

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 216-2020-CV-00570

AMERICAN FEDERATION OF TEACHERS

555 New Jersey Ave., N.W.

Washington, DC 20001

and

MARY WILKE

v.

WILLIAM GARDNER,

in his official capacity as the New Hampshire Secretary of State

25 Capitol Street

Concord, NH 03301

and

GORDON MACDONALD,

in his official capacity as the New Hampshire Attorney General

33 Capitol Street

Concord, NH 03301

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs the American Federation of Teachers and Mary Wilke by and through the undersigned attorneys, McLane Middleton, Professional Association and Perkins Coie LLP, file this Amended Complaint for Declaratory and Injunctive Relief against Defendants William Gardner and Gordon MacDonald, in their official capacities as New Hampshire Secretary of State and Attorney General (collectively, “Defendants”), and upon information and belief allege as follows:

INTRODUCTION

1. The United States is in the throes of an unprecedented public health crisis. A novel coronavirus is sweeping through the country, with known infections well over 5.8 million and over 180,000 deaths. No states are being spared. As of the date of this filing, over 7,200 New Hampshire residents have tested positive for the deadly disease and over 430 people have died. These numbers likely underrepresent the virus's spread, and there is no sign of abatement in sight. Projections indicate the virus will persist at least into the fall, if not longer, and the Commissioner of the Department of Health and Human Services of New Hampshire Lori Shibinette recently stated that New Hampshire should expect a second wave that is just as severe, if not more severe, than what the state has already experienced.

2. The pandemic's impact is not limited to New Hampshire citizens' health; it also endangers their right to vote. Defendants Secretary of State William Gardner (the "Secretary") and Attorney General MacDonald have recognized the serious threat that this unprecedented public health crisis poses to the State's coming elections, recognizing that "[v]oters should not have to choose between their health and exercising their constitutional right to vote." As a result, they and the Select Committee on 2020 Emergency Election Support ("Select Committee") have recommended changes to New Hampshire's election procedures designed to make absentee registration and voting more accessible because "the COVID-19 pandemic will remain a factor impacting the process of voter registration and casting ballots in both 2020 elections, [and] absentee registration and voting represents the lowest health risk to municipal officials, election workers and voters."

3. The New Hampshire General Court has followed their lead, passing HB 1266, which was signed by Governor Sununu on July 17th, to further increase the accessibility of absentee registration and voting.

4. But several features of New Hampshire election law presently in operation threaten to disenfranchise and unduly burden voters in these unprecedented times in which voters, out of fear of the virus, are projected to turn to absentee registration and voting in overwhelming numbers in the upcoming elections. Although many states have long had a substantial number of voters cast their ballots by mail, New Hampshire is by design an in-person registration and voting state, with more than 90% of the electorate voting in person in the 2016 and 2018 general elections. But the Select Committee anticipates that 60-85% of all votes cast in 2020 will be by absentee. Thus, as New Hampshire citizens transition to absentee voting and registration to protect their health, nearly all will be navigating this system of registration and voting for the first time. As a result, they are at significantly higher risk of being disenfranchised by unduly burdensome laws that regulate the absentee registration and voting processes.

5. The anticipated influx of absentee registrants and voters in New Hampshire in the November election is certain to exacerbate the disenfranchising effects of seven features of New Hampshire election law in particular: (1) the cumbersome absentee registration request process (“Absentee Registration Request Process”), N.H. Rev. Stat. Ann. §§ (RSA) 654:16-19; (2) the requirement that absentee registrations be witnessed by another person (“Witness Requirement”), RSA 654:17; (3) the requirement that proof of identity and domicile be provided with an absentee registration (“Documentation Requirement”), *id.*; (4) the failure to prepay for postage to return completed absentee ballots (“Postage Requirement”), RSA 657:17; (5) the rejection of absentee ballots delivered after 5:00 p.m. on Election Day, including those absentee ballots delivered in-person at the polls between 5:00 p.m. and 7:00 p.m. (the “Election Day Receipt Deadline”), *id.* § 657:22; (6) the prohibitions on third-party collection and delivery of sealed absentee ballots, (the “Voter Assistance Ban”), RSA 657:17, and (7) the restrictions on absentee ballot drop box

placement and staffing, as interpreted by Defendants in their August 19 Memorandum on Election Operations during the Public Health Crisis (“Drop Box Restrictions”) (collectively, the “Challenged Laws”).

6. Absent injunctive and declaratory relief, these Challenged Laws will operate independently and together to severely burden the right to vote of thousands of New Hampshire citizens, in many cases resulting in complete disenfranchisement, a result that is as unacceptable as it is unconstitutional. As the Select Committee has recognized, it is of “critical significance” that New Hampshire have “safe selection procedures to all who want to vote, and those who help make it happen. Unless New Hampshire and all other states get this right this year, the future of our nation and world could be affected, forever.” For these reasons and those set forth below, this Court should declare unconstitutional and enjoin each of the Challenged Laws.

PARTIES

PLAINTIFFS

7. Plaintiff the American Federal of Teachers (“AFT”) is an affiliate of the AFL-CIO, and represents 1.7 million members and more than 3,000 local affiliates nationwide, including AFT-New Hampshire. AFT has approximately 5,000 active members that reside in New Hampshire including over 2,453 members in Hillsborough County and over 170 members (active and retired) in Manchester, New Hampshire. Five divisions within AFT represent the broad spectrum of AFT’s membership: pre-K through 12th-grade teachers, paraprofessionals and other school-related personnel, higher education faculty and professional staff, federal, state and local government employees, and nurses and other healthcare professionals. In addition, AFT represents approximately 80,000 early childhood educators and nearly 250,000 retiree members. AFT’s mission is to champion fairness, democracy, economic opportunity, and high-quality public education for its students, families, and communities. It accomplishes its mission through

community engagement, organizing, political activism, and through the work of its members. The Challenged Laws frustrate AFT's mission because they deprive AFT's individual members of the right to vote and to have their votes counted and threaten the electoral prospects of AFT-endorsed candidates whose supporters will face greater obstacles casting a vote and having their votes counted. Indeed, many of AFT's members are on the frontlines of the pandemic and, as a result, seek to limit in-person registration and voting both to protect themselves and the people they serve, as well as to prevent potentially exposing others to COVID-19. Because of the burdens on absentee registration and voting created by the Challenged Laws, AFT will be required to devote time and resources to educating its members about the absentee registration and voting requirements and assisting them in complying with the Challenged Laws so that their mailed absentee registrations and ballots are accepted and counted.

8. These efforts will reduce the time and resources AFT has to support and educate its members and local and national leaders about public policy issues critical to its members, including but not limited to federal funding and legislative action on issues related to labor, employment, and staffing, and organizing efforts. AFT brings this action on its own behalf as well as on behalf of its members who face burdens on their right to vote as a consequence of the Challenged Laws. Because many of AFT's members are of an age that places them at a heightened risk of complications from coronavirus, these members are overwhelmingly likely to register and/or vote by mail in November and consequently face the burdens the Challenged Laws place on those who register and vote absentee. AFT's members, for example, are voters who are likely to face difficulty in finding a witness to safely witness their absentee registration or in delivering their mail ballot themselves should they be unable to return it through the mail with sufficient time for their ballot to be counted. Additionally, many of AFT's members are likely to be voting by mail

for the first time, and thus will be more susceptible to confusion and errors in attempting to comply with the Challenged Laws, thereby increasing their risk of disenfranchisement and further frustrating AFT's mission of championing democracy.

9. Mary Wilke is a resident of Concord, New Hampshire and is registered to vote in Ward 7. A former teacher and an advocate for voting access, Ms. Wilke is a committed voter and intends to vote in the November General Election. At 68 years old and having suffered a heart attack, however, Ms. Wilke is at high risk for contracting COVID-19 as is her 72-year-old husband who lives with her. Because of this, since the coronavirus pandemic began, Ms. Wilke has been observing strict social distancing. She does not go to grocery stores, receiving her groceries almost exclusively through curbside pick-up, and avoids public places where she could potentially be exposed to COVID-19. To ensure that she and her family remain safe in November, Ms. Wilke intends to vote absentee, but fears that due to New Hampshire's Election Day Receipt Deadline, Voter Assistance Ban, and Dropbox Restrictions she will be disenfranchised or forced to choose between risking her health and exercising her right to vote. In particular, it is important to Ms. Wilke to cast an informed vote for down-ballot candidates for office. Information about some of these individuals is usually not published until shortly before Election Day, however. In addition, Ms. Wilke is aware that in an election there can be late-breaking news about a candidate that could affect how she casts her vote. Both of these concerns lead her to prefer to wait until a week or two before the election to cast her ballot, which places her ballot at risk of not arriving in time to be counted if she casts it by mail. Yet casting her ballot in person at the City Clerk's office or at the polls could put her at risk of exposure to COVID-19. Similarly, because she does not want her husband to risk exposure to COVID-19, she does not want to ask him to deliver her ballot for her. Likewise, it is Ms. Wilke's understanding that because drop boxes in New Hampshire have to be

manned by Town or City Clerks, she is not able to drop off her ballot after hours at her City Clerk's Office by using the mail slot. As such, there is no safe, exposure free drop-off option that Ms. Wilke can use to return her ballot, making it more likely that she will have to resort to the USPS and either send her ballot in before she feels she has all the information she needs about candidates to make an informed vote or potentially be disenfranchised because it arrives too late. If Ms. Wilke had the option to use a ballot collector from an organization she trusts or a local drop box designed and placed in such a way as to avoid potentially exposing voters to COVID-19, or if a mailed ballot postmarked before Election Day could be counted even if received after that day, she would feel comfortable using one of those options.

10. In addition to the challenges Ms. Wilke faces as a New Hampshire voter, New Hampshire's confusing absentee voter registration process and restrictive absentee ballot process also frustrate her work as a voting rights advocate, making it much more difficult for her to educate voters. Through her work, Ms. Wilke educates voters on the registration and voting process in an effort to help ensure that they are able to safely register and vote. However, New Hampshire's absentee registration and voting process involves multiple steps, with some complexities that are difficult to explain to voters. Moreover, some COVID-19 accommodations permitted by the Secretary of State are not required, meaning that some municipalities have adopted or will adopt them and others will not. This means that Ms. Wilke sometimes finds herself telling voters and other advocates that they might be able to use a specific procedure or be granted a particular accommodation, but they'll have to call the Town Clerk to find out for sure, even while telling them that some Town Clerk's offices have limited hours and/or are receiving too many calls to keep up with. And then she must tell them what their alternatives are if the Clerk does not offer the accommodation. The complexity of the process and its variability among municipalities means

that it is time-consuming for Ms. Wilke to educate herself to ensure she is providing voters with the correct information. This is time that Ms. Wilke would be spending on other activities. In addition, the complexities of the process and the concerns about the USPS's reliability have presented challenges as Ms. Wilke has worked to recruit other volunteers to help spread the word about the availability of absentee voting and registration.

DEFENDANTS

11. Defendant WILLIAM M. GARDNER is the New Hampshire Secretary of State and is named a defendant in his official capacity. He is the chief elections officer in charge of administering New Hampshire's election laws. RSA 652:23. This includes, but is not limited to, responsibility for publishing the elections manual and procedures for conducting elections, RSA 652:22, and for prescribing the voter registration and absentee voting forms, RSA 654:7, 657:4, and 657:7. The Secretary, personally and through the conduct of his employees and agents, acted under color of state law at all times relevant to this action.

