TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NH CONSTITUTION

STATUTES

OTHER AUTHORITIES

QUESTIONS PRESENTED

1. Are RSA 659:95, II, RSA 669:33, II and RSA 660:16, II relating to ballots constitutional under Part I, Articles 1, 2, 7, 8, 10, 11, and 22 (which together form the basis of our fundamental right of self-government)? Pl. App. 170-180

2. Did the lower court err in denying the Plaintiff's request to review ballots to prove her claim that no ballot would likely be traceable to a voter? Pl. App 95

3. Should the lower court have used either an intermediate or strict scrutiny standard in balancing the state and public interests involved? Pl. App. 22, 241

4. The lower court misunderstood the "process" question the Plaintiff raised about the way ballots were exempted in 2003. Since the Plaintiff believes this question will set a legal precedent, (is the Legislature supposed to follow its own rules, were the required constitutional checks and balances followed, is it accountable to the public through RSA 91-A if it violates the law's intent and purpose (and purpose and intent of Part I, Article 8)?), did the lower court err in saying this question was non-justiciable? Pl. App. 15-21, 241

5, Since the following facts are in dispute, did the lower court err in granting summary judgment to the Defendant?

A. By law, ballots should not be traceable to voters. The rare exceptions can be dealt with without exempting all ballots from public review after the recount period has ended and election results certified. Pl. App. 7, RSA 659:35 (Supp. p. 18)

B. Although the NH Constitution (Part II, Art. 32) and RSA 659:63 REQUIRE public vote counts, the comparison of Nov. 2014 voter registration information in hand count v. computer count locations shows less than 13% of all NH votes are now counted in public. Pl. App. 183-185 , Supp. 23-29

C. Legislative history shows the Legislature exempted ballots in 2003 ONLY to bring the state in compliance with federal Help America Vote Act (HAVA). The defendant has acknowledged HAVA did not require exempting ballots from public records. There is no evidence legislative intent of the 2003 action was to protect either voter privacy or to deter voter bribery and/or intimidation. Pl. App. 15-21

6. The Plaintiff had shown that there had been unanswerable questions about the number of over voted ballots in other elections. After she showed (and was willing to give a specific example if asked) that over voted ballots could indicate fraud, did the lower court err in denying the Plaintiff's request to review ballots to find out why 2.5% of Jaffrey ballots cast in November 2012 contained over votes? Pl. App. 245-246

7. Did the lower court err in determining that the public's right and responsibility to know that election results are true, our government is legitimate, knowing the democratic checks and balances required by our constitution are being followed and election officials are accountable to us is substantially less important

than the Defendant's interest in exempting all ballots from public records law? Court Opinion, Supp. p.7

STATEMENT OF THE CASE AND THE FACTS

This case concerns a 2003 amendment (S 1640) to legislation (HB 627) intended only to bring the state in compliance with federal Help America Vote Act (HAVA) and qualify the state to receive approximately $20 million in federal funds. The intent of HB 627, stated in legislative history, was to define domicile for voting purposes and provide penalties for voter fraud. *Id.* at 17

The Court recently reviewed that legislation as part of its decision in *Guare v. New Hampshire,* No. 2014-558, 2015 (N.H. Sup. Ct. May 15, 2015).

The Plaintiff challenges both the constitutionality of the 2003 amendment, which exempted all ballots from RSA 91-A, which is not narrowly tailored to achieve its specific objective, and the process used by Deputy Secretary of State David Scanlan ("the Deputy"), which he describes as "normal" Pl. App. at 39, Section 13, 165. [1]

The lower court's opinion should be vacated in its entirety since this has set a new legal precedent re: public access to public records that is inconsistent with the Supreme Court's previous rulings and spirit and intent of the NH Constitution. Investigation of three significant facts in dispute should be found in favor of the Plaintiff.

1. Procedural History

A. 2012-2013 case

The Plaintiff filed her first legal action in 2012 because of observed irregularities in the November 2010 election in Jaffrey and elsewhere. She reported

[1] Plaintiff's (Appellant's) Appendix filed with the brief will be cited as "Pl. App." Supplement filed at the end of this brief is "Supp." and contains text of relevant authorities.

these concerns to the Attorney General but they were not investigated or acted upon. Since she knew ballots had been exempted from RSA 91-A, she made her request of the Defendant William Gardner ("the Defendant")"pursuant to Part I, Article 8 of the New Hampshire Constitution and the spirit and intent of N.H. RSA 91-A…."

Although the Deputy has denied under oath that he authored the response, (*Id*. at 83), he probably did since discovery in the current case has shown that the Defendant probably did not know the ballot exemption had been added to HB 627 at the Deputy's (and possibly the assistant attorney general's) request.[2] *Id.* at 233, 228

She filed the case against the state that had taken away her right.

The state argued and the court agreed that she should have brought the case (filed as a Right to Know petition) against the town that had custody of the ballots.

That has proved one of her claims, that S 1640 (amendment added to HB 627, 2003) violated NH CONST, pt. 1, art. 28-a. The Town of Jaffrey would have been required to expend public funds to defend the suit in court yet had no authority to grant her request. *Id.* at 77. Supp. at 15

Before she could amend the petition to make the town a party, she learned that the Jaffrey Town Clerk (of 25 years) had reportedly destroyed the ballots several months earlier before the end of the 22-month required retention period.

Although the Attorney General's office questioned the Town Clerk and told her not to do it again, there was no investigation of the possibility the Deputy or an unknown person in Jaffrey were involved in the illegal destruction of the ballots.

[2] Text of RSA 659:95, II: RSA 660:16, II; RSA 669:33, II, see Supp. at 19-20

Jaffrey officials also failed to investigate or take appropriate action to make sure that the possible election fraud that happened with the Jaffrey Nov. 2010 election would not happen again. *Id.* at 53, 78, 91,

The Court dismissed the case, saying in part:

> The Court finds that the integrity of the election process depends on voter anonymity. Therefore, the Court finds that the Legislature did not act in violation of the New Hampshire Constitution when it passed RSA 659:95,II, in order to exempt ballots from the Right to Know Law. *Id.* at 7.

She appealed the constitutional question to the NH Supreme Court that didn't rule on that question, upheld the dismissal and said, in part,

> …we need not address her arguments that RSA 659: 95, II and similar statutes are invalid….(noting our long-standing policy not to address constitutional issues unless absolutely necessary).

B. 2014-15 case

On July 29, 2013 she requested permission from the Defendant (ballot custodian because of two recounts) to review the Jaffrey ballots cast in November 2012, citing RSA 91-A, to review the ballots for two specific purposes:

A. **To determine why 71 ballots (2.5% of the 2,843 tabulated by the AccuVote) contained over votes, therefore invalidating votes of 71 individuals.**
   Possible reasons include:
   1. Voter confusion
   2. Creases on absentee ballots counted as "votes"
   3. Voter intent not recognized by computer or election officials
   4. Stray marks counted as "votes"
   5. Computer or programming error
   6. Other?

B. **For research purposes relevant to possible future legislation, to determine how many ballots can be traced to a voter and what makes them traceable.** *Id.* at 56

In her cover letter she suggested, "Representatives of the media, Attorney General's Office and Secretary of State's Office could participate in the review to determine if `privacy' is a real or imagined issue." *Id.* at 57

The Defendant denied her request on August 5, saying in part, "please be advised that pursuant to RSA 659:95, II, all cast ballots are exempt from the `Right to Know' law."

