

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 226-2023-CV-00613

Democratic National Committee and  
New Hampshire Democratic Party

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

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**DEFENDANTS' MOTION TO DISMISS**

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The Defendants, David Scanlan, in his official capacity as New Hampshire Secretary of State, and John Formella, in his official capacity as New Hampshire Attorney General, through their counsel, the New Hampshire Department of Justice, move to dismiss the Plaintiffs' complaint in its entirety:

I. **Introduction:**

1. The Plaintiffs, the Democratic National Committee and the New Hampshire Democratic Party, allege that Laws 2022, Chapter 239, which requires a narrow class of voters to vote by affidavit ballot pursuant to RSA 659:23-a, violates Part II, Article 32 and the due process guarantees of the State Constitution. Laws 2022, Chapter 239 requires a voter to vote by affidavit ballot only if the voter seeks to register to vote for the first time New Hampshire on an election day and without sufficient proof of identity; the voter's affidavit ballot is initially counted, but their votes are subsequently deducted from

election results if the voter does not provide a photocopy of valid photo identification to the Secretary of State's Office within seven days following an election.

2. The Plaintiffs--two political parties who do not have the right to vote in New Hampshire—do not have individual standing to bring their claims. The Plaintiffs claims consist of nothing more than speculative, future injuries. Although the affidavit ballot procedure has been in place for more than a year, including for town elections, city elections and primaries, and five special elections and primaries to elect members of the New Hampshire House of Representatives, the Plaintiffs have not identified any present harm to their parties. Even if the Plaintiffs could assert claims on behalf of voters, the Plaintiffs have not identified a single voter who has been required to vote by affidavit ballot, let alone a voter who voted by affidavit ballot for democratic candidates or a voter who voted by affidavit ballot and failed to timely return proof of their identification to the Secretary of State's Office. Therefore, the Plaintiffs' lack standing because they have not alleged any facts that would demonstrate they have personally suffered a concrete injury, and the Plaintiffs cannot rely on their allegations regarding speculative, hypothetical harm that may befall some third party in the future.

3. Even if the Plaintiffs had standing, their complaint fails to state a claim for which relief may be granted. The Plaintiffs first allege that Laws 2022, Chapter 239 violates Part II, Article 32, because the votes cast by an affidavit ballot may be deducted from the final results if the voter does not provide proof of their identity within seven days following the election. However, Part II, Article 32 does not proscribe vote totals from being adjusted after election results are initially reported by a town or ward, which is readily evident by this State's long history of allowing statutory recounts and court

appeals to challenge election results. The Plaintiffs next allege that Laws 2022, Chapter 239 violates their procedural due process rights. However, the Plaintiffs have no right to vote and therefore have no entitlement to procedural due process to protect their right to vote.

## II. **Background:**

### A. The Affidavit Ballot Process

4. Laws 2022, Chapter 239 (effective January 1, 2023) created a procedure for the use of affidavit ballots in certain, limited circumstances. See RSA 659:23-a. Specifically, a voter is required to use an affidavit ballot when voting only when all of the following conditions are met: (1) the voter is registering to vote on election day; (2) the voter has never previously registered to vote in New Hampshire; (3) the voter does not have valid photo identification establishing their identity; and (4) the voter does not otherwise meet the identity requirements of RSA 659:13, which may be met if the moderator, clerk, or supervisor of the checklist can verify the person's identity. See RSA 659:23-a; RSA 659:13.
5. The Secretary of State's Office issued public guidance regarding the affidavit ballot process to all New Hampshire election officials on February 10, 2023. See Pls. Compl., Ex. F.
6. If all of these conditions are met, the voter must cast an affidavit ballot pursuant to RSA 659:23-a. See RSA 659:23-a, I; Pls. Compl., Ex. F. The voter receives an affidavit ballot package, which includes a tracked, postage-prepaid United States Postal Service priority mail envelope addressed to the Secretary of State, and an affidavit verification letter that explains that a voter must provide the Secretary of State with a

copy of a qualified photo identification along with the completed letter. See RSA 659:23-a, II; Pls. Compl., Ex. F.

7. The voter then receives and is able to cast an election day ballot that is marked “Affidavit Ballot” with a sequential identifying number. RSA 659:23-a, III; Pls. Compl., Ex. F. The voter’s affidavit ballot is counted on election day along with all other validly cast ballots. See RSA 659:23-a; Pls. Compl., Ex. F.

8. If the voter does not return the affidavit ballot verification letter, with proof of identification, to the Secretary of State’s Office within seven days after the election, the Secretary of State must instruct the moderator of the town or ward in which the person voted to retrieve the associated numbered affidavit ballot. RSA 659:23-a, V; Pls. Compl., Ex. F. The votes cast on that ballot are reported to the Secretary of State and subsequently deducted from the original vote counts for that election. RSA 659:23-a, VI.

B. The Plaintiffs’ Claims:

9. The Plaintiffs are the Democratic National Committee and the New Hampshire Democratic Party.

10. The Plaintiffs claim that Laws 2022, Chapter 239 violates Part II, Article 32 of the State Constitution, which provides in full:

The meetings for the choice of governor, council and senators, shall be warned by warrant from the selectmen, and governed by a moderator, who shall, in the presence of the selectmen (whose duty it shall be to attend) 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, in presence of the said selectmen, and of the town or city clerk, 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.

Pls. Compl., ¶¶66-71. Specifically, the Plaintiffs claim that election officials cannot report election results within five days, as required under the Plaintiffs' reading of Part II, Article 32, because RSA 659:23-a provides an affidavit voter seven days to verify their identity.