12. Defendant GORDON MACDONALD is the New Hampshire Attorney General (the "Attorney General") and is named a defendant in his official capacity. He is authorized to enforce the State's election laws. RSA 7-6c. He is also responsible for approving the elections manual and procedures for conducting elections, including the political calendar setting forth the dates when action required under the election laws must be taken. RSA 652:21-22. Attorney General MacDonald, personally and through the conduct of his employees and agents, acted under color of state law at all times relevant to this action.

JURISDICTION AND VENUE

13. Plaintiffs bring this action under the New Hampshire Constitution and under the laws of New Hampshire. As a court of general jurisdiction, this Court has authority to hear these claims. N.H. Rev. Stat. Ann. § 491:7.

14. This Court is authorized to grant declaratory relief pursuant to the Declaratory Judgments Act. *See* N.H. Rev. Stat. Ann. § 491:22. This Court also has the authority to grant injunctive relief under the New Hampshire Rules of Civil Procedure. *See* N.H. Rev. Stat. Ann. § 498:1.

15. Venue in Hillsborough County is proper because the cause of action arose in part in Hillsborough County, Plaintiff AFT has a substantial membership in the County including members who are, will be, or are likely to be impacted by the Challenged Laws. Plaintiff AFT also performs a significant amount of its work in the County.

16. This Court has personal jurisdiction over Defendants, who are sued in their official capacities only and are elected or appointed officials in New Hampshire, and both of whom work and reside in New Hampshire.

FACTUAL ALLEGATIONS

A. Absentee Registration and Voting in New Hampshire

17. The New Hampshire Constitution extends the equal right to vote in free elections to any qualified elector. N.H. Const. Pt. 1, art. XI. This right extends to absentee registration and voting. The Constitution guarantees that “[v]oting registration . . . shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote.” N.H. Const. Pt. 1, art. XI. The New Hampshire General Court must ensure the voting rights of those who “are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person.” N.H. Const. Pt. 1, art. XI.

18. Historically, almost all registration and voting in New Hampshire has taken place in person. In 2018, for example, there were 51,472 new registrants who registered in person and only 280 who registered by mail.

19. Likewise, in 2018, only 8% of all votes in New Hampshire were cast absentee, while over 92% of voters voted in person on Election Day. In 2016, 90% of all votes cast were cast in-person.

20. New Hampshire provides only limited opportunities to register and vote by-mail or absentee, and all of these opportunities require significant additional steps that must be taken deliberately and well in advance of Election Day.

21. There are multiple steps along the way when a voter may inadvertently misstep—or may be burdened by forces beyond their control—that may thwart their attempt to successfully register or vote by mail absentee. These risks are present even in ordinary times, but they are significantly exacerbated during the pandemic for multiple reasons.

i. Voter Registration in New Hampshire

22. New Hampshire has historically mandated that all but a very narrow classification of voter must register to vote in person. The pandemic has changed this regime slightly, as discussed below, however, no matter how a voter registers, they must do so any time they move to a new town or ward. RSA 654:8-a.

(a) New Hampshire’s voter registration regime was designed to support and strongly favors in-person voter registration.

23. Historically, the vast majority of New Hampshire voters have registered to vote in person.

24. Under New Hampshire law, there are three ways to register to vote in person: (1) at their town clerk’s office during normal business hours, RSA 654:8; (2) with the Supervisors of the Checklist (the “Supervisors”), either at a special session for correction of the voter checklist, which takes place six to thirteen days before Election Day, or at an additional session which the

Supervisors may schedule at their discretion, RSA 654:11, 654:27; or (3) at their polling place on Election Day (i.e., same day registration), RSA 654:7-a.

25. The most popular means of registering to vote for New Hampshire voters is in person on Election Day using same day registration.

(b) Absentee voter registration by mail (i.e., not in person) is strictly limited and entails navigating multiple requirements not imposed on in-person registrants.

26. New Hampshire allows for a limited exception to in-person registration, but only for voters who are unable to register to vote in person due to a disability or temporary absence. Those voters are permitted to register absentee by mail (the “disability exception”). RSA 654:16.

27. Until December 31, 2020, the disability exception will also apply to voters who are concerned about COVID-19. H.B. 1266 (2020); *see also* Mem. from William M. Gardner, Secretary of State and Gordon J. MacDonald, Attorney General, on Absentee Voter Registration, Voter Registration, and Change to Undeclared, at 1 (Jun. 3, 2020) (hereinafter “Joint Memorandum”).

(1) The Absentee Registration Process

28. To register absentee, voters must first obtain an Absentee Registration Packet—which includes registration instructions, a Voter Registration Form, and an appropriate Absentee Registration Affidavit—by contacting their city or town clerk’s office.¹ RSA 654:16.

¹ There is no general absentee registration form available online from the Secretary unless a voter qualifies as a Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) voter under 52 U.S.C. §§ 20301–20310. In general, UOCAVA voters are members of the military or New Hampshire residents temporarily living overseas.

29. Each individual clerk's office authorizes a different method for requesting an Absentee Registration Packet. Some allow requests via fax, phone, or email, for example, while others limit requests to mail or in-person requests. A voter must contact the clerk's office or visit the clerk's website to determine the method for requesting an Absentee Registration Packet.

30. While voters are statutorily allowed to request an Absentee Registration Packet from the Secretary's Office, *see* RSA 654:16, the Secretary's registration webpage directs voters to their town clerk's office and does not provide a practical way to access the Registration Packet from the "Register to Vote" page of the website or direct them to an individual at the Secretary's Office who can provide the requested information. *See* Register to Vote, New Hampshire Dept. of State, <https://sos.nh.gov/elections/voters/register-to-vote/absentee/>.

31. Once a voter receives the Absentee Registration Packet from the town clerk, they must then complete it.

32. *First*, the voter fills out an Absentee Registration Affidavit where the voter must swear that they are eligible to vote and have a qualifying reason to register absentee, i.e., temporary absence or disability (including, until December 31, 2020, concern for COVID-19) such that the registrant is unable to appear before the Supervisors. RSA 654:17. The Absentee Registration Affidavit is signed under penalty of voter fraud, *id.*, and as discussed in more detail below, must be signed and witnessed, and accompanied by copies of documentation of domicile and identity.

33. *Second*, absentee registrants must also complete the standard Voter Registration Form, which is required of absentee and in-person voters alike. RSA 654:19. To complete that form, the applicant must provide much of the same information required by the Absentee Registration Affidavit, including his or her name, address, and information about the voter's domicile. *See* RSA 654:7.

34. Once a voter receives and completes an Absentee Registration Packet, they must return the completed, signed and witnessed affidavit, voter registration form, and the copies of documents showing qualifying evidence of identity and domicile to their town or city clerk by mail. RSA 654:17, 654:19; “2020 Absentee Voter Registration Requirements and Instructions,” NEW HAMPSHIRE SECRETARY OF STATE, available at: <https://sos.nh.gov/media/rrser2lr/covid-19-absentee-voter-registration-instructions.pdf>.

35. The application is then forwarded to the Supervisors, who determine by majority vote whether the applicant is qualified to vote in the city or town. RSA 654:11. This eligibility determination is made by the Supervisors at their meeting 6 to 13 days before the election, unless a prior meeting is held voluntarily. RSA 654:9, 654:11, 654:27.

36. Even in normal times, New Hampshire’s multistep Absentee Registration Process imposes a substantial burden on all New Hampshire voters by increasing the transaction costs of registering absentee by mail. As Select Committee member Tom Sherman explained, “the current absentee registration process is untenable, especially for people living alone.”

37. In the context of the pandemic, where in person contact is limited, town and city clerk’s offices operate on limited schedules if at all, and mail is significantly delayed due to budget cuts and operational changes at USPS, *see infra* ¶ 84, the opaque process of requesting an Absentee Registration Packet, combined with the multistep process of receiving the registration packet, completing it, and mailing it back, significantly burdens all voters and risks severe delays in the registration and, eventually, voting process that are likely to lead to disenfranchisement.

(2) The Absentee Documentation Requirement

38. When completing the Absentee Registration Affidavit, a voter must attest that they have enclosed proof of their “identity and domicile or shall send a photograph or photocopy of that proof to [their] clerk from the following email address: _____.” RSA 654:17.

39. This Documentation Requirement can only be satisfied through submission of: “(a) a copy of a current and valid New Hampshire driver’s license or an armed services identification or other photo identification issued by the United States government that shows the registrant’s name and address; or (b) a copy of a current and valid photo identification and a copy of a current utility bill, bank statement, government check, paycheck, other government document that shows the registrant’s name and address, or a letter from the administrator of a nursing home or similar facility affirming that they are a resident of that facility that was provided to them at their request pursuant to the administrator’s duty to provide such a letter upon their request.” *Id.*

40. Even though all voters registering absentee must sign and submit the Absentee Registration Affidavit under penalty of voter fraud, unlike in-person registrants, who are also technically subject to the Documentation Requirement, they have no option to complete an affidavit to establish their identity and domicile instead of producing copies of the documents described above. Rather, absentee registrants are denied the affidavit option to satisfy the Documentation Requirement and must submit copies of the required documentation to register to vote absentee.

41. If the registrant has no means of copying their documentation, they may contact the clerk, who is “encouraged” to “view and assess the documents via any mutually convenient on-line meeting technology,” thereby requiring that the voter have a computer and Internet access to complete their registration. Joint Memorandum at 4.

42. If the registrant does not have any documentation, they may seek accommodation from the town or city clerk's office for an in-person meeting—which the clerk may grant if they “choose”—at an outdoor or other agreed upon location utilizing personal protective equipment or through a vehicle window to sign the Qualified Voter Affidavit or Domicile Affidavit. *Id.* at 3-5. This in-person meeting effectively changes their registration from an absentee registration to an in-person registration. *Id.* None of these socially distant accommodations are required by the State, they are merely suggested or encouraged.

43. For a registrant to comply with the application's instructions in a way that is consistent with social distancing guidelines, the registrant must have the appropriate documentation and must either own or have access to a photocopier, printer, or Internet access to submit documentation. If the registrant does not have access to these things, they must travel to a business or other facility that does, potentially paying transactional fees to do so and risking exposure to COVID-19.

44. Would-be voters who lack the accepted documentation are prohibited from registering to vote absentee, instead, they must register in person with the clerk in order to vote.

45. The Documentation Requirement imposes particularly severe burdens on New Hampshire's homeless citizens and students who may not have appropriate identification, leases, or other acceptable documentation of identity or domicile even in ordinary times. *See League of Women Voters of New Hampshire*, 2020 WL 4343486, at *14.

46. In the present pandemic, however, this barrier to entry is far worse because many places where a voter might be able to obtain acceptable documentation (e.g., a New Hampshire photo ID from the Department of Motor Vehicles or a letter documenting residency from their

school), are currently closed, by appointment only, or operating at highly reduced and inconsistent hours.

