the party who designated the documents to which objection has been made shall have fifteen (15) days from service of the objection to meet and confer in a good faith effort to resolve the objection by agreement. If agreement is reached confirming or waiving the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation as to any documents subject to the objection, the designating party shall serve on all parties a notice specifying the documents and the nature of the agreement.

C. Obligation to File Motion. If the parties cannot reach agreement as to any documents designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER for the purpose of discovery, the designating party shall file with the Court within thirty (30) days of the service of the objection a motion to retain the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation. The moving party has the burden to show good cause for the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation. The failure to file the motion waives the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation of documents to which an objection was made.

10. Court Not Bound By Parties' Designation.

Nothing in this Order or any action or agreement of a party under this Order limits the Court's power to make orders concerning the disclosure of documents marked CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER—AUTHORIZED PERSONS' EYES ONLY that are produced in discovery.

11. Use of Confidential Documents or Information at Hearing or Trial.

A party who intends to present or anticipates that another party may present at any hearing or at trial CONFIDENTIAL -SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER—AUTHORIZED PERSONS' EYES ONLY documents or information derived therefrom shall identify the issue, not the information, in a pre-hearing or pre-trial memorandum. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at a hearing or trial.

12. Inadvertent Disclosure.

A. The inadvertent or unintentional disclosure by a producing party of CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents or information, or

information or material protected by any applicable privilege or immunity, regardless of whether the information was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of the party's claim that the information is CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or privileged or otherwise immune from discovery, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter. Upon learning of an inadvertent or unintentional disclosure of CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents or information, or other information or material privileged or otherwise immune from discovery, the producing party shall within thirty (30) days designate such information as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or privileged or otherwise immune from discovery. The obligation to treat such information as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or privileged or otherwise immune from discovery shall run prospectively from the date of designation. Nothing contained within this paragraph prevents a party from challenging such a designation of documents or information pursuant to the procedures contained herein.

B. In the event of a disclosure of any CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents or information, or any other information or material privileged or otherwise immune from discovery to any person or persons not authorized to receive such disclosure under this Order, the party responsible for having made such disclosure shall immediately notify counsel for the party whose CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents or information, or information or material that is privileged or otherwise immune from discovery, has been disclosed and provide to such counsel the nature of the disclosure. The party responsible for the inadvertent disclosure shall promptly take all reasonable measures to retrieve the improperly disclosed CONFIDENTIAL - SUBJECT TO PROTECTIVE

ORDER documents or information, or information or material that is privileged or otherwise immune from discovery, and to ensure that no further or greater unauthorized disclosure and/or use thereof is made. Unauthorized or inadvertent disclosure does not change the status of CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents or information, or information or material that is privileged or otherwise immune from discovery, or waive the right to hold the disclosed document or information as protected under this Order.

C. Any disclosure of any document designated CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER – AUTHORIZED PERSONS' EYES ONLY INFORMATION to any person who is not authorized to receive or view it, whether the disclosure was accidental, inadvertent, or intentional, shall be considered a security breach, shall trigger the requirements of ¶ 6(I) above, and shall require the responsible, authorized law firm, expert, person, or entity to exhaust all possible efforts to retrieve the data or information, to ensure the data or information has not been copied or otherwise duplicated in any manner, and to report on what efforts and steps the responsible, authorized law firm, expert, person, or entity took to the Secretary of State's Office in writing.

13. Obligations on Conclusion of Litigation.

A. Order Remains in Effect. Unless otherwise agreed or ordered, the terms of this Order shall remain in force as an agreement between the parties after dismissal or entry of final judgment not subject to further appeal. Actions to enforce the terms of the Order after dismissal or entry of final judgment shall be by separate legal action and not by motion for contempt or other relief filed in this action.

B. Return or Destruction of Documents.

Within thirty days after dismissal or entry of final judgment not subject to further appeal or any other order or action terminating the case, the receiving party shall return to the producing party all documents treated as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER under this Order, including copies, unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction in lieu of return; or (3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certifies to the producing party that it has done so.

Within thirty days after dismissal or entry of final judgment not subject to further appeal or any other order or action terminating the case, authorized persons shall either return or destroy all documents treated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER – AUTHORIZED PERSONS’ EYES ONLY INFORMATION. All authorized persons must certify within 15 days of termination of the case that such data or information has been returned or destroyed and that no copies of the data or information have been retained or otherwise disclosed. This certification must be in writing, signed under oath, and delivered to the Secretary of State’s Office. A copy of all logs relating to this information shall similarly be delivered to the Secretary of State’s Office within the 15 day timeframe as well.

Notwithstanding the above requirements to return or destroy documents designed as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER, counsel may retain any materials which are in the good faith judgment of counsel attorney work product, including an index which refers or relates to information designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER, so long as that work product does not duplicate verbatim substantial portions of the text or images of confidential documents. This work product shall continue to be CONFIDENTIAL -

SUBJECT TO PROTECTIVE ORDER under this Order. Counsel may not retain any materials designated as CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER – AUTHORIZED PERSONS’ EYES ONLY INFORMATION.

14. Order Subject to Modification.

This Order shall be subject to modification by the Court only on motion of a party or any other person with standing concerning the subject matter and only after a meeting and conferring with respect to such modification.

15. No Prior Judicial Determination.

This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER by counsel or the parties is subject to protection under Rule 29(a) of the Rules of Superior Court or otherwise until such time as the Court may rule on a specific document or issue.

16. Persons Bound.

This Order shall take effect when entered and shall be binding upon all counsel and their law firms, the parties, and persons made subject to this Order by its terms.

So Ordered,

Hon. Charles S. Temple, Presiding Justice

Attachment A
STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2017-CV-00433

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE,
DOUGLAS MARINO,
GARRETT MUSCATEL,
ADRIANA LOPERA,
PHILLIP DRAGONE,
SPENCER ANDERSON, and
SEYSHA MEHTA

v.

WILLIAM M. GARDNER,
in his official capacity as the New Hampshire Secretary of State; and
GORDON MACDONALD,
in his official capacity as the New Hampshire Attorney General

and

Docket No. 226-2017-CV-00432

NEW HAMPSHIRE DEMOCRATIC PARTY,
BY RAYMOND BUCKLEY, CHAIR

v.

WILLIAM M. GARDNER,
in his official capacity as the New Hampshire Secretary of State; and
GORDON MACDONALD,
in his official capacity as the New Hampshire Attorney General

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

The undersigned hereby acknowledges that he/she has read the Protective Order
dated _____ in the above-captioned case and attached hereto, understands the

terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the Superior Court of the State of New Hampshire in matters relating to the Protective Order and understands that the terms of the Protective Order obligate him/her to use documents designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER - AUTHORIZED PERSONS' EYES ONLY INFORMATION in accordance with the Order solely for the purposes of the above-captioned case, and not to disclose any such documents or information derived directly therefrom to any other person, firm or concern. The undersigned acknowledges that violation of the Protective Order may result in penalties for contempt of court or for other relief under the Protective Order agreement and may expose the undersigned to criminal prosecution under RSA 654:45, VI or other civil liability.

By:

Print Name:

Date: