THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2024-0247

DEMOCRATIC NATIONAL COMMITTEE and
NEW HAMPSHIRE DEMOCRATIC PARTY,
Plaintiffs-Appellants,

v.

DAVID M. SCANLAN, in his official capacity as the New Hampshire Secretary of State, and JOHN M. FORMELLA, in his official capacity as the New Hampshire Attorney General,
Defendants-Appellees.

On Appeal from the New Hampshire Superior Court,
No. 226-2023-cv-613, Before the Honorable Amy L. Ignatius

BRIEF FOR APPELLANTS

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1. Whether the superior court erred in (1) dismissing plaintiffs' claim that New Hampshire Senate Bill ("S.B.") 418 violates part 2, article 32 of the New Hampshire Constitution, and/or (2) declining to preliminarily enjoin S.B. 418 based on that claim. *See Complaint*, App.24-25 (¶¶66-71); *Motion for Preliminary Injunction*, App.152; *Transcript of Hearing on Preliminary Injunction*, App.228-231.

2. Whether the superior court correctly held that plaintiffs had standing to challenge the constitutionality of S.B. 418 (cross-appeal issue). *See Complaint*, App.5-9 (¶¶8-16); *Transcript of Hearing on Preliminary Injunction*, App.231-233.

RELEVANT LEGAL PROVISIONS

New Hampshire Constitution part II, article 32

The meetings for the choice of governor, council and senators, shall be … governed by a moderator, who shall, … in open meeting, receive the votes of all the inhabitants of such towns and wards present, and qualified to vote for senators; and shall, in said meetings, … sort and count the said votes, and make a public declaration thereof, with the name of every person voted for, and the number of votes for each person; and the town or city clerk shall make a fair record of the same at large, in the town book, and shall make out a fair attested copy thereof, to be by him sealed up and directed to the secretary of state, within five days following the election, with a superscription expressing the purport thereof.

S.B. 418, codified at RSA 659:13, 659:23-a, 660

S.B. 418 is set forth at Appendix 31-37. In relevant part, it amends RSA 659:23-a to read:

I. For all elections, if a voter on election day is registering to vote for the first time in New Hampshire and does not have a valid photo identification establishing such voter's identification, or does not meet the identity requirements of RSA 659:13, then such voter shall vote by affidavit ballot pursuant to this section.

II. The authorized election official shall hand the affidavit ballot voter an affidavit voter package and explain its use. The affidavit voter package shall be designed, produced, and distributed by the secretary of state, and shall contain the following:

(a) A prepaid U.S. Postal Service Priority Mail Express (overnight delivery) envelope addressed to the secretary of state for the affidavit voter to return the affidavit verification letter described in subparagraph (b) and any required missing documentation that necessitated voting by affidavit ballot. The return address on this envelope shall be for the office of the secretary of state.

(b) An affidavit voter verification letter, in duplicate form, which lists all the documents required to qualify to vote in the state of New Hampshire. The authorized election official shall mark on both copies of the verification letter which qualifying documents were not provided, thereby necessitating voting by affidavit ballot. One copy of the affidavit verification letter shall be given to the voter; the other copy shall be retained by the authorized election official. The voter shall be required to return their copy of the affidavit verification letter and a copy of any required documentation to the secretary of state in the provided prepaid U.S. Postal Service envelope within 7 days of the date of the election in order for the ballot to be certified.

III. The moderator shall mark each affidavit ballot "Affidavit Ballot #___" sequentially, starting with the number "1".

IV. All affidavit ballots shall be cast in person at the polling place, placed in a container designated "Affidavit Ballots," and hand counted after polls have closed using a method prescribed by the secretary of state for hand counting and confirmation of candidate vote totals. After completion of counting, the moderator shall note and announce the total number of votes cast for each candidate, and the total number of affidavit

ballots cast in the election. No later than one day after the election, the moderator shall forward all affidavit ballot verification letters to the secretary of state using a secure means of transmission or delivery.

V. On the seventh day after the election, if an affidavit ballot voter has failed to return the verification letter with the missing voter qualifying documentation to the secretary of state, either in person or using the prepaid U.S. Postal Service Priority Mail Express Envelope, the secretary of state shall instruct the moderator of the town, city, ward, or district in which the affidavit ballot was cast to retrieve the associated numbered affidavit ballot and list on a tally sheet, by candidate or issue, the votes cast on that ballot. The counting of votes on affidavit ballots identified by the secretary of state as unqualified shall be conducted by the town, city, ward, or district using the same methods of counting and observation utilized on the day of the election for hand counted ballots. The votes cast on such unqualified affidavit ballots shall be deducted from the vote total for each affected candidate or each affected issue.

VI. No later than 14 days after the election, any town, city, ward, or district in which any affidavit ballots were cast, and not subsequently verified, shall provide to the secretary of state a summary report, by race or ballot issue, of the total votes cast by the unqualified voters. The total vote minus the unqualified affidavit ballot vote for each race or issue shall be the final vote to be certified by the appropriate certifying authority.

STATEMENT OF THE CASE

S.B. 418 is another in a series of recent legislative efforts to alter New Hampshire's election system in violation of the state constitution. This Court has blocked each prior effort in this series. *See New Hampshire Democratic Party v. Secretary of State*, 174 N.H. 312, 332 (2021); *Guare v. New Hampshire*, 167 N.H. 658, 669 (2015). This case requires the same result. S.B. 418 creates a new regime under which election-day registrants who do not bring adequate photo identification to the polls must cast an "affidavit ballot." These ballots are segregated from all others and are counted only if the voters who cast them successfully complete a burdensome voter-qualification process within seven days after election day.

This scheme conflicts with part 2, article 32 of the state constitution. That provision requires local officials to report a tally of votes cast by persons "qualified to vote" within "five days following [an] election." As just noted, however, S.B. 418 creates a category of voters whose qualifications are not determined until *seven* days after election day. Specifically, voters are given that long to submit the necessary "voter qualification documentation" to the secretary of state. Voters who fail to do so are "identified by the secretary of state as unqualified" on "the *seventh* day after [an] election," S.B. 418 §2, V (emphasis added)—and their ballots are excluded from the final count. But precisely because that does not happen until "the seventh day," election officials are precluded by the statute from complying with article 32's five-day deadline.

S.B. 418's supporters were aware of this conflict before the law's enactment. For example, in a hearing on the bill, defendant Secretary of State David Scanlan warned legislators that "Part 2, Article 32 of the Constitution" may not allow S.B. 418's "novel version of a provisional ballot" that "would be discounted from the election" "if the voter d[oes] not respond to [a] request for documentation" within seven days. App.133. Secretary Scanlan even urged the legislature to "ask [this Court] for an advisory opinion" on this issue. *Id*. The legislature declined to do so, on the ground that—in the words of the bill's lead sponsor—"we, as a legislative branch," should not "subordinate our actions to the courts," App.145.

The constitutional issue raised by Secretary Scanlan is now squarely before this Court. And the answer is clear: S.B. 418 is unconstitutional. The superior court reached a contrary conclusion—dismissing plaintiffs' article 32 claim and denying a preliminary injunction—only by applying a legal standard this Court has expressly disavowed, i.e., that a facial challenge requires showing there are *no* circumstances in which the challenged law can be applied constitutionally. In particular, the superior court deemed plaintiffs' claim legally infirm because there could theoretically be elections in which there are no affidavit-ballot voters or in which all such voters establish their qualifications at least two days before the deadline, i.e., within five days after the election, meaning that there are no votes to deduct "on the seventh day after the election" and hence that election officials can comply with both S.B. 418 and article 32. But under the proper standard for facial challenges—which asks simply whether there

is "a clear and substantial conflict" between the challenged law and the constitution, *American Federation of Teachers v. State*, 167 N.H. 294, 300 (2015)—dismissal was improper, because such a conflict plainly exists. Indeed, the conflict will occur unless (1) *every* election-day registrant arrives at the polls with adequate photo identification (such that no affidavit ballots are filed), or (2) *every* affidavit-ballot voter establishes her qualifications by the fifth day after election day (i.e., two days before S.B. 418's deadline), *and* the secretary of state notifies local election officials of that fact by the fifth day after election day (again, two days before S.B. 418 provides for the secretary to do so). The superior court never denied that there will be many elections in which neither of these circumstances exists (nor did defendants or intervenors). The proper standard for facial challenges is therefore satisfied.

The standard for a preliminary injunction is likewise satisfied: For the reason just given (the conflict between the statute and the constitution), plaintiffs are likely to succeed on their constitutional challenge. And denying an injunction will inflict irreparable harm, in the form of voters (including plaintiffs' members) being denied their fundamental right to vote, which will also directly harm plaintiffs as organizations, by hindering them from achieving their objective of electing Democratic candidates.

In short, the superior court—though correctly holding that plaintiffs have standing—erred in dismissing plaintiffs' article 32 claim as failing to state a claim, and likewise erred in denying a preliminary injunction based on that claim. This Court should reverse the dismissal and remand with instructions to preliminarily enjoin S.B. 418.

STATEMENT OF FACTS

A. S.B. 418 Upended New Hampshire's Rules For Election-Day Registration And Voting

1. For nearly three decades, New Hampshire has allowed people to register and vote on election day. To do so, an applicant must complete a voter-registration form and present proof of domicile and identity. RSA 654:12, I.

For many years, any applicant for election-day registration who lacked acceptable documentation of domicile and identity had to, in order to vote, attest under penalty of felony to satisfying both qualifications. RSA 654:12, I(a)-(b). Such applicants were also photographed and mailed a request for written verification that they had in fact registered and voted. RSA 654:12, III-a, V(b). If such a mailing was returned as undeliverable, the secretary of state's office would conduct an inquiry to identify the voter, and would refer to the attorney general for further investigation any applicant whose identity and qualifications the secretary was unable to confirm. RSA 654:12, V(e).

In 2017, the state legislature enacted S.B. 3, which required people who registered on or within thirty days before election day to verify their domicile in one of two ways: delivering documentation to the secretary of state or agreeing to let state officials take action to verify their domicile. *See* N.H. Laws 2017, chapter 2015 (amending RSA 654:7, 654:7-a, and 654:12). The New Hampshire Democratic Party challenged S.B. 3, and this Court declared it unconstitutional on the ground that it unreasonably burdened the right to vote by confusing and deterring potential registrants. *New Hampshire Democratic Party*, 174 N.H. at 328, 332.

2. S.B. 418, which took effect January 1, 2023, significantly alters New Hampshire's regime for election-day registration and voting. The law requires anyone seeking to both register for the first time in New Hampshire and vote on election day without documentary proof of identity to submit a new type of provisional ballot, called an "affidavit ballot," that is deemed to have been "cast by [an] unqualified voter[]" unless the voter provides "documents required to qualify to vote" within seven days of the election. S.B. 418 §2, II(b), VI. S.B. 418 thus does with respect to identification what S.B. 3 did with respect to domicile: subjects election-day registrants (and no one else) to a uniquely burdensome voter-qualification process.

More specifically, under S.B. 418, a person registering for the first time in New Hampshire on election day without proof of identity will—unless an on-site election official attests to personally recognizing the person—be handed two things: (1) an "affidavit ballot," S.B. 418 §2, I, and (2) an "affidavit voter package" containing (a) a prepaid envelope addressed to the secretary of state and (b) an "affidavit voter verification letter, in duplicate form, which lists all the documents required to qualify to vote in the state of New Hampshire," *id*. §2, II(b). An election official at the polling place will then "mark on both copies of the verification letter which qualifying documents were not provided" by the voter. *Id*. One copy of this letter is retained by the official, while the other is given to the voter, who must return it to the secretary of state (along with qualifying documentation—which those who register prior to election day need *not* provide) "within 7 days of the date of the election in order for the ballot to

be certified." *Id*. An affidavit-ballot voter must also, as was required before S.B. 418, complete the attestation process by signing an affidavit, and have his or her photograph taken. *Id*. §4.

To enable election officials to trace each affidavit ballot back to the voter who cast it, S.B. 418 requires officials to "mark each affidavit ballot 'Affidavit Ballot #__' sequentially, starting with the number '1.'" S.B. 418 §2, III. After a voter casts his or her numbered affidavit ballot, it is segregated from other ballots and "placed in a container designated 'Affidavit Ballots.'" *Id*. §2, IV.

S.B. 418 requires election officials to send, within a day after any election, the retained copies of "all affidavit ballot verification letters to the secretary of state." S.B. 418 §2, IV. "On the seventh day after the election," if a voter has not delivered to the secretary the voter's copy of his or her verification letter along with "qualifying documentation," the secretary must instruct the appropriate local election official to "retrieve the associated numbered affidavit ballot and list on a tally sheet, by candidate or issue, the votes cast on that ballot." *Id*. §2, V. "The votes on such unqualified affidavit ballots shall be deducted from the vote total for each affected candidate or each affected issue." *Id.* "The total vote minus the unqualified affidavit ballot vote for each race or issue shall be the final vote to be certified by the appropriate certifying authority." *Id*. §2, VI. Put more simply, affidavit-ballot voters who do not properly complete the verification process within seven days after an election are denied their right to have their votes counted.

Affidavit-ballot voters who are determined to be "unqualified" are not just disenfranchised, however. S.B. 418 also requires the secretary of state to compile "[t]he names of affidavit voters whose verification letters are either not returned to the secretary … or which do not provide the required voter qualifying information," and to refer those people "to the New Hampshire attorney general's office for investigation in accordance with RSA 7:6-c"—a statute that authorizes criminal prosecution. S.B. 418 §2, VII.

B. S.B. 418 Was Enacted Despite The Absence Of Voter Fraud In New Hampshire

The legislature's stated concern in enacting S.B. 418 was that although New Hampshire law "identifie[d] when unqualified votes have been cast," it did "nothing to prevent" unqualified voters from casting ballots in the first place. S.B. 418 §1, II. The law was thus enacted to "prevent the … casting, counting, and certification of illegitimate ballots." *Id.* §1, II.

There is no evidence, however, that New Hampshire elections have been affected by attempts to vote fraudulently, let alone in ways that S.B. 418 would prevent. Indeed, the single instance of double-voting cited in the statute's legislative findings—involving a person who voted in both New Hampshire and Massachusetts in 2016, S.B. 418 §1, II—almost certainly would *not* have been prevented by S.B. 418, which removes ballots cast by voters without proof of identity, rather than without proof of domicile.

More generally, there *is* ample evidence that the state's process for election-day registration prior to S.B. 418 was secure, and that "voter fraud

[was] not widespread or even remotely commonplace," *New Hampshire Democratic Party*, 174 N.H. at 318. Indeed, over a million votes were cast in New Hampshire's 2020 elections, *see* Rayno, *Election Statistics Show Growing Percentage of Independent Voters*, InDepthNH (Jan. 23, 2021),[1] including over 75,000 general-election votes by election-day registrants in November 2020, *see 2020 General Election Results: Names on Checklist (Registered Voters)*, N.H. Sec'y of State.[2] Yet by early 2022, the state had not brought a single voter-fraud prosecution in connection with those elections. *See* App.77.

The absence of such prosecutions is consistent with Governor Sununu's statement after the 2020 elections that the state's elections "are secure, accurate, and reliable—there is no question about it." *See* App.15 (¶37). The governor also confirmed just after those elections that in New Hampshire "there is no evidence of widespread voter fraud." *Id.* And he explained that a post-election audit was "proof that New Hampshire's voting process is the most reliable, safe, and secure in the country." App.16 (¶37).

Even S.B. 418's proponents, in fact, have conceded that New Hampshire did not have a voter-fraud problem before the law's enactment. For example, Secretary Scanlan testified at a hearing on the bill that "New Hampshire elections are sound" and that he had "complete confidence in

[1] https://indepthnh.org/2021/01/23/election-statistics-show-growing-percentage-of-independent-voters/.

[2] https://www.sos.nh.gov/sites/g/files/ehbemt561/files/documents/2020%20GE%20Election%20Tallies/2020-ge-names-on-checklist.pdf.

them." App.48-49. Likewise, State Senator Bob Giuda, S.B. 418's lead sponsor, stated in that same hearing—in direct contradiction to the statute's asserted purpose—that the "bill was not targeting fraud." App.73; *compare* S.B. 418 §1(II).

The absence of any pre-S.B. 418 voter-fraud problem is unsurprising; as explained, state law already required all registration applicants to either present documentary proof of identity or attest to their identity under penalty of felony—and those who relied on attestation were subject to investigation by the attorney general.

C. S.B. 418 Was Enacted Despite Serious Doubts About Its Constitutionality

S.B. 418's proponents in the state legislature ignored repeated warnings about the law's unconstitutionality—including from Secretary Scanlan and other supporters—and rebuffed the secretary's repeated requests to have those doubts resolved promptly by this Court.

For example, at the first Senate hearing on S.B. 418, Secretary Scanlan testified that there were "constitutional questions"—and, believing the bill "should not be simply … approved on its face," he recommended (unsuccessfully) that the Senate "send those questions to the [New Hampshire] Supreme Court" for an advisory opinion. App.48.

At a later hearing, Secretary Scanlan reiterated his "belie[f] that there are constitutional questions that need to be addressed" regarding the bill—including whether it was compatible with the state constitution's deadline for reporting election results—and he again requested, without success, that the legislature "send a Resolution to the Supreme Court and ask them for an advisory opinion." App.133.

After the bill's passage, Secretary Scanlan repeated both his concern "that there may be a constitutional issue with it" and his view that the bill "should be sent to the court for an opinion." App.18 (¶45). He also observed that, "if the bill becomes law, then we're going to administer it and leave it up to somebody else" to resolve any constitutional issues. *Id.*

D. Procedural History

Shortly after S.B. 418 was signed into law, several individual and organizational plaintiffs filed lawsuits challenging it as unconstitutional. *See 603 Forward v. Scanlan*, 2023 WL 7326368, at *2 (N.H. Super. Ct. Nov. 1, 2023). In November 2023, the superior court dismissed those cases on standing grounds without reaching the constitutional merits. *Id.* at *5. This lawsuit—along with a motion for a preliminary injunction—was filed promptly after that dismissal.

Count I of plaintiffs' complaint here alleges that S.B. 418's affidavit-ballot provisions violate part 2, article 32 of the state constitution by "prevent[ing] town clerks from reporting the number of qualified votes to the Secretary of State within five days of an election," as article 32 requires. App.24-25 (¶¶66-71). Count II alleges that S.B. 418 violates procedural due process, under part 1, article 15 of the state constitution, by denying voters their fundamental right to vote without notice or an opportunity to be heard. App.25-28 (¶¶72-83).

On April 16, 2024, the Merrimack County Superior Court—after holding that plaintiffs had standing to press their claims, both in their own right as organizations and as representatives of their members—granted defendants' and intervenors' motions to dismiss count I of the complaint

(the article 32 claim) and denied the motions to dismiss count II (the due-process claim). *See* Add.44, 53-54. The court also denied plaintiffs' motion for a preliminary injunction (which plaintiffs had sought based on each count), stating only that an injunction was not warranted "for the reasons articulated above including the lack of a specifically named voter or candidate whose right to vote or be elected has been infringed by S.B. 418." Add.62-63.

The superior court ordered the parties to "develop an expedited discovery schedule" on the resolution of count II. Add.61. Plaintiffs instead filed an unopposed motion (which the court granted) to non-suit count II so that they could immediately appeal the dismissal on count I and the denial of a preliminary injunction based on that count. Defendants have cross-appealed the superior court's determination that plaintiffs have standing.

STANDARDS OF REVIEW

"The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Barufaldi v. City of Dover*, 175 N.H. 424, 427 (2022). Where (as here) a court is presented with a facial constitutional challenge to a statute, the question is whether—accepting all well-pleaded factual allegations in the complaint as true—"a clear and substantial conflict exists between [the statute] and the constitution." *American Federation of Teachers*, 167 N.H. at 300. This Court reviews the dismissal of a complaint *de novo*. *Kukesh v. Mutrie*, 168 N.H. 76, 81 (2015).

"[T]he decision of [a] trial court with regard to the issuance of an injunction" may be reversed due to "an error of law, an [unsustainable exercise] of discretion, or clearly erroneous findings of fact." *DuPont v. Nashua Police Department*, 167 N.H. 429, 434 (2015) (last alteration in original). To determine whether a preliminary injunction is warranted, courts consider whether: (1) plaintiffs will "likely succeed on the merits," (2) "there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law," and (3) "established principles of equity" support injunctive relief. *New Hampshire Department of Environmental Services v. Mottolo*, 155 N.H. 57, 63 (2007).

SUMMARY OF THE ARGUMENT

I. S.B. 418 is unconstitutional because it clearly and substantially conflicts with part 2, article 32 of the New Hampshire Constitution. That constitutional provision imposes a deadline of "five days following [an] election" for local officials to report a tally of the votes cast in their jurisdiction by persons "qualified to vote." S.B. 418, however, creates a system in which voters deemed "unqualified" do not have their ballots removed until "the *seventh* day after [an] election," S.B. 418 §2, V (emphasis added), thereby preventing election officials from complying with article 32's five-day deadline. Given this conflict, the statute must yield to the constitution.

The superior court dismissed plaintiffs' article 32 claim on the ground that a "set of circumstances exists under which" S.B. 418 would not violate article 32: if all affidavit-ballot voters successfully complete the verification process, i.e., return the required "qualifying documents," within

five days (rather than taking the seven days allowed by statute) *and* all such voters are deemed to be qualified in that same timeframe. Add.55. But this Court has disavowed the "no set of circumstances" test for facial challenges. *New Hampshire Democratic Party*, 174 N.H. at 325. And S.B. 418 is plainly unconstitutional under the correct standard, which is whether there is "a clear and substantial conflict" between the statute and the constitutional provision, *American Federation of Teachers*, 167 N.H. at 300. The statute's seven-day timeline and article 32's five-day deadline are unquestionably in clear and substantial conflict.

II. The superior court erred not only in dismissing plaintiffs' article 32 claim, but also in denying a preliminary injunction based on that claim. For the reason just given (and elaborated below), plaintiffs are likely to succeed on the merits of their (purely legal) article 32 claim. And they and their members will suffer irreparable harm—including disenfranchisement—absent an injunction. The superior court's claim that denial of an injunction was warranted because of the purported "lack of a specifically named voter or candidate whose right to vote or be elected has been infringed," Add.62-63, is both legally and factually mistaken.

III. (Cross-appeal issue:) The superior court correctly held that each plaintiff has standing to press the article 32 claim, on either of two grounds. First, plaintiffs each have standing as organizations dedicated to maximizing the number of votes for Democratic candidates, a mission that requires plaintiffs to devote significant financial and human resources to educating voters about S.B. 418. Second, plaintiffs each have standing as representatives of their members, including potential voters and political

candidates who have constitutional rights to vote and be elected. Both grounds are consistent with this Court's decisions.