47. New Hampshire's elderly citizens and those with ambulatory disabilities—who New Hampshire has guaranteed the right not just to register, but to do so easily—and those with co-morbidities that make them more susceptible to severe outcomes should they contract the virus are further burdened, because leaving their homes to attempt to obtain such documentation itself poses potentially deadly risks to their health.

48. For those temporarily located out of state or outside of their typical voting jurisdiction, the Documentation Requirement may prove insurmountable. Traveling back to New Hampshire during the pandemic may be unsafe, unreliable, and inadvisable.

49. Young voters in particular, many of whom are more likely to be away from the jurisdictions in which they vote indefinitely as many New Hampshire colleges are starting the school year online, are particularly vulnerable to total disenfranchisement under this regime.

50. The purported accommodations provided for those with COVID-19 concerns cannot overcome these risks. First, they are entirely optional for election officials, and thus may not be available for voters at all. Second, in many cases they would force voters to engage in the very in-person contact that they are seeking to avoid by voting absentee, subjecting them to great risk and forcing them to make an unconscionable choice between exercising their fundamental right to vote and their health. Finally, even those in-person options will not help voters who have been displaced by COVID-19 and cannot safely return to the jurisdiction in which they vote to satisfy these burdensome requirements.

(3) The Absentee Witness Requirement

51. Voters who register using the Absentee Registration Affidavit must also have a witness observe them and sign the Affidavit.

52. The witness must swear or affirm, also under penalties of voter fraud, that the voter has “satisfied me as to his or her identity, signed the foregoing affidavit in my presence, and did before me swear to (or affirm) the truth of the statements therein contained.” RSA 654:17.

53. The Witness Requirement can be met “from a socially appropriate distance of 6 feet or more or through a window[,]” in a procedure where the document is left in a place where the witness can approach and, in some cases, take the entire packet to mail the documents to the clerk’s office themselves. Joint Memorandum, *supra* ¶ 27, at 2. If a registrant determines that they are unable to obtain a witness, they may contact the clerk, who is “encouraged” to determine whether use of a web-video session to witness the signing of documents is practical. *Id.* at 4. If no practical alternative is available, the voter may arrange to meet the clerk in person. *Id.*

54. Even with these suggested social distancing accommodations (which, no clerk is required to provide), the Witness Requirement adds considerable barriers to registering by mail, particularly for disabled and elderly persons—precisely the individuals who the Absentee Registration Process is supposed to serve and, indeed, to provide “easy” access to registration.

55. The Witness Requirement demands that voters find, communicate with, and meet with a person eligible to serve as their witness.

56. For those with significant illnesses, the more than 77,643 persons in the community with an ambulatory disability, and the more than 146,470 persons who live alone (including at least 73,919 seniors), this is challenging even in ordinary times.

57. In the current pandemic, as more voters stay in their homes to protect their health and the health of their family members, these burdens only increase.

58. And voters who live alone and have disabilities are even less likely to be able to take the necessary risks in order to find a witness to satisfy this requirement as they are, according to the Centers for Disease Control (“CDC”), more likely to have underlying conditions that increase the risk of severe illness or death if exposed to COVID-19.

59. The proposed social distancing accommodations do not alleviate these burdens as they are optional for clerks and, even where they are offered or available, they still require individuals to locate a witness—a significant transactional cost in and of itself—and even if they can find one, jump through significant hoops simply to obtain the signature.

60. In addition, more than 13% of households in New Hampshire do not have a broadband internet subscription, foreclosing some forms of accommodation available from clerks. See “Quickfacts, New Hampshire,” UNITED STATES CENSUS BUREAU, available at <https://www.census.gov/quickfacts/fact/table/NH/COM100218>.

(ii) New Hampshire’s imposes several severe burdens on the process of absentee voting itself that threaten to disenfranchise thousands of lawful voters, particularly in the current pandemic.

61. The Select Committee unanimously found that New Hampshire’s: “absentee process can be confusing, error-prone, and sometimes overwhelming.”

62. New Hampshire allows absentee voting only where voters attest, under penalty of voter fraud, that they will be unable to appear on Election Day due to absence, religious observance, disability, or an employment obligation.²

² The form also includes an option for if the National Weather Service has issued a winter storm warning, blizzard warning, or ice storm warning for election day applicable to the voter’s place of domicile. This provision was temporarily struck by HB1266, to be replaced only if relevant.

63. Until December 31, 2020, voters will also be allowed to request an absentee ballot for a disability where they seek to vote absentee due to “concern for the novel coronavirus (COVID-19).” H.B. 1266-III(2); Joint Memorandum at 1.

(a) The Absentee Ballot Application

64. Those voters who seek to vote absentee due to one of the reasons outlined above, must request an Absentee Ballot Application Form from their city or town clerk or the Secretary of State. RSA 657:6. The Secretary’s Office provides a link to this application directly on its website. See Absentee Ballots, New Hampshire Dept. of State, <https://sos.nh.gov/media/rs0ly4xu/absentee-ballot-app-8-20-covid.pdf>.

65. While the absentee ballot application includes an option to simultaneously request registration forms, *see* RSA 657:4, as Select Committee member Tom Sherman noted, this part of the process is not entirely clear and “[p]eople might logically think that they must do one before the other: register, then request an absentee ballot,” which will necessarily slow down the absentee voting process for numerous new registrants in New Hampshire.

66. Once a voter receives an Absentee Ballot Application Form, they must complete it, asserting under threat of criminal penalty that they meet one of the qualifications to vote absentee, and mail it or deliver it to the clerk’s office. RSA 657:4, 657:17.

67. Upon receipt of a properly executed Absentee Ballot Application Form, the clerk must ascertain whether the applicant is already on the checklist of the town or city. RSA 67:12-13. After verifying an applicant’s eligibility to receive an absentee ballot by referencing the checklist (RSA 657:12, 654:13), the city or town clerk shall transmit the absentee ballot package (constituting the ballot and accompanying affidavits) by mail or deliver it personally or via a

deputized agent to the voter.³ RSA 657:15. If the applicant is not on the checklist, the clerk must refuse to certify the application and provide the applicant with an absentee ballot package as well as the Absentee Registration Package and a notice that the ballot will not be counted unless the applicant submits the proper required documents to register.

68. Once the voter receives their absentee ballot package, they (or a person assisting them due to a blindness or disability) must mark their ballot and complete the appropriate accompanying affidavit, which again asserts under penalty of voter fraud that they are eligible to vote absentee. RSA 657:7, 657:17.

(b) Absentee Postage Requirement

69. New Hampshire requires voters who return their ballots by mail to obtain and pay for their own postage. *See* State of New Hampshire, Instructions for State Primary or General Election, at 1 (2020), <https://sos.nh.gov/media/xx1n4qjy/2020-mail-primary-or-general-absentee-ballot-instructions-7-20.pdf> (“Affix postage and mail the larger outer envelope to the clerk in the city or town in which you are entitled to vote.”).

70. The Absentee Postage Requirement imposes both monetary and transaction costs that bear most heavily on individuals who are least likely to be able to overcome them.⁴ These costs are such that even the Select Committee recommended that New Hampshire pay for the cost

³ Absentee ballots may be transmitted to UOCAVA voters by email. RSA 657:15.

⁴ New Hampshire’s imposition of the Postage Requirement is not spread equally among its voters. UOCAVA voters need not pay for postage to mail their completed absentee ballots. *See Election Mail*, U.S. Postal Serv., https://about.usps.com/postal-bulletin/2020/pb22539/html/cover_006.htm.

of return postage from federal funds. To date, neither the General Court nor the Secretary has done so.

71. In this digital era, many voters do not regularly keep postage stamps in their homes, and therefore must visit a post office or other essential business to obtain the correct postage.

72. Purchasing a book of 20 stamps online will cost voters \$11 plus time and cost of shipping—an expense and delay that could be cost-prohibitive for individuals with lower incomes or a short timeline, posing a significant hurdle to returning the ballot and voting.

73. The amount of postage required for a mail ballot is also not readily apparent to voters. Absentee ballots are generally a non-standard size, include two envelopes, and have varying weight depending on the number of races on the ballot. *See* RSA 657:17. As a result, even where a voter has stamps, mailing their ballot may still necessitate a trip to the post office to weigh the envelope and determine the proper amount of postage to affix.

74. For elderly voters, low income voters, voters with disabilities, voters who live far from a post office, voters with limited access to transportation, or voters who are immunocompromised or have other high-risk factors for COVID-19, the Absentee Postage Requirement may very well deter them from voting, because any trip outside the home poses additional burdens and costs, as well as grave health and safety risks.

75. Extra time spent acquiring postage or inquiring about the amount of postage needed also increases the transaction cost of voting, slowing down the voting process and making the voter more likely to mail the ballot later in the election cycle. In turn, this places these voters at heightened risk of their absentee ballot arriving after the Election Day Receipt Deadline.

(c) Election Day Receipt Deadline

76. New Hampshire law rejects all absentee ballots that are not received by 5:00 p.m. on Election Day, with only two limited exceptions: (1) votes returned, pursuant to emergency circumstances, by emergency services workers between 5:00 p.m. and the closing of the polls, RSA 657:21-a (V); and (2) instances where a voter appears at the polling place prior to the closing of the polls and declares under oath that they are unable to access the polling place due to a disability; at which time such voter shall receive the required documents outside the “guardrail” and the 5:00 p.m. Election Day Receipt Deadline shall not apply. *Id.* § 659:20-a.

77. Until December 31, 2020, voters who “due to extenuating circumstances under Covid-19 [are] attempting but unable to access the polling place on the day of an election may follow the provisions set forth in” (2) above. *See* H.B. 1266, Sec. 1-III. Notably, to vote absentee after 5:00 p.m., these voters are required to appear at the polling place prior to the closing of the polls, contact the moderator, and then declare under oath that they cannot enter the polling location due to a disability. RSA 659:20-a. For those who have already completed an absentee ballot and are seeking simply to drop it off, they are unable to do so unless they follow this procedure, undergoing additional steps to cast the ballot that they have already completed, or they vote in person, *see* August 19 Mem. on Election Operations during the Public Health Crisis.

78. But for these limited exceptions, ballots that arrive after the Election Day Receipt Deadline—regardless of whether they were completed and mailed by the voter prior to or on Election Day—are not counted.

79. To make matters worse, the arbitrary 5:00 p.m. deadline is two hours before the closing of polling places. RSA 659:4. Some polling places may even remain open past 7:00 p.m. *See* RSA 659:6. In other words, the Deadline is counterintuitively *earlier* than when polling places close. Therefore, some absentee voters will face arbitrary disenfranchisement if their ballots are

received in the window of time between the Deadline and the polls closing—even though they would be eligible to vote in person during that time.

80. In 2018 alone, half of the absentee ballots rejected in New Hampshire were rejected simply because they arrived after the Election Day Receipt Deadline, disenfranchising hundreds of voters.