Since she was not successful in resolving the issue during the 2014 legislative session (see below), she filed legal action on July 22, 2014, seeking a court order to allow ballot inspection, a declaratory judgment "invalidating illegally passed `law,' declaring its unconstitutionality, and order for the state of New Hampshire to pay legal expenses." *Id.* at 6

> She believes the way S 1640 was passed
> …. will set a legal precedent in answering the question, "Does the Secretary of State have the constitutional authority to bypass the legislative process, and with the help of key legislative leaders mislead other legislators, and amend the NH Constitution by removing an inherent, fundamental right from the people?" If the NH Courts decide the Secretary of State has that authority to do this for himself or a friend, does that "right" also apply to an ordinary citizen such as the Petitioner, the Attorney General, the governor, the leader of a political party, a lobbyist, or someone with money who wants to buy a law? *Id.* at 109

This part of her case is outlined in Section III of her complaint. *Id.* at 13-21 with RSA 91-A:8 remedies requested, including invalidating the action of the Senate Internal Affairs Committee of May 15, 2003 because it did not have the authority to add a non-germane amendment to HB 627. Senate Rules 23 and 43, Supp. at 17 and 22 and "Principle of Accountability" Ethics Guidelines, Pl. App at 18. See RSA 91-A:2 Supp. at 17

In her Prayer for Relief, she asked, in part

> "after reviewing the evidence that there are no legitimate privacy reasons to exempt all ballots from public review, issue a declaratory judgment that the above named laws are unconstitutional (NH CONST pt I art. 1, 2, 8, 10, 11, 22, 28-a, 37, pt. II, art. 5, 32 and 90 and the 14th Amendment's Equal Protection Clause of the US Constitution) or transfer this question to the Supreme Court for review and opinion, pursuant to RSA 491:17. Pl. App. at 32

In her complaint and affidavit, she:

1) provided evidence of her previous questions regarding over voted ballots, evidence showing that over voted ballots can indicate fraud. *Id.* at 35

2) detailed her experience in Jaffrey beginning in 2010 showing why reviewing ballots after an election is the only way she can verify the accuracy of vote counts and ensure elected officials are accountable to the public. *Id.* at 36-38, 44-48, 53-55.

3) showed that current practice in her town and most computer counts are not in compliance with NHCONST. pt. 2, art. 32 and consistent law. Supp. at 15

> Citizens in hand count towns who can see that the checks and balances to ensure an honest count are in place on election night (in compliance with RSA 659:35, 659:60, 659:63, 659:64, 659:77 and 666:2) are less likely to feel a need to review ballots after an election. They can see that election laws are being followed. This unfairly burdens citizens in computer count towns where votes can be switched between candidates or otherwise not tabulated correctly in a secret process with no witnesses. (RSA 659:42) In computer count towns, the above laws are not enforceable because the vote counting process is not public or transparent. This is an equal protection issue and violates the 14th Amendment of the U.S. Constitution. (with references to Ex. A, Affidavit). *Id.* at 26-27. Supp. at 15 for text of Art. 32 and 18-21 for text of RSAs. *Id.* at 16-17, Pl. App. at 26-27

There was one hearing, a structuring conference on Oct. 29, 2014. She learned that the judge planned to address the constitutional question instead of transferring it to the Supreme Court and that the Defense planned to file a dispositive motion by Dec. 1. *Id.* at 87-88

The Plaintiff expressed her concern that the Court's opinion in this case be based on accurate information and that the Deputy had informed the House Election Law Committee in January 2014 that the court saw no problem (in its 2012 decision) with the way ballots were exempted in 2003. *Id*. at 87

See "Case summary", *id.* at 1-5 for filed motions, objections and decisions.

The Court denied two Motions to Amend (*id.* at 103, 133). They are included in the record to show the arguments and legal precedents cited have been preserved for Court's review. *Id.* at 136.

She made the following attempts to access evidence that would likely have proven that no Jaffrey ballot is traceable to a voter

- three motions, a response to the defense's objection, a motion to compel discovery and a motion to reconsider.
- Motion to Admit as Fact. Unless evidence provided to the contrary, admit "that legitimate privacy concerns can be protected and is not a compelling reason to exempt all ballots from public records law." No evidence was provided. *Id.* at 126-27

The Plaintiff requested two hearings, (*Id*. at 180 and 188) the last asking the judge to examine sample ballots and overseas ballots to determine "the facts" regarding voter privacy and in her Motion to Reconsider or Clarify of April 15, 2015 to "schedule a hearing if [court] so chooses,"

Discovery was partially completed. (See motions to compel, *Id.* a*t 220,* 227)

The following facts should be undisputed:

1. Deputy has acknowledged that HAVA did not require exempting ballots from public records law.

2. The Defendant refused to answer discovery questions and relies solely on his Deputy to represent his office in this case. *Id.* at 220, 224

3. Discovery information (voluntarily disclosed) from five former legislators and Peter Heed, Attorney General in 2003, showed they had no recollection of the ballot exemption being part of HB 627. Other former legislators, including current Attorney General Joseph Foster, and the Jaffrey moderator refused to answer the plaintiff's discovery questions. *Id.* at 227-228

4. The Deputy has acknowledged that he asked that the ballot exemption from public records law be added to the bill (May 9) after the Senate Internal Affairs Committee's Public Hearing on April 30, 2003. Neither Mr. Scanlan nor the Senate sponsor of S 1640 were present for the April 30 hearing, where there was no mention of any need to exempt ballots. The Deputy acknowledges he spoke to the Executive Session of that Committee on May 15 and may have talked with the Committee of Conference. The non-germane amendment, in violation of Senate rules, was approved by that committee 3-0 (no record of minutes or who attended that session) and passed in the Senate on May 22 with no public hearing or opportunity for the public to object. *Id.* at 220, 223

5. There is no evidence in legislative journals of any public discussion about constitutionality in 2003 or repeal attempts in 2007 or 2012 except in the 2014 Public Hearing on HB 1357 to repeal the ballot exemption. (*Id.* at 63) and the Plaintiff's follow up addressing the Deputy's testimony.

> "….when policy becomes law, the Executive and Legislative branches have a legal duty under our constitution to make sure that law is consistent with our highest law. There is NO evidence there has been ANY attempt to do that. *Id.* at 68

6. There is no evidence from House or Senate journals or response to questions that any legislator except the three Senators who approved the non-germane amendment on May 15 and five additional legislators on the Committee of Conference were aware the ballot exemption had been added to HB 627.

7. In March 2003, the NH Attorney General published a 25 page "Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A" that provided guidelines based on NH Supreme Court precedent. These were updated in July, 2009. (*id.* at 8)

http://www.righttoknownh.org/Documents/AG's%20Memorandum%20of%20Law%20on%20Right%20to%20Know%20March%202003.pdf

8. There is no evidence that the Defendant, Deputy or any legislator publicly asked the Attorney General about the constitutionality of exempting ballots from public records law or the legality of adding the exemption as a non-germane Senate amendment to a bill that had already passed the House.