ARGUMENT

I. PLAINTIFFS' PART 2, ARTICLE 32 CLAIM SHOULD NOT HAVE BEEN DISMISSED

A. S.B. 418 Is In "Clear And Substantial Conflict" With Part 2, Article 32 Of The New Hampshire Constitution

S.B. 418 violates what this Court has called "[t]he paramount law … by which town-clerks must be governed in performing their duties respecting elections," *Bell v. Pike*, 53 N.H. 473, 476 (1873). That "paramount law," which is "found in art[icle] 32 of the second part of the [state] constitution," *id*. at 477, imposes a deadline of "five days following [an] election" for local election officials to report to the secretary of state a tally of the votes cast in their jurisdiction by persons "qualified to vote," N.H. Const. pt. 2, art. 32. S.B. 418 makes it all but impossible to meet that deadline, creating a system in which election officials generally cannot know which voters were "unqualified," S.B. 418 §2, V—or, conversely, who was "qualified to vote," N.H. Const. pt. 2, art. 32—until "the seventh day after [an] election," S.B. 418 §2, V. If even one affidavit-ballot voter fails to return the required "qualifying documents" to the secretary of state within five days after election day, or if the secretary deems a single affidavit-ballot voter's documents insufficient, election officials must wait, under the plain terms of S.B. 418, until "the seventh day after the election," *id.*, to deduct that person's votes from the count. Hence, a conflict would not arise only if (1) there were no affidavit-ballot voters in an election, or (2) all the affidavit-ballot voters in an election returned satisfactory

documentation to the secretary of state by the fifth day after the election (two days before S.B. 418's deadline), *and* the secretary notified local election officials of that fact by the fifth day after the election (two days before S.B. 418 provides for the secretary to do so), such that there were no votes to deduct "[o]n the seventh day after the election," S.B. 418 §2, V. In all other circumstances, election officials cannot comply with both provisions. That is a "clear and substantial conflict," *American Federation of Teachers*, 167 N.H. at 300, that renders S.B. 418 unconstitutional.

This conflict cannot be avoided by construing S.B. 418 and article 32 to address different subjects. To the contrary, S.B. 418 makes clear time and again that what it defers until *seven* days after an election is the same thing that article 32 requires within *five* days of an election: a completed tally of the votes cast by persons "qualified to vote," N.H. Const. pt. 2, art. 32. Indeed, the stated purpose of S.B. 418 is to establish a new regime to prevent "unqualified" votes from being counted (whereas previously election officials would "merely identif[y] when unqualified votes ha[d] been cast" and counted through "post-election investigation"). S.B. 418 §1, II.

In particular, under S.B. 418, affidavit-ballot voters are provided a verification letter "which lists all the documents required to *qualify to vote*." S.B. 418, II(b) (emphasis added). Any such voter who fails to return the requisite verification letter "with the missing *qualifying* documentation" to the secretary of state within seven days is deemed to be "unqualified," *id.* §2, V (emphasis added). And local jurisdictions then "provide to the secretary of state a summary report, by race and ballot issue, of the total

votes cast by the *unqualified* voters," *id*. §2, VI (emphasis added), which are deducted from the final vote to be certified by the appropriate certifying authority.

In short, under S.B. 418, the affidavit ballots of voters who fail to return adequate documentation are not removed from the count until at least "the seventh day after the election." That means any vote count on the fifth day will, in the vast majority of circumstances, necessarily include "unqualified voters" and thus cannot, by definition, be a tally of those "qualified to vote," N.H. Const. pt. 2, art. 32, as required by the New Hampshire Constitution. That is a clear and substantial conflict between S.B. 418 and the state constitution.

B. The Superior Court's Grounds For Dismissal Lack Merit

The superior court dismissed plaintiffs' article 32 claim on the ground that the court could hypothesize one "'set of circumstances'" "'under which the Act would be valid.'" Add.55 (quoting *State v. Furgal*, 161 N.H. 206, 210 (2010)). Specifically, the court reasoned that although "affidavit voter[s] may have a maximum of seven days to comply with the statute, they *could* also comply by proving their identity" earlier, such that "whether the town's report on the fifth day following the election truly represents the number of qualified votes is uncertain and depends on the rate at which affidavit ballot voters submit their identity-proving documentation to the Secretary of State." Add.56 (emphasis added). That reasoning is infirm.

To start, the superior court—relying on this Court's *Furgal* decision—required plaintiffs to "'establish that no set of circumstances

exists under which the Act would be valid,'" Add.55. But following *Furgal*, this Court made clear that no such requirement exists. It did so after carefully considering (1) the "origin[]" of "[t]he 'no set of circumstances' language," (2) "the fact that the [U.S.] Supreme Court [has] not … appl[ied]" that test recently (which created "doubt [about] its applicability"), and (3) the fact that this Court has never "applied the 'no set of circumstances' language as requiring a party raising a facial challenge to affirmatively demonstrate the constitutional invalidity of every application of the statute." *New Hampshire Democratic Party*, 174 N.H. at 322-324. In light of all that, the Court held, "the 'no set of circumstances' language is not intended to be a test that prescribes a specific method of determining constitutional validity." *Id*. at 325. Instead, the proper test is whether "a clear and substantial conflict exists between [the statute] and the constitution." *American Federation of Teachers*, 167 N.H. at 300. As explained, such a conflict exists here.

The superior court further erred in relying on *New Hampshire Association of Counties v. State*, 158 N.H. 284 (2009), which the court labeled "instructive," Add.55. In fact, that case is inapposite (which likely explains why it was not cited in any briefing or raised at the hearing below). In *New Hampshire Association of Counties*, this Court considered an alleged conflict between part 1, article 28-a of the state constitution, which restricts the state's authority to require county spending, and a statute that could have required such spending. This Court concluded that the alleged conflict was overly "speculative" because the statute "called for" additional legislation "to establish caps on county spending," caps that

could "eliminate any potential constitutional violation." 158 N.H. at 291. Distinctions between that case and this one abound.