81. Many voters are unaware of the Election Day Receipt Deadline or how to ensure their ballots arrive by the Deadline.

82. Voters are also left without clear guidance as to how to comply with the Deadline. Many local election authorities neglect to advise voters as to how many days before Election Day they should mail in their ballots in order to avoid being disenfranchised by the Deadline. For example, the City of Exeter merely suggests that voters “should allow enough time for the Clerk to receive the written request, for the post office to deliver the ballot, and for the voter to mail that ballot back to the City Clerk in time for the election,” without providing any suggested time period at all. Similarly, the town of Durham recommends voters “allow[] enough time for our staff to receive the request, for us to send the ballot to you and for you to get it back to us to be processed,” but provides no guidance on actual timing. And neither Manchester nor Hanover provide *any* information to its voters about when to mail in their ballots. Defendants, meanwhile, recommend mailing a completed ballot two weeks before election day so that it arrives by the 5:00 p.m. Deadline.

83. Yet, at the same time that Defendants are now asserting that voters must mail their ballots back at least two weeks before election day in order to avoid disenfranchisement, New Hampshire permits voters to request an absentee ballot (and clerks may respond to such requests) up until 5:00 p.m. on the day before the election. RSA 657:15.

84. USPS has conceded recently that, under its current operating conditions, New Hampshire's system is designed to fail. A July 7, 2020 internal management alert issued by the USPS Inspector General specifically identifies New Hampshire as a "high risk" state whose request deadline "do[es] not provide sufficient time for election offices to generate a ballot and for the Postal Service to process and deliver the ballots to voters before the election." USPS states that its "operational capability" for first-class mail is 2 to 5 days, but that it "cannot guarantee a specific delivery date or alter standards to comport with individual state election law."

85. Even before the pandemic, mail service in New Hampshire could be subject to delay or error, in part due to budget issues and the closure of processing facilities and post offices. According to Select Committee member Kate Hanna, "[i]n New Hampshire, we've seen at least one instance of an absentee ballot taking 30 days or more to arrive from postmark--and that was in the pre-covid era."

86. These warnings are particularly important because, under New Hampshire's current elections regime, multiple mailings are required between the voter and the clerk's office for a voter to vote absentee, each leg of which could result in disenfranchisement, notwithstanding a voter's very best efforts.

87. Even in the case of a voter who is already registered and simply needs to request an absentee ballot, they must first request, and then complete and transmit an Absentee Ballot Application Form to their city or town clerk via mail, and then receive and return their actual

absentee ballot via mail. This process alone could take upwards of three weeks even assuming that everything goes well with no delays.⁵

88. For unregistered voters dependent on absentee registration, the process could take nearly two months, as the voter must transmit a registration request (in some cases by mail), receive a registration packet by mail, and return the registration packet by mail. The voter must then wait for the registration to be processed (of which they receive no affirmative notice).

89. While voters can request registration forms at the same time that they request an absentee ballot via an Absentee Ballot Request Form, to do so the voter must understand that they may register absentee and request an absentee ballot simultaneously. For a new absentee registrant and voter unfamiliar with the system, they are likely to mistakenly believe that they must first wait for their registration to be processed to then apply for an absentee ballot as Select Committee member Sherman noted. *See supra* ¶ 65.

90. These scenarios for the time that it can take to complete the absentee balloting process are more than mere hypotheticals as many clerks are encouraging transactions by mail rather than in person, and outside of UOCAVA voters, email transmission of absentee ballots is limited.

91. Indeed, mailing absentee ballots is required in many New Hampshire towns and cities as several clerks' offices are closed through the November General Election and will not accept any ballots delivered in person by the voter or an authorized delivery agent, *see infra*,

⁵ Some clerk's offices do accept applications and application requests via email and fax, but this is not uniform throughout New Hampshire. All jurisdictions accept requests submitted in person, but that does not help the voter who is displaced because of COVID-19 or who fears contracting or spreading the virus, and is further complicated as the pandemic has caused clerks' offices broadly to reduce their office hours and in some cases to close altogether.

thereby requiring that the entire absentee process take place through the postal service and placing voters' ballots at further risk of arriving after the Election Day Receipt Deadline. *See, e.g.*, "Absentee Ballots and Voting," CITY OF LEBANON, <https://lebanonnh.gov/564/Absentee-Ballots-Voting> ("We are not open to the public, so please disregard sections of this site that say to appear in person." and "Please note that the City Clerk's office is currently closed due to COVID-19 concerns and is not anticipated to reopen until November 16, 2020"); "Town Clerk's Office," CITY OF SANDWICH, http://www.sandwichnh.org/departments/town_clerks_office/index.php ("[u]ntil further notice the Town Hall building and the Town Clerk/Tax Collector's Office will be closed to the public" and voter registration will be available by appointment only, on Wednesdays) (last accessed August 3, 2020); "Elections," TOWN OF HAMPTON, <https://www.hamptonnh.gov/284/Elections>.

92. For those voters who seek to avoid potentially being disenfranchised by the Election Day Receipt Deadline by dropping their ballot off in person on Election Day, but are unable to arrive at the polling location before 5:00 p.m., they are deprived of their right to safely cast their ballot absentee. Rather, they must risk their health by undergoing additional steps to cast their vote outside the "guardrail," *see supra* ¶¶ 76-77, or they are forced to vote in person, risking their health.

93. Accordingly, New Hampshire voters face a substantial risk of being burdened and disenfranchised in November as a result of the Election Day Receipt Deadline, many despite doing everything that any reasonable voter could possibly be expected to do in order to attempt to register and vote absentee.

(d) Voter Assistance Ban

94. Making matters worse, New Hampshire broadly prohibits voters from receiving third-party assistance in returning their voted ballots to elections officials, outside of a limited class of individuals.

95. Specifically, New Hampshire only permits voters to obtain assistance in delivering their ballots from family members, nursing home and elder care facility administrators, and—for disabled voters only—a person who signs the absentee ballot affidavit may be a delivery agent (though they are limited to delivering ballots for four voters). RSA 657:17.

96. There is no specific indication in the guidance issued by the Secretary’s Office regarding ballot delivery that individuals concerned with COVID-19 are considered persons with disabilities for the purpose of these exceptions.⁶

97. As a result, a substantial number of voters, including those among the over 146,470 New Hampshire citizens who live alone (including 60,736 over the age of 65), are cut off from any assistance with delivering their ballot.

98. These restrictions also hit the 13% of adults in New Hampshire who have a disability exceptionally hard. In 2012, “close to one-tenth of people with disabilities who voted by mail reported having difficulties in doing so, saying they needed assistance in filling out or sending the ballot.” Lisa Schur, et al., *Accessible Democracy: Reducing Voting Obstacles for People with Disabilities*, 14 Election Law J. 60, 63 (2015). Nevertheless, New Hampshire law restricts these individuals from receiving assistance from anyone of their choice, relegating them only to limited categories of individuals.

⁶ The interpretation of disability provided by Defendants only references the use of “physical disability” in RSA 654:16, 17, and 657:1. There is no reference to the interpretation of the term “disability” in RSA 657:17.

99. As community members explained to the Select Committee, lifting the Voter Assistance Ban “would ease the process [of absentee voting], especially for older adults and those with disabilities, if third-parties were allowed to drop off ballots.”

100. The Ban also prohibits organizations like Plaintiff AFT from exercising their First Amendment rights to assist voters, and particularly, vulnerable populations such as disabled voters, elderly voters, and voters with limited access to mail or transportation, and voters with inflexible schedules, as well as voters who receive their absentee ballots with insufficient time to return them by mail.

101. New Hampshire’s procedures make the Voter Assistance Ban particularly burdensome considering the multiple mailings that the absentee procedure requires (and more if registration is included), and the multiday delivery time between mailings. It is highly likely that voters may not have a signed and sealed ballot until close to Election Day.

102. Moreover, voters who have received their ballots too late to mail, late-deciders, voters with poor mail service, voters who had to register, or voters delayed—through no fault of their own—by an overburdened clerk’s office operating on limited or reduced hours, may have no other option to turn in their ballot on time outside of a delivery agent, making the impact of the Voter Assistance Ban particularly severe.

(e) Drop Box Restrictions

103. The Secretary and Attorney General’s August 19 Memorandum on Election Operations during the Public Health Crisis imposes strict limitations on absentee ballot drop boxes by limiting the locations of drop boxes available to voters before Election Day to only the town or city clerk’s office and requiring that drop boxes be “staffed by a properly trained election official throughout the course of its use.”

104. As a result, voters face significant burdens returning their absentee ballots. Indeed, requiring a person to staff each drop box defeats one of the purposes of establishing drop boxes during the global pandemic—contactless delivery. Voters reasonably fearing contracting or spreading COVID-19 will be deterred from using a drop box if a staff member is required to be present. As a result, these voters are left with mail delivery as their only option for contactless delivery, meaning that they are significantly more likely to face disenfranchisement due to the Election Day Receipt Deadline.

105. Likewise, for those voters who are able to risk some contact to deliver their ballot, the limited locations of drop boxes mean that some voters will have to travel longer distances to reach the only drop box in their city or town, disproportionately burdening low-income voters, rural voters, voters with disabilities, elderly voters, and voters without access to transportation, among others. When voters cannot reach these locations due to transportation difficulties, they are again relegated to mail delivery and likely mail delays and, again, are far more susceptible to disenfranchisement due to the Election Day Receipt Deadline.

106. Finally, the confusion that the limitations on drop boxes introduces into the absentee voting system regarding after hours drop off at the town clerk's office also places a significant burden on voters and, particularly so if clerk's, pursuant to this rule, reject such ballots as the rule seemingly requires. Accordingly, voters who drop their ballots off at the clerk's office after hours are potentially subject to disenfranchisement or, at a minimum, may have their absentee voting process further delayed as the clerk attempts to contact them to have them submit a new ballot all over again.

B. The novel coronavirus pandemic has upended daily life and exacerbates the burdens that the Challenged Laws place on voters.

107. COVID-19, the severe and sometimes deadly disease caused by the novel coronavirus, has been spreading through New Hampshire for months.

108. To date, the State has reported over 7,200 cases of COVID-19, and at least 430 deaths, and the virus has spread to every county in the state. Many public buildings, such as those that house the town and city clerks' offices, remain closed to the public and some have announced that they will not reopen until after the November General Election. *See supra* ¶ 91.

109. Governor Sununu has announced that a "second wave" is anticipated for the fall, meaning that New Hampshire is likely to see a spike in cases in the months during and before the upcoming November Elections.

110. The Commissioner of the Department of Health and Human Services of New Hampshire has announced she anticipates the second wave will be just as severe, if not more severe, than what the state has already experienced.

111. There is thus little question that the spread of the virus will continue this fall and during New Hampshire's November general election.

112. Even if the pandemic is not at its peak when the November election is held, CDC guidelines recommend that individuals still take meaningful social distancing measures even if the threat of community transmission of COVID-19 in the area is only "minimal."

113. This guidance is necessitated by the reality that asymptomatic carriers appear to be contributing significantly to community spread (indeed, 30% of infected individuals are estimated to be asymptomatic, yet are capable of transmitting the virus as effectively as those with symptoms), and until there is a vaccine or "herd immunity" Americans will remain at serious risk of contracting the virus, likely at least until—and maybe even through—2021.

114. The Secretary recognized as much by convening the Select Committee specifically to make recommendations on voting because “the COVID-19 pandemic will remain a factor impacting the process of voter registration and casting ballots in both 2020 elections.”

115. The Select Committee concluded that as long as COVID-19 continues “absentee registration and voting represents the lowest health risk to municipal officials, election workers and voters.”