9. Adding non-germane amendments by any source....."are prohibited and shall not be allowed under any circumstances." "Senate Rules for 2003" 23 and 43, Supp. at 22

10. The Deputy has claimed attorney-client privilege from answering any questions regarding conversations with then Assistant Attorney General Bud Fitch either about the constitutionality or legality adding the exemption as a non-germane amendment to the bill described above. *Id.* at 227

11. The Plaintiff has offered a proposed draft that shows the legitimate concerns of the Deputy and Legislature can be addressed in a narrowly tailored, "least restrictive means available to accomplish the purposes sought to be

achieved." *Petition of Keene Sentinel, 136* N.H. 129-130 (1992) without exempting all ballots from public review. *Id.* at 73, Ex. J, *Id.* at 111

12. Laws, current practice and guidance of legal precedents are already in place to address most, if not all, of the stated concerns. (See *id.* at 197, Supp. at 18, 19 regarding distinguishing marks on ballots (RSA 659:35), tampering with public records (RSA 641:7), bribery and intimidation, (RSA 659:40) Supp. at 18, 19

13. There is evidence an underlying reason for exempting ballots is to deny free speech rights (NH CONST pt. 1, art. 22). *Id.* at 135 Supp. at 15

14. The Deputy has acknowledged that NH computers are not programmed to return over voted ballots to voters for possible correction. *Id. 245*

On April 27, 2015, the Court granted Summary Judgment to the Defendant, denied the Plaintiff's Motion for Partial Summary Judgment, regarding the constitutional question. She had requested that Section III (process used) complete discovery and proceed to trial and that Section II (court order to review ballots) be ruled on separately, not contingent on the court's opinion re: constitutionality.

Discovery was not completed and the Plaintiff had no opportunity to ask questions of the Defendant or Deputy under oath.

The Court denied Plaintiff's motion to reconsider or clarify on May 5 along with her final motion to review ballots to determine reason for over votes. She now appeals those decisions, the constitutional question and questions of "fact" regarding voter privacy, public counting of votes and legislative intent in 2003.

As of June 19, 2015, Defense says the Jaffrey ballots "remain secured at the

archives."

II. The Plaintiff

In her Affidavit, Ex. A, (beginning Pl. App. p. 34) she states, prior to 2003, she had helped count ballots for her town and:

> In 2003, I voted with the majority of voters in Jaffrey Town Meeting to purchase a voting machine to make things easier for election officials based on the assurance these machines were "accurate and reliable." I didn't know this was a computerized system requiring programming by a private corporation, that there would be yearly costs associated with this purchase or that this violated our NH Constitution and state law (RSA 659:63 Counting of votes shall be public.) *Id.* at, at 34. Supp. at 19
>
> I served as ballot clerk in Jaffrey for the Nov. 2008 election and other elections up until the Nov. 2010 election and had been scheduled to serve in that one. My knowledge of voting machine vulnerabilities and the oath of office I took as an election worker (Part II, Art. 84) to "support the constitution" prompted me to take the following action. Supp. at 16
>
> Prior to the Nov. 2010 election, I was among the citizens in my town sharing information with the Moderator and Town Clerk about known vulnerabilities and unanswered questions regarding past NH vote counts. The information included recommendations from a 2009 state advisory group recommending random hand count checks of the computer count and, in addition, moderators retaining the option of hand counting high profile, high stakes races on election night to ensure accuracy of the count. This was consistent with state law and would assure citizens there was no significant error in the reported results.
>
> After checking with the chair of the opposing party in town, the Jaffrey moderator agreed to hand count one of the two federal races (both open seats and fitting the definition of high stakes and high profile), chosen at random after the polls closed. *Id.* at 36

The Deputy's interference with that decision and her understanding of NH CONST pt. 1, art. 8 (Supp. at 14) was the red flag that prompted the Plaintiff to take her first legal action in 2012 Pl. App. at 181 and 137.

III. Legislative History of Ballot Exemption (RSAs 659:95, II, RSA 669:33, II, RSA 660:16, II) Supp. at 20, 21

A. HB 627 (2003) Senate Amendment 1640 ("S 1640") "Docket" *id.* at 219,

The history shows Sen. Boyce, Chair of the Senate Internal Affairs Committee, introduced the amendment on May 9 "and access to preserved ballots" was not added to the title until the bill was enrolled on June 30, 2003.

A streamlined version of Legislative history of s 1640 was included in Plaintiff's testimony to House Election Law Committee in 2014 re: HB 1357. *Id.* at 67-68.

B. Repeal attempts 2007 and 2012 *Id.* at 23 (Summary presented by Plaintiff, no response from Defense or Court)

> **2007 —**research could be misused. Privacy of ballot and integrity of election process (based on wrong information re: privacy and ignoring established New Hampshire legal precedent regarding legitimate Right to Know exemptions)
>
> **2012** —voter privacy (based on wrong information)

C. Repeal attempt 2014 (See *id.* at 59, 60, 63-70)

Before the deadline for final language to be submitted the Plaintiff attempted to meet with the Deputy to agree on proposed guidelines that would address legitimate concerns he had expressed in the 2012-13 case. He refused to meet with her and the individual making the request. *Id.* a*t* 22*5, Id.,* Ex. J, at 73-76

Although the House Election Law Committee did correct its error regarding voter privacy from 2007 and 2012, the majority failed to recommend correcting the 2003 error of removing ballots from public records law. *Id.* at 12 re: HB 1357.

> A secret ballot means we don't show it to anyone or place any distinguishing mark on it that would allow someone else to know how we voted. Once our ballots are among others NO ONE (election officials, citizens counting ballots in hand count towns, individuals involved in recounts or citizens during public inspection) should be able to trace a ballot to a voter. "Plaintiff's Testimony in support of HB 1357, Jan. 14, 2014," *id.* at 12

The majority opinion recommending against repeal cited historical precedent, risk of ballot tampering and "it would be a logistical nightmare for election officials." *Id.* at 29

SUMMARY OF THE ARGUMENT

This case challenges the constitutionality of S 1640 enacted as a non-germane amendment to HB 627 in 2003 (not repealed in 2007, 2012 or 2014) and the process used to pass it. A separate request asks for a court order to review Jaffrey ballots cast in November 2012 election.

The NH Constitution requires transparent, publicly accountable elections. Part I, Article 11 and Part II, Article 32 (codified in law Section LXIII, if followed and enforced) protects the equal rights of voters to have votes counted and reported as they intend and the equal right of candidates to be elected. Under the NH Constitution, and settled case law, the public has the right and responsibility to participate in the oversight of our elections, making legitimate counts on election night more likely. Supp. at 14, 15

Electronic voting not only removes public oversight of vote counting (RSA 659: 63) but also, removes oversight from elected officials (moderator, town clerks and selectboard), who are required by law to ensure accurate vote counts on election night. RSA 659:60, RSA 659:63, RSA 659:77, RSA 666:2, RSA 659:42,) Supp. at 18, 19. *Opinion of the Justices,* 53 N.H. 640, 1873. Pet. App. at 25

They are no longer required or even encouraged by the Executive to fulfill their legal duties to follow laws that protect our rights, our votes and our elections.

Acts of the legislature must be consistent with these promises made to the people (social contract) and it is the duty of the Executive to protect these rights and

make sure election officials are performing their duties. NH CONST. pt. 2, art. 5 and 90. *Id.* at 106

> "Thus the origin of government is in mutual consent or contract, and its object is the common benefit," Justice Charles Doe wrote in *State v Express Co* 60 N.H., 253, 256 (1880). "The common right….is not therefore vested in the strongest, or in those whose number and combination for the time make them an effective majority." *Id.* at 109

Part I, Article 8, codified in part in RSA 91-A, gives the public the right and responsibility of inspecting ballots after elections to 1) ensure the facts of our elections are true and that our government is legitimate 2) that election officials and our elections are accountable to us. Supp. 16-17

Openness in conducting public business (in public bodies and our elections) is a deterrent to fraud and error, and can prevent what probably happened in Jaffrey in November 2010 and what the Plaintiff showed possibly happened in New Hampshire in 2004 and 2008 from reoccurring. *Id.* at 174-175

Under the current election system and practice, performing legal duties is discretionary. *Id.* at 37. The Plaintiff can't force public officials to perform their legally required duties or tell the truth about our elections (even to the Court). But neither can the Defendant prevent citizens from performing our duties.