First, whereas the challenged statute in *New Hampshire Association of Counties* expressly "called for" the very thing that could "eliminate any potential constitutional violation," 158 N.H. at 291, here the challenged statute's contemplated operation will (in all but the rarest of circumstances) yield a constitutional violation. Indeed, as noted, the violation here is avoided only if (1) no one cast an affidavit ballot in a particular election, or (2) every affidavit-ballot voter completed the qualification process at least two days before the date called for by S.B. 418, none of the "qualifying documents" returned by voters contained any deficiencies, *and* the secretary of state notified local officials that there were no votes to deduct on the fifth day after the election, notwithstanding that S.B. 418 provides for the secretary to instruct local officials of any deductions "on the seventh day after the election," S.B. 418 §2, V. That is so because, again, unless every affidavit-ballot voter successfully completes the qualification process within five days, election officials must wait for instructions from the secretary of state "[o]n the seventh day after the election" to deduct the votes of unqualified voters. S.B. 418, §2, V.

A second distinction between the two cases is something the superior court (wrongly) deemed a basis for *equating* S.B. 418 with the statute challenged in *New Hampshire Association of Counties*: the fact that both statutes "employ[] a statutory cap," Add.56. In *New Hampshire Association of Counties*, the cap (on county spending) had not been set—which created the possibility (on which this Court relied) that the cap would

prevent any constitutional violation. 158 N.H. at 291. Here, by contrast, there is no such possibility: The "cap" (S.B. 418's seven-day deadline) has already been set, creating (as explained) the all-but-certain conflict between the statute and the constitution.

Finally, whereas any challenge to the statute at issue in *New Hampshire Association of Counties* could easily be deferred until the statute actually required counties to make unconstitutional payments, here it would be inequitable to require plaintiffs to defer bringing suit until a constitutional violation occurred. That could not happen until more than five days after an election—at which point it likely would be too late to obtain relief, i.e., voters would lose their fundamental right to have their votes counted. Sound judicial policy "advise[s] in favor of resolving this case" now, "in a timely and efficient manner so as not to disrupt the upcoming election process." *Norelli v. Secretary of State*, 175 N.H. 186, 200 (2022).

C. The Additional Arguments Defendants And Intervenors Offered Below Lack Merit

Defendants' and intervenors' additional arguments for dismissal below—arguments the superior court did not address—fare no better than the grounds on which the superior court ruled.

Defendants and intervenors primarily argued that S.B. 418 does not conflict with article 32 because article 32 does not prohibit the final vote count from being adjusted after the constitution's five-day deadline. But that argument mischaracterized what plaintiffs say the constitution requires within five days: not a conclusive election result, but a tally of votes cast by

those "qualified to vote," N.H. Const. pt. 2, art. 32. As explained, that is precisely what S.B. 418 defers until seven days after an election.

To support their straw-man argument, defendants and intervenors pointed to New Hampshire's recount procedures (which contemplate adjustment of the final vote count beyond article 32's five-day deadline), suggesting that if those procedures do not violate article 32, S.B. 418 must not either. But the recount procedures simply underscore what is uniquely unconstitutional about S.B. 418. Unlike the affidavit-ballot process that S.B. 418 creates, recounts in New Hampshire do not involve any assessment of voter *qualifications*. *See* RSA 660:1-6. In fact, any such assessment is impossible at the recount stage, because New Hampshire's ballot-anonymity requirement, *see* RSA 656:16, means that individual voters (and hence their qualifications) are not identifiable during a recount. Thus, while recounts may result in an adjustment of the tally completed pursuant to article 32 (by double-checking that ballots were accurately tallied, *see* RSA 660:5), they do not—as S.B. 418 does—prevent that tally of qualified votes from being timely completed in the first place.

Intervenors also argued below that plaintiffs' article 32 claim fails because that article does not expressly create a privately enforceable right. But plaintiffs seek relief under the declaratory-judgment statute, *see* App.10 (¶19), which "has long been construed to permit challenges to the constitutionality of actions by [New Hampshire's] government or its branches," *Lorenz v. New Hampshire Administrative Office of the Courts*, 152 N.H. 632, 635 (2005). Indeed, "[a] petition for declaratory judgment is particularly appropriate to determine the constitutionality of a statute when

the parties desire and the public need requires a speedy determination of important public interests involved therein." *Werme's Case*, 150 N.H. 351, 353 (2003). That principle certainly applies in election litigation; this Court invoked the principle, for example, in *Levitt v. Maynard*, 104 N.H. 243 (1962), holding that a private plaintiff "proper[ly]" sought "a declaratory judgment that [New Hampshire's] apportionment of senatorial districts" was "unconstitutional," *id*. at 244. More recently, this Court affirmed the grant of declaratory relief in two challenges to legislation making it harder for Granite Staters to register to vote. *See Guare*, 167 N.H. at 669; *New Hampshire Democratic Party*, 174 N.H. at 332. So too here: Plaintiffs properly invoke the declaratory-judgment statute to challenge the constitutionality of S.B. 418.

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

The superior court erred in denying a preliminary injunction on plaintiffs' article 32 claim. That denial was based on the court's (1) analysis of the merits of that claim and (2) conclusion that plaintiffs "have not demonstrated that absent preliminary relief, irreparable harm will result," in particular due to the purported "lack of a specifically named voter or candidate whose right to vote or be elected has been infringed by SB 418." Add.62-63. Neither justification has merit.

A. Plaintiffs Are Likely To Succeed On The Merits

For the reasons explained in Part I, plaintiffs are virtually certain to succeed on the merits of their (purely legal) article 32 claim. And as noted, "the decision of [a] trial court with regard to the issuance of an injunction" may be reversed due to such "an error of law," *DuPont*, 167 N.H. at 434.

B. Plaintiffs Face An Immediate Threat Of Irreparable Harm For Which They Have No Adequate Legal Remedy

Plaintiffs have likewise demonstrated "an immediate danger of irreparable harm" for which there is "no adequate remedy at law." *Mottolo*, 155 N.H. at 63. The lack of an adequate remedy at law for the alleged harm has never been disputed in this litigation. *See* App.184 (¶18); Add.63. The only question before this Court is whether that harm is irreparable and immediate. It is.