116. This finding is in line with the CDC which, anticipating difficulties in conducting elections during the COVID-19 crisis, recommends that jurisdictions reduce methods of voting that lead to direct contact with other voters or poll workers.

117. Other federal, state, and local officials have come to the same realization. Congress, for example, in the early days of the pandemic authorized \$400 million to help states transition to voting-by-mail.

118. The experiences of states that have held primary elections since the onset of the pandemic have also demonstrated that these concerns are warranted.

119. In Wisconsin, Georgia, Kentucky, and Florida, for example, voters clad in masks and gloves waited for hours to cast their ballots due to pandemic-related poll worker shortages and location closures that required election officials to consolidate polling places, cramming thousands of voters into woefully inadequate sites. In New York, polls opened late, public transportation was closed, and poll sites were moved at the last minute.

120. At the same time, absentee ballots requests have surged. For instance, this spring in Wisconsin, 62 percent of voters voted absentee as compared to 5.5 percent in the 2018 general election; in Georgia, 57 percent of voters voted absentee, as compared to 5.6 percent in the 2018 general; in Nebraska, 84 percent of voters voted absentee, as compared to 24 percent in the 2018

general; and in Kentucky, 80 percent of voters voted absentee, as compared to 1.5 percent in the 2018 general.

121. This increased interest in voting by mail, combined with social distancing efforts and decreases in available elections staff, have placed a significant strain on local election boards, many of which have struggled to process the increasing volume of absentee ballot requests, resulting in systemic failures where countless voters have not received their timely requested ballots in time for them to be returned—or even delivered to them—by Election Day receipt deadlines.

122. In Wisconsin this crisis ultimately necessitated federal litigation that reached the U.S. Supreme Court and resulted in the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they were received within six days of Election Day. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1208 (2020). But for this judicial intervention, 80,000 ballots that were postmarked by the deadline would not have been counted.

123. This surge in absentee voting is hardly surprising; evidence is mounting that voting in person increases the risk of contracting COVID-19. *See People First of Ala. v. Sec’y of State*, No. 20-12184, 2020 WL 3478093, at *3 (11th Cir. June 25, 2020) (citing death and infection of poll workers and voters who voted in person in elections across the country since pandemic began).

124. The risk of transmission caused by in-person voting processes is particularly heightened in New Hampshire, where the system is largely designed for in-person registration and voting and necessitates multiple lengthy in-person interactions for nearly all voters to register and vote, while options for absentee registration and voting are limited.

125. The Select Committee predicts that New Hampshire will similarly experience an exponential increase in absentee voting, anticipating that 60-85% of all ballots cast in the upcoming elections will be cast absentee, a massive shift from the less than 10% of mail ballots cast in previous years.

126. The severity of burdens the Challenged Laws impose are significantly exacerbated by the present conditions and a massive shift to absentee registration and voting under New Hampshire's absentee systems.

127. An increase in absentee registration and voting in the upcoming elections also means that a significant number of voters who typically register and vote in person will be registering and voting by mail, and many of those will be doing so for the first time. These voters differ from current absentee voters and registrants in important respects that make them even more likely to be burdened by the Challenged Laws.

128. For example, many voters who switch to absentee registration and voting will be doing so precisely because they are immunocompromised, have conditions placing them at high risk for COVID-19, or are generally concerned about their health or the health of their family and friends. As such, they will be far less likely and less able to venture out to find a witness to sign their ballot if they do not already have a ready witness in their home.

129. Over 146,470 people in New Hampshire that live alone—60,736 of whom are 65-years-old and over, the age group that is most at risk from COVID-19. Moreover, at least 67,443 New Hampshire citizens have no spouse present, living with children under the age of 18. All of these voters will face the “excruciating dilemma” between whether to “either venture into public spaces, contrary to public directives and health guidelines or stay at home and lose the

opportunity to vote.” *Democratic Natl. Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1320819, at *5 (W.D. Wis. Mar. 20, 2020).

130. Even if individuals do take the risk to venture out and are able to find a witness, it is unlikely that the certification can be signed safely while maintaining social distancing standards as it requires at least some in-person exchange of the Absentee Voter Registration Affidavit. Studies have found that COVID-19 can remain on surfaces for several hours to days. Thus, merely exchanging the affidavit even where voters are able to maintain a six-foot distance is extremely risky.

131. Moreover, the optional social distancing accommodations even if provided are no safe harbor as they themselves require multiple, complicated steps or, in other instances, Internet access that many New Hampshire citizens simply do not have.

132. Similarly, the Documentation Requirement places a particularly severe burden on low-income voters, students, and elderly voters, many of whom do not own printers, scanners, or have Internet access to transmit images of their documents. Indeed, nearly eight percent of households in New Hampshire do not have a computer, and fourteen percent do not have broadband Internet access. *See supra* ¶ 60.

133. Likewise, for those who simply have no documents, their only option is to effectively register in-person, potentially subjecting themselves to COVID-19 if they are even able to register in this way, or leaving them completely disenfranchised if they are out-of-state or otherwise away from their voting jurisdiction or simply unable to arrange for in-person registration at all due to health conditions or concerns.

134. Even if a voter is able to overcome the burdens associated with absentee registration, the pandemic greatly exacerbates the burdens associated with absentee voting making them no less severe.

135. Severity of the burdens imposed by the Postage Requirement are particularly exacerbated under the present circumstances, when many New Hampshire voters are experiencing significant financial struggles due to the economic impact of COVID-19.

136. Before the pandemic, a voter with access to reliable transportation could go to the post office to buy stamps; today, when many voters who request an absentee ballot will be doing so because they have underlying conditions that put them at higher risk for severe complications from COVID-19, doing so could pose an equally severe threat to their health.

137. While the financial costs of purchasing stamps and traveling to the post office may seem trivial to some, at least 117,000 New Hampshire citizens have filed unemployment claims since the pandemic began.

138. Many New Hampshire citizens are counting every penny, and this additional burden, together with legitimate concerns about exposing themselves to the virus, is highly likely to cause widespread and unjustifiable disenfranchisement.

139. The Election Day Receipt Deadline is also certain to disenfranchise thousands more voters during November as absentee voting by mail skyrockets and as thousands more voters—many of whom will be unaware of the Election Day Receipt Deadline, or the steps or time required to comply with it—attempt to navigate the absentee by-mail voting process for the first time.

140. Voters transitioning to absentee voting from Election Day voting also tend to be “late deciders”; that is, they decide who they will vote for later in the election cycle. Because of

that, they are more likely to cast an absentee ballot at the end of the voting process with only a few days to go until Election Day.

141. These first-time absentee voters are less likely to be familiar with the Election Day Receipt Deadline, especially when many other mail deadlines in New Hampshire voter's lives are postmark related. *See, e.g.*, RSA 400-A:32-a (setting the deadline for "any report, claim, tax return, statement and other document, relative to tax matters, required or authorized to be filed with or any payment made to the state."); N.H. Code Admin. R. Fis 307.05 (c) (wildlife baiting permits awarded first come first served via a postmark deadline). As a result, they are also far more likely to be in the category of voters that USPS has identified as not having sufficient time for election offices to generate a ballot and for the Postal Service to process and deliver the ballots to voters before the election.

142. These risks are particularly salient given the anticipated increases in absentee turnout, as neither the clerks nor USPS will be able to process so many applications and requests in time to ensure no voters miss the Receipt Deadline.

143. As Select Committee member Kate Hanna acknowledged: "Because of the high volume of absentee ballot applications expected in 2020 and the short timelines between ballot finalization and the election, clerk's offices will be under immense pressure."

144. To make matters worse, USPS is facing a budget crisis, disruptions, and staffing shortages that may cause further delays in mail delivery. As a result, voters will be forced to choose between casting a vote very early, or risk being disenfranchised by the Receipt Deadline.

145. A USPS strategic communications specialist for the Northeast said only last month that COVID-19 furthers existing financial problems facing the Postal Service, and is "threatening

our ability to operate.” USPS says that it may not be able to make payroll and continue mail service uninterrupted past September without a financial relief package that may not arrive.

146. To make matters worse, given that the 5:00 p.m. Deadline is actually two hours *before* the polls close on Election Day, those voters who do not want to risk mailing their ballot and who instead seek to drop it off at their polling location are likely to face additional burdens if they arrive after 5:00 p.m., as they will then have to submit themselves to the process set out for a disabled voter or will have to vote in person.

147. These delays make “[t]he other historically best option, delivery in person to the city or town clerk’s office,” the most reliable place for voters to turn. “Absentee Voting Process,” Kate Hanna, NEW HAMPSHIRE SECRETARY OF STATE SELECT COMMITTEE ON 2020 EMERGENCY ELECTION SUPPORT, <https://sos.nh.gov/media/ctupyqjx/absentee-voting-process-plan-submitted-by-kate-hanna.pdf>. But this too is not only hazardous due to COVID-19, but marked with severe limitations due to the Voter Assistance Ban and Drop Box Restrictions and the limited, and in some cases non-existent, hours at town and city clerks’ offices.

148. The Voter Assistance Ban ensures that the many voters who do not have a delivery agent, will be forced to make the risky trip to the clerk’s office or polling location on Election Day. As Select Committee member Hanna made clear, for some voters, there will be no good options.

149. New Hampshire’s restrictive absentee voting system will cause voters—and especially first-time voters—to be much more likely to need assistance with delivering their ballots so that they can avoid the pitfalls that too often lead to rejection. In addition, voters who are at a high risk of severe illness or death if exposed to COVID-19 will be dependent on assistants to deliver their ballots if they are unable or unwilling to risk mail service delays, or if they receive their ballot too late for it to be mailed back.

150. Even under more normal circumstances, the Voter Assistance Ban can impose a severe burden on the right to vote that falls disproportionately on low-income, minority, and rural voters who generally have less access to postal service, live in areas lacking reliable access to public transportation and broadband internet, and live farther away from their clerk's office, as well as voters who receive their ballots too late to be sure that they will be delivered to their town clerk in time to be counted.

151. In the context of the current pandemic, the burdens imposed on the right to vote by the Voter Assistance Ban are both more severe and more likely to detrimentally impact a substantially larger number of voters. Simply put, it prohibits a crucial means of ensuring that voters are able to safely and successfully cast an absentee ballot.

152. But for the Voter Assistance Ban, Plaintiff AFT and its members could and would ensure that absentee voting is safe and reliable for many voters by collecting and timely returning voters' absentee ballots. And it is now more critical than ever that organizations such as Plaintiff AFT be allowed to help voters safely express themselves at the ballot box.

153. Likewise, New Hampshire's Drop Box Restrictions also remove a logical avenue of contactless delivery, a necessity for absentee voters during the pandemic, and restrict absentee ballot delivery to the limited hours and times that town and clerks' offices are open, if they are even open at all. Thus, these voters will have to rely on an unstable mail service to safely deliver their ballots and hope their absentee ballot arrives on time to be counted.

C. The State has little justification for the burdens that the Challenged Laws place on voters, and much less so in a global pandemic.

154. Even before the COVID-19 crisis, the State's interest in the Challenged Laws were thin. In the context of COVID-19, they cannot possibly outweigh the serious burdens that they impose on impacted voters' fundamental right to vote.