It is axiomatic that if we do our jobs, it is more likely our public servants will do theirs. That is the power and promise previous generations left us and we have the duty to preserve for future generations.

It is now the duty of this Court to restore the right the Executive had a duty to protect (NH CONST pt. 2, art 41 and 84) and the Legislature had no authority to take away. (NH CONST pt. 1, art. 1, 2, 7, 8, 10, 11, 22 and pt. 2, art. 5 and 90). Supp. 14, 15

ARGUMENT

I. RSA 659:95, II, RSA 669:33, II, and RSA 660:16, II Relating to Ballots Are Unconstitutional Under Part I, Articles 1, 2, 7, 8, 10, 11, and 22 (Which Together Form the Basis of Our Fundamental Right of Self-Government)

Standard of Review

The New Hampshire Supreme Court interprets the State Constitution and reviews disputes regarding constitutionality of statutes *de novo* as a question of law. *Akins v. Secretary of State,* 154 N.H. 67, 70, 2006. The Court presumes the statute is constitutional but may declare it invalid upon inescapable grounds.

> To determine whether a restriction is "reasonable," the Court "balance[s] the public's right of access against the competing constitutional interest in the context of the facts of each case. *Hughes v. Speaker,* 256, 290 152 N.H. (2005).

A. Fundamental Rights

1. Voting

Although not acknowledged by the Defense nor the lower Court, the main issue in this case is the fundamental voting rights of citizens: "the right for voters to have their votes counted and reported accurately and to know they are"). NH CONS. pt. 1, art. 1, 2, 7, 8, 11, pt 2, art. 5, 32, 41, 84, 90. Pl. App. at 74

> … voter intent presents a question of fact, not a question of law. See Broderick v. Hunt, 77 N.H. 139, 141 (1913)…. The goal must be the ascertainment of the legally expressed choice of the voters. The object of election laws is to secure the rights of duly qualified voters, and not to defeat them. Opinion of the Justices, 116 N.H. 756, 759 (1976) (citations and quotations omitted) *Appeal of Peter McDonough, 149 N.H. 110 (2003) Id.* at 107

It is axiomatic that the right to cast a ballot has no value if it is not counted and reported based on voter intent (RSA 659:64) and that the outcome of elections must be based on evidence that the public can prove to be factual.

> A decision [about who was elected] cannot be rendered without evidence, nor in disregard of settled rules of law. *Broderick v. Hunt,* 77 N.H. 143 (1913) *Id.* at 106

Without transparency and public accountability, there can be no trust in election results or government legitimacy. Electronic voting in New Hampshire has removed that transparency and public accountability and must be restored.

> Translated into traditional considerations for election law, the deployed e-voting systems have allowed numerous secret methods for dishonest or highly partisan vendors, vendor personnel (including software programmers), election office staff, poll workers or voters to engage in the electronic equivalent of ballot box stuffing and to erase any tracks back to themselves….**use of all-electronic voting equipment without quality assurance techniques that rely on a tangible record of the voter's choices independent of the electronic equipment permits nefarious conduct to convert voting rights into an illusion.** (emphasis added) *Id. at 25.*[3]

2. Public Accountability/Access to Public Records

Under the Supreme Court's standard, the burden is always on the party seeking non-disclosure of public records. The particular facts of each case matters, even if the Legislature has consciously chosen to exempt certain records.

The standard of reasonableness is that most citizens would agree with the government's reason.

This question is in the courts a second time because in adding s 1640 to HB 627, the Deputy and Assistant Attorney General didn't do their jobs to protect what they knew was a fundamental right of citizens. They knew, based on legal precedent as of 2003, there was no legitimate reason to exempt ballots. But slipping it into "law" would make a difficult burden for anyone to 1) discover how it got passed 2) challenge it in court. Maybe they could get away with it. So far, they have.

---

[3] Candice Hoke, *Judicial Protection of Popular Sovereignty: Redressing Voting Technology*, Case Western Reserve Law Review, Vol. 62 (2012) p. 1017

> The former teacher in me knows that if rules aren't enforced, the kids know they're not real rules and a few will take advantage. Some will always test to see where the line is. If election laws and checks and balances consistent with our constitution are not enforced, someone WILL take advantage, not a question of if, but WHEN. Maybe someone already has. *id.* at 9

Laws are not always followed or enforced. Public servants don't always act in the public's best interest.

Electronic voting is faster, convenient and allows election officials to evade accountability for election results. Public records law is inconvenient for public officials and can reveal errors, problems and "truth" contrary to the "official story." See Bev Harris statement, re: 2008 Presidential Primary recount, *Id.* at 40

This case proves it. Instead of enforcing the laws that protect our rights, our votes and our elections (Title LXIII), the Defense vigorously tries to enforce this illegitimate and unconstitutional "law" that allows public officials to evade public accountability. It hides evidence that will likely prove there is no legitimate privacy reason to exempt ballots from public review after the results have been certified.

If the review of over voted ballots showed computer or election officials error, the Defendant and the Attorney General should follow up and figure out why. If it showed voter confusion, public education would be warranted.

If the review in this instance (or testing for chemical solvent in 2008) indicated fraud, officials should investigate and take appropriate action. *Id.* at 40.

Either scenario is inconvenient for the Secretary of State and Attorney General, but it is their legal responsibility. It's the law.

> "[e]very voter's vote is entitled to be counted once. It must be correctly counted and reported." *Gray v. Sanders*, 372 U.S. 368, 380 (U.S. 1963). *Id. 22*

3. Free Speech

Restrictions on public access to information and free speech have to be narrowly tailored to fit a specific and real governmental interest. *City of Keene v. James Cleveland et al*. 2013-0885 (Decided June 9, 2015). *Rideout et al v. New Hampshire Secretary of State,* Case 1:14-cv-00489 (Decided Aug. 11, 2015}

Access to public documents is tied to the ability to speak and act on that information. NH CONST. pt. 1, art. 8 and 22

> Accessibility of information assumes and encourages a community of people free to think as it chooses and act according to its collective will." *Petition of Keene Sentinel*, 136 N.H. 123 (1992).

It is axiomatic that denying access to the facts of our elections, denies our ability, individually and collectively, to speak and, if necessary, push our government to improve its practices and/or laws.

In *Rideout* (ballot selfie case) the Federal court found "The state must specifically identify an 'actual problem' in need of solving . . . ." and could not meet the burden of showing there had been any problem with vote buying or intimidation since the secret ballot was introduced in 1891. The free speech rights of the Plaintiffs trumped the regulatory interests of the State.