In analyzing plaintiffs' standing, the superior court correctly found, based on plaintiffs' allegations and supporting declarations, that plaintiffs alleged "an impairment of a present legal or equitable right arising out of the application" of S.B. 418. Add.52 (citing *Avery v. New Hampshire Department of Education*, 162 N.H. 604, 608 (2011)). Specifically, the court found adequate plaintiffs' allegations that S.B. 418 injures them both as organizations (by undermining their core mission to elect Democrats and requiring significant expenditures) and as representatives of their voters and candidates, who are directly affected by the violation of article 32. *See id.* When it turned to its preliminary-injunction analysis, however, the court concluded that plaintiffs "ha[d] not demonstrated that absent preliminary relief, irreparable harm will result"—even though its standing analysis described plaintiffs' injury as "harm that may result from improper election procedures" and that "*cannot easily be remedied after the fact.*" Add.53 (emphasis added). The court's conclusion that an injunction was unwarranted because irreparable harm had not been shown also glosses over S.B. 418's practical implications in the lead-up to a general election that is less than five months away.

First, absent a preliminary injunction, S.B. 418 will result in disenfranchisement of New Hampshire voters (some of whom will be plaintiffs' members) in upcoming elections. As explained, S.B. 418 imposes on affidavit-ballot voters a maze of procedural requirements, with potential criminal liability for non-compliance. Granite Staters who lack ready access to photo identification on election day may decide it is not worth the trouble to attempt to vote—and even if they do go to the polls, they may have their votes thrown out for failure to successfully complete the affidavit-ballot-qualification process on time.

Such denials of the franchise "unquestionably constitute[] irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), because "once the election occurs, there can be no do-over and no redress," *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). And it is no small injury; to the contrary, both this Court and the U.S. Supreme Court have explained that "[n]o right is more precious" than the right to vote in free and fair elections, because "'[o]ther rights, even the most basic, are illusory if the right to vote is undermined.'" *Below v. Gardner*, 148 N.H. 1, 1 (2002) (per curiam) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

A second irreparable harm is S.B. 418's effect on the qualified-vote-tally process that article 32 mandates. By virtually ensuring that election officials will not comply with article 32's five-day deadline, S.B. 418 deprives voters and candidates of the timely vote tally that article 32 guarantees. That guarantee is a core piece of the state's constitutional election design: As this Court explained long ago, the tally article 32

requires is announced to all "who may take an interest in the election," so that they may "be able … to detect and expose any error, and obtain a correction of it immediately, when it can be most easily corrected." *In re Opinion of Justices*, 53 N.H. 640, 643 (1873). In other words, by precluding compliance with article 32, S.B. 418 undermines a core mechanism by which voters, candidates—and plaintiffs—hold election officials accountable and ensure correct election outcomes.

These harms not only affect plaintiffs' voting members and candidates, but also directly affect both plaintiffs as organizations. Each day that S.B. 418 remains in place, plaintiffs and their affiliated candidates must invest organizational resources to educate voters and protect threatened rights. They must also prepare for delayed vote counts and contests over which affidavit ballots count—contests incompatible with article 32's guarantee of a prompt tally of qualified votes. Courts have recognized such harm to political parties as immediate and irreparable. *See Arizona Democratic Party v. Arizona Republican Party*, 2016 WL 8669978, at *11 (D. Ariz. Nov. 4, 2016); *Republican Party of North Carolina v. North Carolina State Board of Elections*, 1994 WL 265955, at *1 (4th Cir. June 7, 1994).

The superior court addressed none of the foregoing points, instead suggesting that to obtain a preliminary injunction, plaintiffs were required to identify a "specifically named voter or candidate whose right to vote or be elected has been infringed by SB 418," Add.62-63. New Hampshire courts have expressly rejected any such requirement. As one court explained—in a decision this Court affirmed—where (as here) a law

"establishes enough hurdles … and the penalties present enough risk that they tend to dissuade a specific type of voter from even engaging with the process," any argument that individual affected voters must be named "rings hollow." *League of Women Voters of New Hampshire v. Gardner*, 2020 WL 4343486, at *16 (N.H. Super. Ct. Apr. 8, 2020), *aff'd*, 174 N.H. 312 (2021).

In any event, if the requirement the superior court posited exists, plaintiffs have satisfied it. According to public reporting that plaintiffs and their declarants raised below, the state has rejected at least one affidavit ballot even in the relatively low-turnout local elections that have taken place since S.B. 418's enactment: "In the 2023 Manchester city election, an election-day registrant who did not return the verification letter in time (and who was reported to have cast his ballot for a Democratic mayoral candidate) had his or her vote excluded from the total vote count." App.211 (¶15); *see also* Bookman, *First Affidavit Ballot Was Cast in NH Last Month, and then Was Pulled from Final Vote Tally*, N.H. Public Radio (Dec. 15, 2023);[3] Bookman, *Under a New NH Voting Law, the Right to a Secret Ballot Is No Longer Guaranteed*, N.H. Public Radio (May 22, 2024) (identifying another rejected affidavit ballot).[4] Plaintiffs also identified a candidate in a tied special election who had to "devote limited campaign resources to informing potential voters in his runoff election of S.B. 418's

[3] https://www.nhpr.org/nh-news/2023-12-15/first-affidavit-ballot-was-cast-in-nh-last-month-andthen-was-pulled-from-final-vote-tally/.

[4] https://www.nhpr.org/politics/2024-05-22/one-casualty-of-nhs-new-voting-rules-the-right-to-a-secret-ballot.

requirements." App.222 (¶17). The superior court mentioned none of this, but again it satisfies any requirement that plaintiffs had to identify an affected voter or candidate.