155. The State has little justification for failing to streamline the Absentee Registration Request Process by making the Absentee Registration Packet widely available online and directly available for download and completion from the Secretary's website or for issuing guidance or instructions that the city and town clerks should do the same on their websites.

156. Given the varied methods allowed for requests as well as varied hours of the clerk's offices as well as the considerable delays that mailing an Absentee Registration Packet adds to the Absentee Registration Process, providing the Absentee Registration Packet directly to voters for download reduces both the time and energy that clerks must expend when processing application requests and ensures that the process can move more quickly for voters, eliminating at least one step in the multistep transaction that voters must undergo to register to vote absentee, and placing most New Hampshire voters on equal footing for absentee requests no matter where they live.

157. Likewise, the State has no legitimate interest in Witness and Documentation Requirements. Voter fraud is virtually nonexistent in New Hampshire, and adequate protections are already in place to protect against even the perception of it. *See, e.g.*, RSA 659:34-I(a) (imposing criminal and civil penalties for anyone who "purposely or knowingly makes a false material statement regarding his or her qualifications as a voter," when registering to vote); RSA 666:1 (imposing criminal and civil penalties for violating election laws). Voters already attest, under penalty of voter fraud and on multiple forms, that they are who they say they are and are domiciled where they say they are domiciled. RSA 654:17. In fact, for in-person registrants, both the identity and domicile documentation requirements may be completed via affidavits, which are perfectly capable of ensuring election integrity and, indeed, have virtually no incidents of voter fraud associated with them.

158. The Documentation Requirement is also unjustifiable for another reason. Like virtually every other state in the country, and as required by the federal Help America Vote Act (“HAVA”), 52 U.S.C. § 21083(a)(1)(A), New Hampshire maintains a computerized statewide voter registration database that stores and manages the official list of registered voters in the state. HAVA requires that New Hampshire’s voter registration database is capable of sharing information with state motor vehicle and federal social security databases. *See id.* §§ 21083(a)(1)(A)(iv), (a)(5)(B). This enables the database to verify the identity of a mail-in registrant simply by matching their name, date of birth, and identification number from their voter registration form with the data in the state and federal databases. *See id.* §§ 21083(a)(5)(B), (b)(3)(B).

159. As a result, when a New Hampshire resident registers to vote and provides their New Hampshire driver’s license number or the last four digits of their social security number, New Hampshire already has procedures in place to verify their identity without any need to review a photocopy of an identity document. In many states, this is the process for voter identification without the additional steps that New Hampshire requires.

160. Similarly, for in-person registrants who register by completing a Domicile Affidavit, New Hampshire already has a process in place—like all other states that comply with HAVA—for sending out post cards to confirm a voter’s domicile, a process that can easily be applied to those voters who register via absentee.

161. Requiring New Hampshire residents to also provide a photocopy of identity and domicile documents when registering to vote is redundant and serves no purpose other than to impose burdens on registrants.

162. The Postage Requirement is similarly indefensible. Governments, including New Hampshire's, already provide postage to enable citizens to readily complete other government forms. For instance, New Hampshire mails postage prepaid inventory blanks to all persons and corporations known or believed to own taxable property in their towns and cities every year. RSA 74:45.

163. At least eighteen states currently provide prepaid postage for all absentee voters. A.R.S. § 16-542 (Arizona); Cal. Elect. Code § 3010 (California); 15 Del. Code § 5504 (Delaware); HRS § 11-182 (Hawaii); I.C. § 34-308 (Idaho); I.C.A. § 53.8 (Iowa) ; K.S.A. 25-433 (Kansas); MD Code, Election Law, § 9-310 (Maryland) ; M.S.A. § 203B.07 (Minnesota); V.A.M.S. 115.285 (Missouri); Nev. Rev. Stat. 293.323 (Nevada) ; N. M. Stat. Ann. § 1-6-8 (New Mexico); SB 861, 2019 (Oregon) ; R.I. Gen. Laws § 17-20-10 (Rhode Island); Va. Code § 24.2-706 (Virginia); RCWA 29A.40.091 (Washington); W. Va. Code, § 3-3-5 (West Virginia); W.S.A. 6.87 (Wisconsin). And South Carolina, has stipulated to providing prepaid postage for absentee voters for the November general election due to the ongoing public health crisis. Joint Stipulation Resolving Prepaid Postage Claims, *Middleton v. Andino*, Case No. 3:20-cv-1730-JMC (D.S.C. Jul. 8, 2020), ECF No. 58.

164. The State's only conceivable interest in the Postage Requirement is budgetary, but that cannot outweigh the severe burden the Postage Requirement imposes on the right to vote, particularly considering that New Hampshire received \$3.2 million from the federal government to use toward election administration in 2020. The Select Committee estimated that based on projected absentee turnout range of 60-85%, the cost of return postage for registration packets and ballots for the November Election would be between \$273,793 and \$414,578 and could be easily be paid for by the allotted federal funds.

165. The justifications for the Election Day Receipt Deadline also cannot hold water. While New Hampshire may set a reasonable deadline for receiving ballots to ensure the finality of election results, the Election Day Receipt Deadline is not reasonable. Voters do not reasonably expect that they must submit their ballots one or two weeks or more in advance of Election Day, especially where the last meeting of the supervisors is only 6-13 days before the election and voters may request absentee ballots up until Election Day.

166. The Election Day Receipt Deadline is also unnecessary to ensure that all ballots are received and counted within a reasonable time as New Hampshire law mandates neither a particular deadline for the canvass nor a particular time for public release of election results.

167. Moreover, New Hampshire already allows for instances of ballots being processed after the Deadline. *See, e.g.*, RSA 655:22; 657:21-a (ballots of emergency workers and persons with accessibility issues may be processed after Election Day). And the 5:00 p.m. cut-off is at least two hours *earlier* than the closing of polling places, meaning thousands of people will still be voting after the Deadline for absentee ballots has passed. RSA 659:4, 659:6. The State has no interest in maintaining two deadlines—one for absentee voters, and one for in-person voters—mere hours apart.

168. Indeed, the lack of justification for the Deadline is particularly stark here where it will also result in absentee voters who arrive at their polling location before 5:00 p.m. being able to simply drop-off their absentee ballots, but those who arrive at 5:01 p.m. will be forced to undergo the standard process for disabled voters to complete an absentee ballot on Election Day, *see supra* ¶¶ 76-77, essentially having to recomplete their ballot.

169. Likewise, New Hampshire would allow in-person voters who were already in line extended time to vote if problems beyond their control, like long lines or technical difficulties,

kept them from being able to vote before the polls closed. *See* RSA 659:26-a (allowing for extension of polling hours).

170. Voters disenfranchised by the Election Day Receipt Deadline are no different. These voters, who have already mailed their ballot before the close of the polls, are already in line. It is simply the USPS, delayed processing of their absentee ballot request, and New Hampshire's own laws regarding ballot requests and delivery that have kept their ballot from reaching the front of the queue before the Deadline.

171. The Voter Assistance Ban's burdens cannot be justified by any state interests. New Hampshire has no inherent interest—and certainly no compelling interest—in the Voter Assistance Ban given the lack of voter fraud in New Hampshire. As Governor Sununu has explained to the media: “[W]e have no evidence of voter fraud in this state.” “We have none. I’ve never seen a bit of actual evidence of it.”

172. Moreover, even if there were fraud, there are a myriad of protections in place that would better protect against any such actions. *See, e.g.*, RSA 659:34 (prohibiting wrongful voting), 666:1 (prohibiting offense against any provision of the laws relating to elections), 666:6 (prohibiting submission of false documents, names, or endorsements); *see supra* ¶ 149. Indeed, as Kate Hanna explained during the Select Committee meeting, “election fraud and undue influence is a crime.... If a malicious actor wanted to break the law and submit multiple illegal ballots, a third-party delivery prohibition would hardly stop such a person. The theoretical bad actor would simply drop the ballots at a mailbox instead of the clerk’s office.”

173. Finally, the Drop Box Restrictions’ burdens are not justified by any interests New Hampshire can articulate. *First*, the Restrictions are not mandated by any New Hampshire statute and they, in fact, are overly restrictive interpretations of state law. The plain language of New

Hampshire law allows voters or their delivery agents to deliver their ballots “to the city or town clerk *from whom it was received.*” RSA 657:17(1) (emphasis added). There is nothing in New Hampshire prohibiting the city or town clerk from designating additional absentee ballot drop boxes at locations other than the clerk’s office, such as at a library, school, or church, as an acceptable place for voters to return and clerks to receive absentee ballots. Indeed, if the law were really so restrictive, taken to its logical conclusion it would mean that only the city or town clerk could accept an absentee ballot, thereby making it illegal to hand an absentee ballot to a staff member in the office, which is plainly not the case.

174. Further, limiting the number of drop boxes available to voters and requiring an election official to monitor them advances no interest in administrative costs when the cost of drop boxes are insubstantial and, in fact, the cost of staffing a drop box site (e.g. hiring, training, and paying at least one election official per drop box) is costly. Moreover, the Restrictions do not combat the non-existent threat of voter fraud, as the drop boxes are locked, and any concerns about security can be addressed through less costly means, such as security cameras. In other important contexts, drop boxes need not be manned by a human being. *See, e.g.*, N.H. Sup. Ct. R. 26(1) (permitting a clerk of the court to provide a drop box for filing court documents).

175. Absent relief from this Court, the individual and cumulative impacts of the Challenged Laws will impose a severe burden on New Hampshire voters, deterring them from participating in the upcoming elections and disenfranchising them. If these laws stand, many New Hampshire voters will find themselves faced with the “excruciating dilemma”: “either venture into public spaces, contrary to public directives and health guidelines or stay at home and lose the opportunity to vote.” *Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1320819, at *5 (W.D. Wis. Mar. 20, 2020).

CAUSES OF ACTION

COUNT I

N.H. CONST. Pt. 1, art. XI

Undue Burden on the Right to Vote (All Challenged Laws Against All Defendants)

176. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Amended Complaint and the paragraphs in the counts below as though fully set forth herein.

177. “The right to vote is a fundamental right.” *Opinion of the Justices*, 191 A.3d 1245, 1256 (2018). The New Hampshire Constitution guarantees that “[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” N.H. Const. Pt. 1, Art. XI.

178. In determining the constitutionality of legislation affecting the right to vote, the court must weigh the character and magnitude of the asserted injury to the voting rights sought to be vindicated against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights. *Guare v. New Hampshire*, 167 N.H. 658, 663 (2015). When those rights are subjected to “severe” restrictions, the regulation “must withstand strict scrutiny to be constitutional,” and must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* When those rights are subjected to “unreasonable” restrictions, the State must “articulate specific, rather than abstract state interests,” and must explain “why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest set forth.” *Id.*

179. This test derives from the federal *Anderson Burdick* balancing test. In explicitly applying the *Anderson Burdick* test to state constitutional questions, the New Hampshire Supreme Court has held that the *Anderson Burdick* framework “properly considers the rights of voters under

Part I, Article 11 of the New Hampshire Constitution as well as the legislature’s right to regulate elections.” *Akins v. Sec’y of State*, 154 N.H. 67, 72 (2006). Under this framework, “[h]owever slight th[e] burden [on the right to vote] may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling op.) (quotation marks omitted). Moreover, a state may not justify practices that impinge upon fundamental rights by citing concerns about “administrative convenience.” *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

180. As discussed above, the Challenged Laws violate the New Hampshire Constitution because they create a severe burden on the fundamental right to vote for all New Hampshire voters during the pandemic by forcing them to make the unconscionable choice of risking their health and the health of their communities or exercising their fundamental right to vote, thereby requiring strict scrutiny review.