Although the Court denied the Plaintiff's motion to amend her complaint to include the First Amendment as a cause of action, this Court first looks at the State Constitution, pt. 1, art. 22 to decide the free speech issue. *Keene v. Cleaveland, id.*

> Denying access to information that proves or disproves the legitimacy of our elections prohibits speech and action on the part of citizens that is contrary to the democratic process that requires an informed citizenry and contrary to the spirit and intent of RSA 91:A, which was passed with strong bi-partisan support in 1967.
>
> A Senate supporter said: "The public has a `right to know' what its public servants are doing and how they are responding to the people who put

> them there. An informed and knowledgeable electorate is the life-blood of a democratic society. Ignorance on the other hand breeds the type of situation which opens the door to those who would destroy the democratic process." *Id.* at 135

Both the Defendant and Deputy have made statements that show intent to illegally prohibit this speech and undermine that democratic process.

> There are groups who have the position that electronic ballot counting devices should not be used and that all ballots should be hand counted. In some cases the moderator granting a hand count amounts to a fishing expedition to find something these groups can run with to lobby for eliminating the use of these machines," Scanlan said. *Monadnock Ledger Transcript* article " Moderator makes switch on handcounting," Nov. 2, 2010, Ex. K. *Id.* at 137.

During the Jan. 30 Executive Session of the subcommittee [considering HB 1357], Rep. Marston stated he had talked with Bill Gardner who had told him, "the people behind this don't trust the machines" and want to return to hand counting. *Id.* at 135

> If you allow access to ballots by groups and individuals that may have motives that are not in the best interest of the state, they can read those ballots and reach different interpretations and could raise issues that create doubt in the minds of voters and those running for office and we don't believe that is appropriate," Scanlan said. "Secretary of State opposes move to open ballots to public view," *Union Leader* article, Jan. 14, 2014. Ex. L. *id.* at 138-139.

B. How Other States Have Answered Ballots as Public Records Question

The lower court ignored examples of how 23 other states have handled the ballots as public records question. Yet, the Supreme Court relies on that information for better "understanding the necessary accommodation of the competing interests involved." *Union Leader v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553 (1997). *Id.* at 113

The *Timothy Price v. Town of Fairlee, 2011 VT 48* case presents similar facts and issue to be resolved, but these differences: 1) Requiring a court order was state policy, not law 2) Price's town hand counted ballots.

As an election official honoring his oath of office, he wanted to know, when a recount showed a discrepancy in one contest, if other contests were also affected. Before the Court could rule whether to let him inspect the ballots, the Town Clerk destroyed them, on advice from Town Counsel. *Id.* at 77.

The judge declared that case "moot" but that the issue presented "an issue capable of repetition, yet evading review."

On July 20, 2009, Judge Mary Miles Teachout wrote:

> The question presented is a legal issue of general applicability and significant importance in relation to public accountability of public officials and the interface between laws relating to elections and those providing for public access to records….*id.* at 78

The pro se plaintiff ultimately prevailed in the Supreme Court, granting the public access to ballots after the recount period was over.

> What the State really appears to be arguing here is that, as the trial court found, subsequent disclosure may undermine "the public's confidence" in an election later revealed to contain errors or discrepancies, and that withholding the ballots therefore serves to preserve electoral "purity" or stability. Yet even if that were the unstated purpose of the election statutes—a conclusion we do not reach today—the PRA's express, overarching goal of ensuring public access "to review and criticize" the performance of our public officials "<u>even though such examination may cause inconvenience or embarrassment</u>" plainly must take precedence. 1 V.S.A. § 315 (emphasis added). *Id.* at 115

1. Ohio (2004) and Michigan (2010) Attorney Generals' opinions, *Id.* at 113-114.

2. Courts in Michigan (2004), Vermont(2011) , Colorado (2012) and Wisconsin (prior to 2007) *Id.* at 113, 115.

3. 19 other states favor public access. [4] *Id. at 113*

The Plaintiff asks that this Court apply the conclusion reached in *Firefighters* in deciding this case so New Hampshire will join those states that say public accountability, our right to know "what our government is up to" trumps the state's interest in keeping the facts of our elections a secret. *Id* at 59

> Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism. See International Federation v. Superior Court, 165 P.3d 488, 495 (Cal. 2007 ….[and] is essential to the transparency of government, the very purpose underlying the Right-to-Know Law. *Professional Firefighters v. Local Government Center, Inc.,* 159 N.H.699, 99, A.2d 582, 2010, *Id.* at 135

II. The lower court erred in denying the Plaintiff's request to review ballots to prove her claim that no ballot would likely be traceable to a voter.

Standard of Review

This appears to be a violation of both court rules and the Defense's code of professional conduct to deny access to information that would probably disprove the Defense's claim and prove the Plaintiff's.

The Plaintiff has never disputed the importance of protecting voter privacy, only that there is no evidence that would be violated by her reviewing the Jaffrey ballots, (based on her experience as ballot counter and ballot clerk and that of the former Jaffrey Town Clerk of 25 years) and others, including the NH Press Association. Ex. E. *id.* at 59

Federal courts interpreting FOIA, the NH Supreme Court and NH Attorney General guidelines use a three-step analysis when considering whether disclosure of

---

[4] The Plaintiff included Texas and Kansas in that list and is aware that current legal suits in those states are attempting to access election records. "Clarkson became more interested in the issue after reading a paper …….. in 2012 of the Republican primary results showing strong statistical evidence of election manipulation in Iowa, New Hampshire, Arizona, Ohio, Oklahoma, Alabama, Louisiana, Wisconsin, West Virginia and Kentucky. http://www.kansas.com/news/politics-government/article17139890.html

governmental records constitutes an invasion of privacy and is "sufficiently confidential to justify non-disclosure." *Lamy v. N.H. Public Utilities Comm'n*, 152 NH 106 (2005), *Goode v. NH Office of Legislative Budget Assistant,* 148 N.H. 551 (2002).

> i. Is there a privacy interest at stake that would be invaded by the disclosure?
> ii. Would disclosure inform the public about the conduct and activities of its government?
> iii. Balance the public interest in disclosure against the government's interest in non-disclosure and the individual's privacy interest in non-disclosure. *Id. 172*

The Court prevented access to evidence to prove her claim that "she needs to review the ballots to get the evidence that will show there is `no sufficiently compelling reason" to exempt all ballots to protect voter privacy. *Associated Press v. State* 153 N.H. 125 (2005) *Id*. at 95.

The Defense claimed "should this matter survive the forthcoming summary judgement and proceed to trial, the Secretary of State will provide evidence as to how a ballot can be easily traced to a specific voter that cast it." *Id.* at 129.

Defense's "evidence" given through discovery, see Appendix A. *Id.* at 169.

A reasonable person would agree that only the person who voted the ballot would know who voted it. Much easier to "buy" votes of absentee voters or have the voter take a picture as proof than to file public records requests, where the activity should be spotted as suspicious by the official supervising the review. *Id.* 69-70.

The Court ignored the Plaintiff's requests that it examine both sample "regular ballots" and "overseas" ballots to determine objectively if legitimate privacy reasons existed to exempt ballots from public records law. *Id.* at 186-188.

> The judicial function under the constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigations of evidence as a basis for that

> determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. *Murchie v. Clifford,* 76 N.H. 106 (1911) *Id.* 176

Since there is no evidence voter privacy is a legitimate concern and was not mentioned as an issue in the House Election Law Committee's majority opinion in the 2014 repeal attempt, the court's ruling based primarily on the notion of "alleged" voter privacy must be vacated. *Id.* at 12

III. The Court Should Have Applied a Strict Scrutiny Standard Because of the Fundamental Rights Involved or Minimally, an Intermediate Standard in Balancing the Deputy's Stated Interests and the Public Interests Involved.