C. Principles Of Equity Favor An Injunction

Principles of equity underscore that an injunction is "in the public interest," *UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987), as the public has a "strong interest in" being able to "exercise[e] the fundamental political right to vote," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quotation marks omitted). By "fail[ing] to raise" principles of equity "before the trial court," defendants and intervenors have "waived" any argument otherwise. *State v. Exxon Mobil Corp.*, 168 N.H. 211, 260 (2015).

III. THE SUPERIOR COURT CORRECTLY HELD THAT PLAINTIFFS HAVE STANDING TO PRESS THEIR ARTICLE 32 CLAIM (CROSS-APPEAL ISSUE)

Applying longstanding precedent, the superior court correctly concluded that plaintiffs each have standing to press their article 32 claim, on either of two bases. First, they each have standing as organizations that are dedicated to "maximizing the number of votes for Democratic candidates" and that must—to achieve this objective—"expend significant financial and human resources to educate voters on" S.B. 418. Add.50. Second, plaintiffs each have standing "as the representatives of their members, including potential voters and political candidates who have constitutional rights to vote and be elected." Add.50. Finally, the superior court properly determined that plaintiffs have standing to petition for declaratory relief because they "'allege[] an impairment of a present legal

or equitable right arising out of the application'" of S.B. 418. Add.52 (quoting *Avery*, 162 N.H. at 608).[5]

There is no sound basis to reverse any of the superior court's standing rulings. Indeed, this Court recently affirmed the New Hampshire Democratic Party's standing to challenge S.B. 3's voter-registration requirements. *See* 174 N.H. at 332, *aff'g New Hampshire Democratic Party*, 2018 WL 5929044, at *2-3.

The same conclusion is warranted here: As the superior court recognized, political parties are uniquely situated to bring constitutional claims like plaintiffs' and have standing to do so on two independent bases. *See* Add.53-54. First, as organizations, plaintiffs' "core goal" is to get Democrats "up and down the ballot" elected, including by "maximizing the number of votes for" their candidates. App.6-7 (¶¶3, 8, 13). But S.B. 418 *deters* Democratic voters from registering on election day and *bars* those who do not return adequate documentation quickly enough from voting—thus making it harder for plaintiffs to accomplish their central purpose to elect Democrats in New Hampshire. That is "no mere setback to [plaintiffs'] abstract social interests," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Rather, S.B. 418 directly interferes with plaintiffs'

[5] As the superior court in the challenge to S.B. 3 recognized, where (as here) "the relief sought amongst all of the parties is identical," "the rule is if one plaintiff has standing, then the case proceeds." *New Hampshire Democratic Party v. Gardner*, 2018 WL 5929044, at *3 (N.H. Super. Ct. Apr. 10, 2018). Thus, while plaintiffs here submit that each of them has standing (and defendants never argued otherwise below), this case can proceed if *either* plaintiff here has either organizational or representative standing.

core business activities, i.e., it is a "direct injury to [plaintiffs'] raison d'être—electing candidates who support the democratic platform," *New Hampshire Democratic Party*, 2018 WL 5929044, at *2. And it is an injury that requires resources to counteract. App.213 (¶19); *see also* App.220 (¶14) (similar). As courts have repeatedly held when considering whether political parties have standing to challenge voting and election laws, that is enough. *See New Hampshire Democratic Party*, 2018 WL 5929044, at *2-3 & nn.2, 3 (collecting cases).

Political parties' unique position vis-à-vis standing explains why the superior court's conclusion here diverged from *603 Forward*, which dismissed challenges to S.B. 418 on standing grounds. Those challenges were brought by voters who could not claim they were injured by a restriction on voter registration (because they were already registered), *see 603 Forward*, 2023 WL 7326368, at *2, and by non-profit organizations that could not establish standing based on a diversion-of-resources theory because they—unlike political parties—lacked a "protectable interest in their allocation of resources," *603 Forward*, 2023 WL 7326368, at *5. Indeed, the court in *603 Forward* noted that the New Hampshire Democratic Party was held to have standing in *Gardner*, and it cited no case rejecting a political party's standing to challenge a voter-registration law. *Id.* at *4 n.5.

Finally, the fact that plaintiffs seek a declaration that S.B. 418 is unlawful, rather than money damages, does not alter the standing analysis. *New Hampshire Democratic Party* involved a comparable request for declaratory relief. 174 N.H. at 332. And as the superior court explained

here (relying on this Court's precedent), the declaratory-judgment statute should not be construed narrowly; indeed, it is particularly suited to constitutional claims like those plaintiffs bring here. *See* Add.52-53 (citing cases). As the superior court further reasoned, moreover, if plaintiffs do not have standing to "challeng[e] election laws on behalf of their members, the duty to ward off potentially discriminatory and unconstitutional election laws will fall upon private individuals"—whom S.B. 418 already threatens with potential criminal liability—and "who would be required to proactively identify and legally challenge potentially problematic legislation, and likely to do so without the resources, support, or political drive to mount such a challenge." Add.53. This Court has never required that, nor should it.

CONCLUSION

This Court should reverse the dismissal of plaintiffs' article 32 claim and remand with instructions to issue a preliminary injunction.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request 15 minutes of oral argument to be presented by Seth P. Waxman.

CERTIFICATION REGARDING THE APPEALED DECISION

I certify that the appealed decision is in writing and is appended to this brief.

Respectfully submitted,

/s/ William E. Christie

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Dated: June 17, 2024

CERTIFICATE OF SERVICE

Pursuant to this Court's Rule 26(3)(b), a copy of the foregoing was transmitted by electronic filing to all counsel of record on this 17th day of June, 2024.

/s/ William E. Christie
WILLIAM E. CHRISTIE

CERTIFICATE AS TO COMPLIANCE WITH WORD LIMIT

I certify that the within document complies with the word limit for opening briefs because it contains 8,431 words that count against the limit.

/s/ William E. Christie
Dated: June 17, 2024 WILLIAM E. CHRISTIE

DECISION BEING APPEALED OR REVIEWED