181. The Challenged Laws also severely and unreasonably burden the fundamental right to vote of students, low-income voters, voters with disabilities, and elderly or other voters at high-risk for COVID-19 like Plaintiff Wilke, in particular, all of these groups are also groups to whom Plaintiff AFT’s mission extends and many of whom are members of Plaintiff AFT’s organization, and who are particularly likely to lack either a ready witness or the required documentation to meet the Witness and Documentation Requirements for absentee registration, and/or are especially likely to be burdened by the cost of postage, disenfranchised by the arbitrary Election Day Receipt Deadline and lengthy Absentee Registration Request Process, be cut-off from assistance delivering their ballots due to the Voter Assistance Ban, and prevented from safe and accessible drop boxes due to the Drop Box Restrictions.

182. What is more, any burden imposed by the Challenged Laws is augmented by the complexity of New Hampshire's absentee registration and voting system, which requires multiple complicated steps that are not only hard to ascertain, but many of which, including New Hampshire's Absentee Registration Request Process, may be subject to severe and critical limitations given the related closures of town clerks' offices and other public facilities during the pandemic. Indeed, for disabled and elderly voters, for whom New Hampshire law requires the registration procedure be not just accessible, but easy, this complicated process—complete with the Witness and Documentation Requirements—is anything but, and the State has fallen far short of its constitutional requirements to these citizens. N.H. Const. Pt. 1, art. XI (“[v]oting registration . . . shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote.”).

183. The State cannot justify placing these burdens on New Hampshire Voters under any level of scrutiny. There are no government interests, let alone sufficiently weighty interests, that justify requiring New Hampshire voters to endure these burdens. This is doubly so during the ongoing health crisis where many voters will be unable to leave their home due to their health status or disability and will therefore be entirely disenfranchised if they are unable to register and vote absentee.

184. Thus, Defendants have deprived and will continue to deprive Plaintiffs and Plaintiff AFT's members and constituents of rights secured to them by the New Hampshire Constitution. Unless Plaintiffs are granted the relief requested herein, thousands of New Hampshire voters, including Plaintiffs and Plaintiff AFT's members and constituents, will suffer severe burdens on their right to vote as a result of the Challenged Laws in the upcoming elections, some to the point of complete disenfranchisement.

185. Because the Challenged Laws do not sufficiently support a state interest to justify the resulting burdens on the right to vote, they violate the New Hampshire Constitution.

COUNT II
N.H. Const. Pt. 1, art. II, XI
Violation on Prohibition on Poll Taxes and Other Taxes
(Postage Requirement Against Defendant Gardner)

186. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Amended Complaint and the paragraphs in the counts below as though fully set forth herein.

187. The New Hampshire Constitution provides: “The right to vote shall not be denied to any person because of the nonpayment of any tax.” N.H. Const. Pt. 1, art. XI. In other words, as the United States Supreme Court has held under a similar provision of the federal Constitution, voters must not have to pay “a price for the privilege of exercising the franchise.” *Harman v. Forssenius*, 380 U.S. 528, 539 (1965). The Supreme Court of New Hampshire has recognized that “there is no question that states may not condition the right to vote on the payment of a tax or fee.” *Ops. of the Justices*, 171 N.H. at 147.

188. The State Equal Protection provisions, like the Equal Protection Clause of the federal Constitution, guarantee that “all persons similarly situated should be treated alike,” *In re Sandra H.*, 846 A.2d 513, 517 (2004); N.H. Const. pt. 1, arts. II, XI. The State Equal Protection Clause is at least as protective as its federal counterpart. *Id.* Thus, the State Equal Protection provisions, like the Equal Protection Clause of the federal Constitution, prohibit the government from imposing a poll tax or other tax on the access to the franchise. *See Harman v. Forssenius*, 380 U.S. 528 (1965); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

189. During the COVID-19 public health crisis, the only safe way for many New Hampshire voters to vote will be by mail. But New Hampshire requires individuals who seek to vote by mail to pay for the postage to return their ballot. Requiring voters to spend money to submit

a mail ballot imposes an unconstitutional tax on voting in violation of N.H. Const. Pt. 1, art. XI and the State Equal Protection Provisions. Indeed, New Hampshire voters—and particularly voters who are low-income, disabled, or homebound due to COVID-19—are being forced to pay “a price for the privilege of exercising the franchise.” *Harman*, 380 U.S. at 539.

190. Based on the foregoing, the Defendants have burdened and deprived and will continue to burden and deprive Plaintiffs and Plaintiff AFT’s members and constituents of their right to vote in violation of the New Hampshire Constitution.

COUNT III
Due Process
N.H. Const. pt. I, art. XV
Denial of Procedural Due Process
(Election Day Receipt Deadline Against Defendant Gardner)

191. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Amended Complaint and the paragraphs in the counts below as though fully set forth herein.

192. Part I, Article XV of the State Constitution provides, that: “No subject shall be . . . deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land . . .” N.H. Const. pt. I, art XV. The New Hampshire Supreme Court has interpreted “law of the land” to mean “due process of law.” *Appeal of Mullen*, 149 A.3d 1270, 1275 (2016) (citing *State v. Veale*, 972 A.2d 1009, 1011 (2009)).

193. To determine whether a particular procedure violates due process, courts first consider the nature of the interest that will be affected by the government’s actions, “ascertain[ing] whether a legally protected interest has been implicated.” *In re Town of Bethlehem*, 911 A.2d 1, 12 (2006). Next, they determine “whether the procedures provided afford appropriate safeguards against a wrongful deprivation of the protected interest.” *Id.* Ultimately, “[t]he . . . standard for

judging a due process claim is the notion of fundamental fairness. Fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play." *Saviano v. Dir., N.H. Div. of Motor Vehicles*, 855 A.2d 1278, 1282 (2004) (quotations and citations omitted). In assessing due process, New Hampshire courts have found federal law, including the standard set out by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), instructive. *See In re Kilton*, 939 A.2d 198, 207 (N.H. 2007).

194. Because New Hampshire residents have a "legally protected interest" in voting and registering absentee, the State's absentee registration and voting system must comport with due process. *State v. McLellan*, 146 N.H. 108, 113 (2001); *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted."). "Such due process is not provided when the election procedures [for voting absentee]" do not adequately protect the right to vote or ensure that an "individual is not continually and repeatedly denied so fundamental a right." *Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990).

195. New Hampshire's Election Day Receipt Deadline too often disenfranchises voters because (1) the absentee registration and voting system, which requires multiple mailings between voters and clerks in the weeks prior to the election, is not designed to allow completed ballots to be received by the Receipt Deadline; (2) many voters do not learn of the Election Day Receipt Deadline before Election Day, and (3) even voters who do learn of the Election Day Receipt Deadline may not have their ballots counted, through no fault of their own, if they do not arrive at their clerk's office by 5:00 p.m. on Election Day.

196. New Hampshire's Receipt Deadline also has disenfranchised hundreds of voters in previous elections and stands to disenfranchise thousands in the upcoming elections as requests for absentee registration and ballots skyrocket.

197. New Hampshire's Election Day Receipt Deadline is neither a reliable nor fair way to administer voting absentee. The Election Day Receipt Deadline and the corresponding ambiguous cutoff for casting ballots is unreliable because many voters are not able to ascertain when that cutoff is (and most town and city clerks provide little guidance). To add to voters' confusion, the Deadline is at an entirely different time—5:00 p.m. on Election Day—than the closure of polling places, which occur no earlier than 7:00 p.m. RSA 659:4, 659:6. Other voters are not even likely to be sent their absentee ballots until after the mailing cutoff given the anticipated uptick in absentee ballot requests, coupled with mail delays and New Hampshire's late deadline for requesting an absentee ballot, leaving voters with no safe mail alternative for their votes to be counted. Nor is the Election Day Receipt Deadline fair because it forces those voters to cast their ballots with incomplete information and before candidates have delivered their final messages to voters.

198. The value of additional or substitute procedural safeguards to ensure that the absentee ballots of New Hampshire voters are both meaningfully cast and actually counted is readily apparent. A substitute procedure of requiring absentee ballots to be postmarked on or before Election Day and received by the town or city clerk within a reasonable time after Election Day to be counted, approximately five business days, resolves the inequities inherent in New Hampshire's Election Day Receipt Deadline.

199. A postmark date not only offers a reliable date to New Hampshire voters by which they must cast their ballots, but it also ensures that voters who receive their ballots late, through

no fault of their own, are still able to engage in the franchise. A postmark date additionally ensures that all of New Hampshire voters can consider any information that may arise and influence their choices in the final week of the election.⁷

200. Having introduced the option to vote absentee, New Hampshire must establish adequate procedures to ensure that voters have a reliable, fair, and effective method to cast their ballots. Because the Election Day Receipt Deadline is inadequate, and the State is readily capable of instituting a substitute procedure which would protect those voters' rights with minimal burden to the State, the Election Day Receipt Deadline violates voters' procedural due process rights.

COUNT IV
Free Speech and Association
N.H. CONST. Part I, arts. XXII and XXXII
Violation of Free Speech and Associational Rights
(Voter Assistance Ban Against All Defendants)

201. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Amended Complaint and the paragraphs in the counts below as though fully set forth herein.

202. Part I, Article 22 of the New Hampshire Constitution states that “[f]ree speech and Liberty of the press are essential to the security of Freedom in a State: They ought, therefore, to be inviolably preserved.” N.H. Const. Pt. I, Art. 22.

203. New Hampshire courts reviewing state constitutional claims can use federal law to “aid in [the] analysis.” *Montenegro v. N.H. Div. of Motor Vehicles*, 93 A.3d 290, 293 (2014) (citing

⁷ The term “postmark” refers to any type of imprint applied by USPS to indicate the location and date USPS accepts custody of a piece of mail, including intelligent mail bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed later. Further, election officials can also send election mail using intelligent mail barcodes, which allows for tracking of individual mail pieces as they enter the mail stream.

State v. Ball, 471 A.2d 347, 351 (1983)). Further, it is “to be expected that counsel and courts will refer to federal decisions . . . even in debating an undecided issue under state law.” *State v. Ball*, 471 A.2d 347, 352 (1983) (quoting *State v. Kennedy*, 666 P.2d 1316, 1321 (1983)).

204. Like Part I, Article 22 of the New Hampshire Constitution, the First Amendment to the United State Constitution protects free speech. Specifically, it protects against the passage and enforcement of laws “prohibiting the free exercise [of] or abridg[ment] [of] freedom of speech.” U.S. Const. amend. I.