Because this case involves several fundamental rights (voting, access to public information, public accountability and free speech), the Court should have applied a strict scrutiny standard in deciding this case.

The burden under RSA 91-A and NH CONST. pt. 1, art. 8 is always on the party that seeks nondisclosure. In this case, the Court erred in putting the burden on the Plaintiff. She cannot prove that ballots have ever been available for public review and the Defense cannot prove that they never have been. *Associated Press v. State,* 153 N.H. (2005). The facts of this case and interest of justice require that is not a reason to grant summary judgment to the Defendant. *Id.* at 242

The Plaintiff has a presumed constitutional right to access and should not have to "prove" it to the Defense, who has a duty to protect it, or a Court.

This kind of severe burden justifies a strict scrutiny standard.

To survive a strict scrutiny analysis, a severe restriction must:

> "be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose." *Akins v. Secretary of State*, 154 N.H. 74 (2006) *Id.* at 22

Discovery in *Rideout, id.* showed:

> ….the State has not identified a single tangible instance of vote

> buying or voter coercion **since the late 1800s.** The State has even acknowledged that it has **never received a complaint or concern regarding a voter displaying or publishing a photograph of his or her marked ballot to a party buying or coercing a vote since 1976.** (emphasis added). *Id.* at 240.

In the *Guare v. New Hampshire,* No. 2014-558, 2015 (N.H. Sup. Ct. May 15, 2015) voting rights case, this Court applied the intermediate standard of scrutiny and ruled that "The government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation, nor upon overbroad generalizations." *Community Resources for Justice, Inc. v. City of Manchester, 154 N.H. 748, 762 (2007). Id.* at 241 (argued by Plaintiffs in that case, preserved for review.)

It then follows that the Deputy cannot make up "facts" about legislative intent that conflict with the stated legislative intent of HB 627, that its ONLY purpose was required to comply with federal HAVA law in order to receive $20 million in federal funds. *Id.* at 17. See IV below.

The Court erred in saying a made up interest (to protect against vote buying and intimidation) and an unproven claim that voter privacy would be violated is more compelling than the public's right to know that election results are true and that our government is legitimate (the foundation of our inherent right to self-government).

IV. Since the Plaintiff believes this question will set a legal precedent re: the process used to exempt ballots from public records law in 2003 (is the Legislature supposed to follow its own rules, were the required constitutional checks and balances followed, is it accountable to the public through RSA 91-A if it violates the law's intent and purpose (and purpose and intent of Part I, Article 8), the lower court erred in saying this question was non-justiciable.

Standard of Review

Justiciability of claims under Part I, Article 8 and RSA chapter 91-A, the Right-to-Know Law, are a question of law, which the Court reviews de novo. See Carbone

v. Tierney, 151 N.H. 521, 533 (2004). *Hughes v. Speaker, N.H. House of Representatives,* 152 N.H. 276, 283, 876 A.2d 736 (2005).

Because the Court decided, as a matter of law, the process used in 2003 to exempt ballots from RSA 91-A was non-justiciable, it ignored the facts of the case, did not allow discovery to be completed, evidence to be presented at trial or the Plaintiff to question the Deputy or Defendant under oath.

There is an available process for amending the state constitution. That would have been the proper procedure for the Deputy and Assistant Attorney General to follow if they wanted to remove all public oversight and accountability of our elections in computer count locations.

The Plaintiff claims the "law" was illegally enacted in 2003, violating constitutionally required checks and balances to ensure laws are constitutional and the spirit and intent of "openness" expected in considering legislation that SHOULD be carefully vetted by many different people, not just three people on one committee. Not only were procedural due process rights violated for public participation, *Starr v. Governor, 154* N.H. 174, 178, 2006, but also for most legislators who likely did not know the ballot exemption had been added to HB 627. See legislative history summary, *id.* at 67-68. The process violated the spirit and purpose of RSA 91:A. Any one of the 424 legislators could have asked the Attorney General for an opinion re: constitutionality IF they had known.

> Discovery question asked of former Representative Ted Leach: "If you had been aware [the ballot exemption] was in the bill and not required by HAVA, what would you have done? Response: "I would have probably joined with others inquiring as to why we needed this." *Id.* at 239
>
> This case will set a legal precedent regarding both the Secretary of State's duty and authority." *Id.* at 33.

> Does the Secretary of State have the constitutional authority to bypass the legislative process, and with the help of key legislative leaders mislead other legislators, and amend the NH Constitution by removing an inherent, fundamental right from the people?" If the NH Courts decide the Secretary of State has that authority to do this for himself or a friend, does that "right" also apply to an ordinary citizen such as the Petitioner, the Attorney General, the governor, the leader of a political party, a lobbyist, or someone with money who wants to buy a law. *Id.* at 31

From April 30, 2003 Testimony, Senate Internal Affairs Committee Public Hearing before s 1640 was added May 9.

> Sen. O'Hearn asks: "…Did we go beyond the federal? Do we have more in here than we need? Or is it in compliance?"
>
> Rep. Stritch (then chair of House Election Law) replies: "No, it is in compliance and, to my knowledge, we have not added additional sentences to it. No."
>
> Sen. Flanders inquired about any possible violations of NH CONST pt. 1, art. 28-a (unfunded mandates); the Secretary of State representative [Anthony Stevens] assured him there were none. *Id.* at 17.

Neither the Deputy nor committee chair and Senate sponsor of s 1640 attended that hearing.

> From the Plaintiff's complaint:
> The only clue available about legislative intent when the policy was passed in 2003 comes from the Senate sponsor of the amendment (to HB 627) before the Senate voted on May 22.
>
> Sen. Boyce said,
> "**The [Senate Internal Affairs] committee amendment [of May 15] ensures that the provisions of this bill are consistent with the Help America Vote Act legislation that we just passed**." *Id.* at 46

Contrary to continual Defense assertions that there was a public hearing on S 1640, there was not. He continues to make up facts, then provides the Docket for HB 627, that disproves his claim. *Id.* at 219. First mention of s 1640 appears May 15 (amendment introduced May 9). *Id.* at 17

The Deputy claims the process was "normal" and has told the House Election Law Committee considering the ballot exemption repeal in 2014 that the court, in its 2012 opinion, saw nothing wrong with it. *Id.* at 87

Senate rules in 2003:

> 23: **No amendment to any bill shall be proposed at any time or by any source….except it be germane.** Amendments shall have been reviewed by the Office of Legislative Services for form, construction, statutory and chapter reference. (Note: including 28-a provisions] emphasis added
>
> 43: Non-germane amendments….are prohibited and shall not be allowed under any circumstances. *Id.* at 20.

Since the process for passing this "illegal constitutional amendment" presents an "issue capable of repetition yet evading review" the Court should carefully consider the message it will send to state officials, legislators, and the public. If not overruled, the lower court's opinion can be interpreted as saying "State officials, legislators and their friends don't have to follow rules or laws, all are `discretionary' FOR THEM. Yet they can pass laws this way and the REST of you are supposed to follow them because `it's the law.'"

> As Justice Brandeis warned in 1928, this attitude of entitlement, of being "above the law" is an invitation to revolution and/or anarchy. "If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." *Id.* at 104

The Plaintiff could not have gotten a legislative committee to add HB 1357 as a non-germane amendment to a bill that has already passed the other branch of government. She had to follow the rules. The Deputy and Assistant AG don't?

Compare the way s 1640 was passed with that of two controversial laws this past session, SB 179 (to protect against alleged "drive by voting" and the "ballot selfie," (*Rideout, id.)* (to protect against voter intimidation and bribery).

Though critics of both bills questioned their constitutionality, they passed House and Senate. Individuals and groups had the opportunity to 1) speak at public hearings in both House and Senate, 2) contact their legislators 3) issue press releases, write opeds and letters to the editor 4) investigate to find if there was a real "problem" a law needed to address, [5] 5) lobby the governor to veto (she vetoed SB 179) and 6) immediately challenge the law in Court (as opponents, including a legislator, of the ballot selfie did.)

There is NO one on the record saying ANYTHING about s 1640. Six Senators recorded their dissent to the entire bill. Text of s 1640 wasn't in either the House or Senate Journals prior to the June 24, 2003 vote. No roll call was taken in the House so no member recorded his/her dissent. NH CONST pt. 2, art. 24 Supp. at 15.

The first the Plaintiff believes any citizen was aware of the ballot exemption was during the Presidential Primary Recount in 2008. *Id.* at 4

The Court should have allowed Discovery to be completed, proceed to trial and consider the RSA 91:A- 8 applicable remedies for such an egregious violation of public trust.

V. Since the following facts are in dispute, the lower court erred in granting summary judgment to the Defendant.

A. By law, ballots should not be traceable to voters. The rare exceptions can be dealt with without exempting all ballots from public review after the recount period has ended and election results certified.

B. Although the NH Constitution (Part II, Art. 32) and RSA 659:63 REQUIRE public vote counts, the comparison of Nov. 2014 voter registration information in hand count v. computer count locations shows less than 13% of all NH votes are now counted in public.

---

[5] The NHCLU's investigation found four allegations in past 15 years and that "the Secretary of State's Office has failed to document a single case of an out-of-state voter illegally voting in a New Hampshire election."
http://aclu-nh.org/wp-content/uploads/2015/06/ACLU-Report-Final.pdf

C. Legislative history shows the Legislature exempted ballots in 2003 ONLY to bring the state in compliance with federal Help America Vote Act (HAVA). The defendant has acknowledged HAVA did not require exempting ballots from public records. There is no evidence legislative intent of the 2003 action was to protect either voter privacy or to deter voter bribery and/or intimidation.

Standard of Review

Motions for summary judgment can be granted when there are no material facts in dispute. The standard of review is whether a reasonable person could have reached the same decision as the lower court based upon the same evidence. *McNeal v. Lebel,* 157 N. H. 458, 461, 2008.

1 Protect Voter Privacy—claimed by Defense, not proven. See II above.

2. Public Vote Counts

The Court's conclusion that "Moreover, the public has various mechanisms for ensuring election integrity without accessing ballots. *See* RSA 659:63 (requiring that vote counting is public, but that ballots be kept four feet from the public."…. (Supp. at 6) is clearly erroneous and no reasonable person would draw that conclusion from the evidence presented. See Ex. O, *id.* at 199-211.

> The vast majority of votes in New Hampshire are counted out of public view by machines using proprietary software. Minority Report on HB 1357, *id.* at 12

In filings, the Plaintiff claimed that about 85% of NH votes are NOT counted in public. *Id.* at 88. Research conducted after the Court issued its opinion shows, based on November 2014 voter registration, nearly 87% of all votes are NOT counted in public. Supp. at 23-29.

It's axiomatic that laws (like RSA 659:63 and other election laws consistent with NH CONST, pt. 2, art 32, text included in the Supplement) which protect the

rights of voters, candidates, votes and elections have no meaning if those laws are not followed and enforced by state or local election officials.

The Deputy discouraged the Jaffrey moderator from following the law and fulfilling his legal duty in the November 2010 election (see *id. at 181).* The moderator had planned to conduct a public vote count of one of the hotly contested federal races (which were most vulnerable to tampering). RSA 659:42, Supp. at 18-19. NO public vote counts in Jaffrey were conducted during that election or any since 2003, except in Town Meeting,

The November 2010 ballots were the ones the Plaintiff asked to review in her 2012-13 legal action and the Jaffrey Town Clerk reportedly destroyed them before the end of the required retention period, before the Plaintiff could amend her petition and add the Town as a party, before the lower court could issue an opinion.

The Plaintiff offered to explain "an exemplary model" that fits the spirit and intent of a public vote count using the computer. The Court didn't ask. *Id.* at 183

During the 2014 Jaffrey Town Meeting, Town Counsel told voters that conducting public vote counts to check the accuracy of the computer count and make sure there is no tampering is "probably illegal" and "violates state regulations." *Id.* at 53. Supp. 18-19. That contradicted the Attorney General's interpretation of state law as of Nov. 2010.

> Moderators are given significant authority to determine what procedures at their polling place are necessary to ensure an accurate count. (Assistant AG Matthew Mavrogeorge, Nov. 2, 2010 email). *Id.* at 37

The Court relied, not on evidence, but the Defense's claim. The evidence (Section 27 of 1891 Act, *Id. at 161*), added to Court files after May 5, proves

the Plaintiff's claim, that vote counting by computer is NOT public. *Id.* at 149, 152, 155.183, 184. See *Opinion of the Justices,* 53 N.H. 640, 1873, *id. at* 25

The Defense made up another fact the Court relied on to be true. But, it is not a fact. And the facts matter, in our election results, court actions, legislative committees, guidance given local election officials and in Town Meetings. And, if we are to have government based on "consent of the governed" NH CONST pt. 1, art. 1, it is the duty of those that know the facts, to make sure decision makers have them. Supp. at 14

> It is the duty of one who volunteers information to another not having equal knowledge, with the intention that he will act upon it, to exercise reasonable care to verify the truth of his statements before making them…..One who makes a representation that is true when made has a duty to correct representations which are discovered to be false or erroneous prior to the time the transaction has been consummated.
>
> *NH Practice*, Vol 8 p. 157-158, *id.* at 105.

3. Legislative Intent See IV above.

The Court erred in granting summary judgment to the Defendant.

VI. The Plaintiff had shown that there had been unanswerable questions about the number of over voted ballots in other elections. After she showed (and was willing to give a specific example if asked) that over voted ballots could indicate fraud, the lower court erred in denying the Plaintiff's request to review ballots to find out why 2.5% of Jaffrey ballots cast in November 2012 contained over votes.

Standard of Review

> It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity…. We will uphold the decision of the trial court with regard to the issuance of an injunction absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact. *Town of Atkinson v. Malborn Realty Trust*, 164 N.H. 62, 66, 2012.

The Court erred by applying the law (all ballots are exempt from public review) without considering the facts. The Deputy has repeatedly stated publicly, a

member of the public has "an inherent right" to see ballots, "there is a process through the courts….." *id.* at 138.

The Plaintiff had clarified that Section II of her complaint was separate from the constitutional question, but the Court ignored that request. *Id.* at 190. She alleges bad faith on the Defense's part for arbitrarily changing "the rules" after she had spent money and taken the time to pursue two legal actions. *Id.* at 95

Legal Precedent Set by Lower Court

Unless vacated by this Court, the lower court's opinion will serve as legal precedent and place an insurmountable burden on the Plaintiff or any other citizen seeking access to ballots in New Hampshire. *Id. at 98.*

Even when there is evidence of significant error that MAY indicate fraud, this opinion can be used to say the litigant should be denied access.