205. Under the First Amendment, the United States Supreme Court has applied “exacting scrutiny” to review laws governing election-related speech. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345-46 (1995); see also *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 722 (M.D. Tenn. 2019) (“[L]aws that govern the political process surrounding elections—and, in particular, election-related speech and association—go beyond merely the intersection between voting rights and election administration, veering instead into the area where ‘the First Amendment has its fullest and most urgent application.’”) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

206. Restrictions on such speech are unconstitutional when they “significantly inhibit” election-related speech and association and are “not warranted by the state interests . . . alleged to justify [the] restrictions.” *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999).

207. Voter turnout efforts, including assisting voters in requesting and returning their *sealed* and *voted* ballots, are important ways in which Plaintiff AFT communicates its belief in the power and importance of participating in democratic elections.

208. Such activities are “the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414,

422-23 (1988); *cf. League of Women Voters*, 400 F. Supp. 3d at 720 (“Encouraging others to register to vote is pure speech, and, because that speech is political in nature, it is a core First Amendment activity.” (quotation marks and alterations omitted)).

209. The acts of assisting voters by requesting absentee ballots to permit them to vote and delivering completed ballots to ensure they are counted are inherently expressive, and an individual or organization that conducts such activities engages in speech by encouraging voting. *See Bernbeck v. Moore*, 126 F.3d 1114, 1115 (8th Cir. 1997) (rejecting argument that regulating an election “process” raises no First Amendment concerns); .

210. These initiatives also facilitate the political participation of voters who have experienced historically low turnout rates when compared to the rest of the population, or who for various reasons, including disability, advanced age, or lack of access to transportation, would have difficulty voting.

211. This is why Plaintiff AFT’s ability to collect and deliver *sealed* and *voted* ballots would significantly further their missions to serve underrepresented populations as well as their members’ and constituents’ access to the ballot box.

212. Furthermore, “Part I, Article 32, [of the New Hampshire Constitution] like the First Amendment to the Federal Constitution, ‘protects the right of citizens to associate.’” *Op. of the Justices*, 973 A.2d 915, 920 (N.H. 2009) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997)). “An organization’s attempt to broaden the base of public participation in and support for its activities is conduct ‘undeniably central to the exercise of the right of association.’” *Am. Ass’n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1202 (D.N.M. 2010) (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–15 (1986)).

213. The conversations and interactions between Plaintiff AFT, its members, and constituents surrounding requests for and the submission of ballots are forms of protected political speech and association. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (describing “overlapping” rights “of individuals to associate for the advancement of political beliefs” and “of qualified voters . . . to cast their votes effectively”); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700–01 (N.D. Ohio 2006) (explaining “participation in voter registration implicates a number of both expressive and associational rights which . . . belong to—and may be invoked by—not just the voters seeking to register, but by third parties who encourage participation in the political process”).

214. New Hampshire’s Voter Assistance Ban violates that protection by “limit[ing] the number of voices who will convey [Plaintiff’s] message,” and “the size of the audience they can reach[,]” thereby burdening the speech and associational rights of Plaintiff AFT and the voters they serve. *Meyer*, 486 U.S. at 422–23.

215. These burdens are severe because they would subject Plaintiff AFT, its members, and constituents to criminal prosecution for protected political speech about ensuring all eligible voters are able to vote safely: “the most effective, fundamental, and [likely] economical avenue of political discourse[.]” *Id.* at 424.

216. Because multiple other laws prosecute and deter voter fraud and there is nothing fraudulent about requesting or returning an absentee ballot for another person, the Voter Assistance Ban is not narrowly tailored to advance a compelling state interest.

217. Based on the foregoing, Defendants burdened and deprived and will continue to burden and deprive Plaintiff AFT of its free speech and associational rights under the New Hampshire Constitution.

COUNT V
Equal Protection
N.H. Const. Part I, art. II, X, XI, XII, and XIV
Disparate Treatment of Voters by Denying Equal Protection Under the Law
(Absentee Registration Process, Documentation Requirement, and Election Day Receipt
Deadline Against Defendant Gardner)

218. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Amended Complaint and the paragraphs in the counts below as though set forth herein.

219. The equal protection provisions of the New Hampshire Constitution in Part 1, Articles 1, 2, 10, 11, 12, and 14 guarantee equal protection under the law. Article XI specifically guarantees an equal right to vote. The equal protection provisions of the State Constitution are designed to ensure that State law treats groups of similarly situated citizens in the same manner. *McGraw v. Exeter Region Co-op. Sch. Dist.*, 145 N. H. 709, 711 (2001).

220. The principle of equal protection has repeatedly been applied by courts to bar arbitrary and disparate treatment. In *Bush v. Gore*, the Supreme Court held that the Equal Protection Clause of the U.S. Constitution applies not just to the “initial allocation of the franchise,” but also to “the manner of its exercise,” and that “once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” 531 U.S. 98, 104–05 (2000). There, the Court found it problematic that individuals who would engage in the recount process “had no previous training in handling and interpreting ballots,” *id.* at 109, and that the recount procedures were not “consistent with [the] obligation to avoid arbitrary and disparate treatment of the members of [the] electorate,” *id.* at 105. Similarly, in *Wexler v. Anderson*, 452 F.3d 1226, 1231–32 (11th Cir. 2006), the appellate court found that a non-uniform voting practice that makes it “less likely” that a person in one county will “cast an effective vote” than a voter in another county is a question “of constitutional dimension.” And, in *Stewart v. Blackwell*, 444 F.3d 843, 871 (6th Cir. 2006), *vacated en banc on*

other grounds, 473 F.3d 692 (6th Cir. 2007), the Sixth Circuit applied strict scrutiny to the use of disparate voting technologies by particular counties, concluding that the disparity in technologies “result[ed] in a greater likelihood that one’s vote will not be counted on the same terms as the vote of someone” in a different county.

221. New Hampshire’s election laws do not treat groups of similarly situated citizens in the same manner. Namely, similarly situated groups of voters who would like to request an application to register to vote absentee, i.e., an Absentee Registration Packet, are treated differently based solely upon the city or town in which they live due to the variability in the way that Absentee Registration Application Packets may be requested as well as the variations in city and town clerk hours. As a result, similarly situated voters are subject to varied times for receiving their Absentee Registration Packets and, in some cases, the entire registration process may be slowed down, subjecting them to potential disenfranchisement that their counterparts in other localities do not face. These burdens are severe.

222. Likewise, similarly situated groups of voters who would like to register to vote but do not have a photocopier, proof of identity, or proof of domicile differently because, if unable to vote due to concerns for COVID-19, these voters are unable to register. These burdens will have a strong impact on particular groups who are similarly situated other than the fact that some are and some are not able to register in person: college students, low income voters, the elderly, and those who are or live with someone who is immunocompromised or otherwise at a high risk of severe illness or death if exposed to COVID-19.

223. If these voters were to register in person, they could sign an affidavit that they do not have the forms of proof required. This option is not available to these same voters while confined at home, due to the Documentation Requirement, unless they are able to secure a

“reasonable accommodation” for their particular circumstances, which may involve an in-person meeting with the clerk, defeating the purpose of their absentee registration. Moreover, these accommodations are inconsistently provided across the state, meaning that while some voters may have access to them, others will not based solely upon where they live.

224. Further, the Election Day Receipt Deadline places arbitrary restrictions on voters who drop their ballots off at polling locations on Election Day. Indeed, despite the fact that voters who arrive at 4:59 p.m. to drop off their already completed absentee ballot are no different than those who arrive at 5:01 p.m., because of the Receipt Deadline those arriving at 5:01 p.m. must undertake additional procedures to be able to vote absentee or they must vote in person, in both instances risking their health and potential exposure to COVID-19.

225. The burden that these requirements place on voters is severe. They may either venture out and risk exposure to a deadly virus, or not register to vote or cast their ballot absentee.

226. This means that it is likely that practices amongst clerks will vary in sending Absentee Registration Packets to voters and in determining who is eligible to vote and, as a result, New Hampshire’s voting system will deprive its citizens of the right to vote or severely burden the exercise of that right depending on where they live in violation of the equal protection clause. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008).

227. Defendants have no rational basis or compelling governmental interest to justify unduly burdening New Hampshire voters merely because they are confined at home.

228. Thus, Defendants have deprived and will continue to deprive Plaintiff AFT’s members and constituents of rights secured to them by the New Hampshire Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in favor of Plaintiffs and against Defendants, and:

- 1) Enter a declaratory judgment pursuant to RSA 491:22 that as applied during the COVID-19 pandemic, the Witness Requirement, Documentation Requirements, Postage Requirement, and Drop Box Restrictions violate the New Hampshire Constitution, Part I, art. XI;
- 2) Enter a declaratory judgment pursuant to RSA 491:22 that as applied during the COVID-19 pandemic, the Postage Requirement violates the New Hampshire Constitution, Part I, arts. II, XI as an unconstitutional poll tax;
- 3) Enter a declaratory judgment pursuant to RSA 491:22 that the Absentee Registration Request Process violates the New Hampshire Constitution, Part I, arts. II, X, XI, XII, and XIV and Equal Protection Clause;
- 4) Enter a declaratory judgment pursuant to RSA 491:22 that the Election Day Receipt Deadline violates the New Hampshire Constitution, Part I, arts. XI and XV and Equal Protection Clause;
- 5) Enter a declaratory judgment pursuant to RSA 491:22 that the Voter Assistance Ban violates the New Hampshire Constitution, Part I, arts. XI, XXII, and XXXII;
- 6) Enter a declaratory judgment pursuant to RSA 491:22 that as applied during the COVID-19 pandemic, the Documentation Requirement violates the New Hampshire Constitution, Part I, arts. II, X, XI, XII, and XIV and Equal Protection Clause;
- 7) Preliminarily and permanently enjoin Defendant Gardner and his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from failing to provide the Absentee Registration Packet on the Secretary of State's website;
- 8) Preliminarily and permanently enjoin Defendant Gardner and his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from rejecting ballots that are postmarked on or before Election Day and arrive at the clerk's office within a reasonable period of time after Election Day, subject to the definition of "postmarked" noted herein;
- 9) Preliminarily and permanently enjoin Defendant Gardner and his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from rejecting absentee ballots a voter or a voter's delivery agent drop off before the closing of such drop-off location on Election Day, such as a polling place or clerk's office;
- 10) Preliminarily and permanently enjoin Defendant Gardner and his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of

them for the duration of the COVID-19 pandemic, from rejecting any absentee registration materials solely for failure to meet the Documentation or Witness Requirements;

- 11) Preliminarily and permanently enjoin Defendant Gardner and his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them for the duration of the COVID-19 pandemic, from requiring that voters provide postage on their absentee ballots and further require that New Hampshire provide prepaid postage on all absentee ballots;
- 12) Preliminarily and permanently enjoining Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing the Voter Assistance Ban, allowing voters to designate any third party to assist in the collection and submission of their absentee ballots;
- 13) Preliminarily and permanently enjoining Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing the Drop Box Restrictions, allowing town and city clerks to establish additional drop boxes outside of their offices without requiring staff members present during the course of their use;
- 14) Award Plaintiffs their costs and disbursements, pursuant to applicable statutory and common law, *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 595 (1999); and
- 15) Grant Plaintiffs such other and further relief as the Court deems necessary, just, and proper.

Respectfully submitted,

AMERICAN FEDERATION OF TEACHERS
MARY WILKE

By Their Attorneys,

Dated: August 31, 2020

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