Attorney professional conduct rules don't allow helping their client cover up fraud.

In discovery, the Deputy acknowledged he knew the following:

an attack or initial programming [of the computer] could:

- turn off under-and-over vote notification. It could selectively disable over vote notification or selectively provide false over vote notification for favored or disfavored candidates. (Source: VSTAAB Report, February 2006) *Id.* at 34,35
- In addition, the pre-election ballot testing in Jaffrey prior to the November 2010 election revealed an additional potential for fraud. *Id.* at 245-46

By law, voter intent is the legal standard for determining a vote. RSA 659:64, Supp. at 19.

The Defense claims "the law contemplates the "purity of elections" and imposes penalties where government officials violate their prescribed duties. RSA

666:1-2." *Id.* at 149, Supp. at 21.

However, if the moderator knowingly counts an illegal vote or does not count a legal vote when the computer tabulates the votes out of public view, who would know? And, if the moderator unknowingly counts an illegal vote or does not count a legal vote, who would know?

Discovery question posed of the Defendant and the Jaffrey Moderator (who refused to answer any question):

> "If the votes for US Representative in November 2010 had been switched among candidates, how would he/you have caught that error and corrected it before reporting the results to Concord?" [see *id.* 204]
>
> The Deputy answered:
>
> ….reconciliation procedures overseen by the moderator help identify any errors that may have occurred during the process of counting votes.
>
> The Plaintiff's answer is the honest one. In the Jaffrey moderator's current practice, there would be no way to catch and correct the error. NH CONST. pt. 2, art. 32. *Opinion of the Justices,* 53 N.H. 640, 1873. *id.* at 194

The lower court should have considered the facts before applying the law as he interpreted it.

> "A legislative determination whether restrictions to public access are `reasonable' is subject to judicially discoverable and manageable standards "See Union Leader Corp. v. Chandler, 119 N.H. 442 (1979); Petition of Union Leader Corp., 147 N.H. 603 (2002). *Hughes v. Speaker* 152 N.H 276, 2005 *Id.* at 23

VII. The lower court erred in determining that the public's right and responsibility to know that election results are true, our government is legitimate, knowing the democratic checks and balances required by our constitution are being followed and election officials are accountable to us is substantially less important than the Defendant's interest in exempting all ballots from public records law.

Standard of Review

> To determine whether restrictions are `reasonable,' we balance the public's right of access against `the competing constitutional interests in the context of the facts of each case.' Associated Press, Inc. v. Department, 4 P.3d 5, 10 (Mont. 2000)(quotation omitted); see also Petition of Union Leader,

147 N.H. at 604." *Id.*

The Court "finds that the State's interest in ensuring voter privacy far outweighs any benefits that could be obtained from the public accessing private ballots." Supp. at 7

The Court based its conclusion that the Defense's argument was more convincing and that *Associated Press v. State,* 153. N.H. 120, 130, 2005 presented the proper standard to follow in deciding this case.

> (1) the party opposing disclosure must demonstrate that there is a sufficiently compelling reason that would justify preventing disclosure to the public;
>
> (2) the court must determine that no reasonable alternative to nondisclosure exists and use the least restrictive means available to accomplish the purposes sought to be achieved by nondisclosure of the documents.

The Defense and the lower Court believe the public's interest in knowing that our election results are true and our government is legitimate is as important as the public's interest in a financial affidavit filed as part of a divorce proceeding.

Unless this Court fulfills its duty and vacates the lower court's ruling, New Hampshire citizens are where they were in 1776 when the first state constitution was written to protect the rights Parliament "Depriving us of our Natural and Constitutional rights and Privileges" failed to protect. The "right of revolution" becomes our "duty" and NH CONST. pt. I, art. 10 applies. *Id.* at 243-244. Supp. at 14.

CONCLUSION

Because the lower Court's opinion is not based on fact or an objective standard for assessing evidence, did not properly balance the public's and Defendant's interests as legal precedent in public records, voting rights and free speech cases require, the opinion in total, regarding Sections II, III and IV of Plaintiff's complaint should be vacated so it is not used to guide legislative committees, other court actions, or as a precedent for government to justify keeping information hidden from the public.

The Plaintiff respectfully requests the following, if it is within the Court's authority to grant:

1) To order and oversee inspection of the 2012 Jaffrey ballots to determine, using objective criteria, "whether `privacy' is a real or imagined issue." *Id.* at 57

2) With that evidence, and what is presented in this case, to determine whether RSA 659:95, II et al relating to ballots, are constitutional and issue a ruling.

3) If they are not constitutional, order the Defendant to work with the Plaintiff and town clerk representatives to develop "reasonable guidelines" for ballot review subject to Court approval. See *Id*. at 117 for draft.

4) Determine whether the facts presented in the record (*Id.* at Section III, 15-21) and through questioning the parties, show the process used to exempt ballots from RSA 91-A is justiciable under the provisions of RSA 91:A. If they are, provide guidance to the lower courts regarding accountability of the Legislature (and parties seeking legislative sponsorship of a bill) under RSA 91-A, similar to what this Court provided after the *Petition of Keene Sentinel,* 136 N.H. 121 N.H.1992 ruling.

5) Include in your court rules or offer a bill to the legislature that would likely deter the Defendant/Deputy from doing this kind of action again. The following is an example of what the Plaintiff would like to see:

> order the Defendant to pay a substantial monetary penalty into a fund that will help pay attorney fees for future litigants seeking to restore fundamental rights the State had the duty to protect and no authority to take away and any other remedies available to the Court's discretion. *Id.* at 80-82

6) Determine whether, under RSA 91-A: 8 remedies (Supp. p. 17) this case would qualify for reimbursement of Attorney's fees and order reimbursement of all Plaintiff's expenses for 2012-2013 and 2014-15 cases (including fees paid to an attorney after she filed the 2014 action). *Lamy v. N.H. Public Utilities Comm'n*, 152 NH 106 (2005) *Id.* at 136

7) If anything is remanded to the lower court to review, that a different judge than the one who issued the 2012 and 2015 opinions be assigned to the case. In her motion of Feb. 26, 2015 "For Judge to Consider Recusal," she cited concerns with his impartiality and independence first noted after the Oct. 29, 2014 hearing. *Id.* at 88

> She would expect an impartial judge to qualify as a "reasonable, disinterested person fully informed of the facts" and that's the judge she saw until September 4, 2012 when she discovered that the ballots she had asked to review had reportedly been destroyed. Then she saw a judge looking away and pretending not to see. Supp. at 30.
>
> She was willing to give you the benefit of the doubt, we all make mistakes and learn from them. But she has only seen a continued "looking the other

way" in the current action, including one decision (not allowing her access to ballots to prove her claim) that has NO legal precedent or any justification that she knows of. *Id. at 31*

ORAL ARGUMENT

The Plaintiff requests 15 minutes for oral argument.

September 8, 2015

Respectfully submitted
By Plaintiff

Deborah Sumner
474A Great Rd.
Jaffrey, NH 03452
(603) 532-8010
dsumner@myfairpoint.net

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Appellant's Brief and Appendix have been hand delivered this day to Stephen LaBonte, NH Department of Justice, 33 Capitol St., Concord, NH 03301-6397 and nine copies have been filed with the Clerk in accordance with Rule 26 (2), (3) and (4).

Deborah Sumner