11. The Plaintiffs additionally allege that Laws 2022, Chapter 239 violates the procedural due process rights of persons who seek to register to vote and vote on election day. See Pls. Compl., ¶¶72-83. Specifically, the Plaintiffs allege that RSA 659:23-a violates certain voters' procedural due process by not providing sufficient time to provide proof of identity after casting an affidavit ballot and by not providing a voter notice if their verification submission is rejected. See Pls. Compl., ¶¶77-78.

12. Although the Plaintiffs have not identified any member of their parties that has been or will be subject to RSA 659:23-a's affidavit ballot procedure, the Plaintiffs nevertheless argue that they are individually harmed because: (1) the law will prevent or deter people who would vote for democratic party candidates from doing so, see Pls. Compl. ¶13; (2) the Plaintiffs "will have to engage in a broad-based education program targeting thousands of New Hampshire Democratic voters as well as Democratic candidates," see Pls. Compl. ¶14; and (3) the law will "interfere" with the Plaintiffs' core mission of electing Democratic candidates," see Pls. Compl. ¶15.

13. Although Laws 2022, Chapter 239 has been in effect for more than a year, the Plaintiffs have not alleged any facts identifying: (1) a single person who was prevented or deterred from registering to vote or voting because of the law; (2) a single member of either of their political parties who voted by affidavit ballot; (3) a single person of any

political affiliation who voted by affidavit ballot; (4) a single person who voted by affidavit ballot for Democratic candidates; (5) a single qualified voter who was unable to complete the required affidavit ballot verification letter within the prescribed seven-day time period; (6) a single voter who submitted an affidavit ballot verification letter that the Secretary of State's office "rejected."

14. Nor do the Plaintiffs allege any facts to support existing harm to either of their organizations. They merely allege that as a result of the law, which has been in place for more than a year, their organizations "will have to" take certain actions, and they further speculate as to what those future actions "will likely include." See Pls. Compl. ¶14. Notably, the Plaintiffs do not allege that either of them has presently spent even a single dollar educating voters regarding the affidavit ballot procedure, let alone that they have "engage[d] in a broad-based education program targeting thousands of New Hampshire Democratic voters as well as Democratic candidates." See Pls. Compl. ¶14.

### III. Standard of Review.

15. A complaint must be dismissed if the plaintiff's allegations are not "reasonably susceptible of a construction that would permit recovery." See Beane v. Dana S. Bean & Co., 160 N.H. 708, 711 (2010). "This threshold inquiry involves testify the facts alleged in the pleadings against the applicable law." Id. Dismissal is required if "the facts pled do not constitute a basis for legal relief." Id. (quotation omitted). The trial court may also consider "documents attached to the plaintiff's pleadings," "documents the authenticity of which are not disputed by the parties," "official public records," and "documents sufficiently referred to in the complaint." Id. (cleaned up). "The trial court

need not accept allegations in the writ that are merely conclusions of law.” Id. (quotation omitted).

IV. **Standing:**

16. As a threshold matter, the Plaintiffs lack standing to maintain their claims.

A. Standard of Review

17. The doctrine of standing limits the judicial role “to addressing those matters that are traditionally thought to be capable of resolution through the judicial process.”

Carrigan v. N.H. Dep’t of Health and Human Servs., 174 N.H. 362, 366 (2021)

(reasoning that a claim cannot be subject to judicial resolution unless the parties’ “actual interests are at stake”). To that end, a “party must allege a concrete, personal injury, implicating legal or equitable rights, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress by a favorable decision.” Id. “Requiring that a party claim a personal injury to a legal or equitable right “capable of being redressed by the court tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” Id. (quoting Duncan v. State, 166 N.H. 630, 643, 647-48 (2014).

18. “A party will not be heard to question the validity of a law, or any part of it [under RSA 491:22] unless he shows that some right of his is impaired or prejudiced thereby.”

Id. (quotation omitted) (emphasis added). The claims raised in a declaratory judgment action “Must be definite and concrete touching the legal relations of the parties having adverse interests.” Asmussen v. Comm’r, N.H. Dep’t of Safety, 145 N.H. 578, 587 (2000) (quotation omitted). “The action cannot be based on a hypothetical set of facts,

and it cannot constitute a request for advice as to future cases.” *Id.* (quotation omitted). “[T]he controversy must be of a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character. *Id.* (quotation omitted). Further, the legal or equitable rights sufficient to give rise to a declaratory judgment action must be “substantive rights” belonging to the plaintiff, such as constitutional rights, property rights, and contractual rights. *See Emps. Liab. Assur. Corp. v. Tibbetts*, 96 N.H. 296, 298 (1950); *Benson v. N.H. Ins. Guar. Ass’n*, 151 N.H. 590, 593 (2004) (explaining the Medical Society lacked standing under RSA 491:22 “as a matter of law” to maintain a declaratory judgment action on behalf of its members because the Medical Society itself had not asserted a legal or equitable right).

19. When a motion to dismiss “challenges the plaintiff’s standing to sue, the trial court must look beyond the allegations and determine, based upon the facts alleged, whether the plaintiff has demonstrated a right to claim relief.” *Carrigan v. N.H. Dep’t of Health and Human Servs.*, 174 N.H. 362, 366 (2021).

B. The Plaintiffs lack standing because they have not demonstrated a concrete, personal injury:

20. Neither Plaintiff is a “person” who is eligible to vote in New Hampshire, and therefore neither Plaintiff could ever be subject to RSA 659:23-a’s affidavit ballot procedure.

21. Nor have the Plaintiffs identified any member of their political parties who has been required to vote by affidavit ballot pursuant to RSA 659:23-a. This is not surprising because no existing registered member of the New Hampshire Democratic Party could ever be subject to RSA 659:23-a’s affidavit ballot procedure. *See* RSA 659:23-a; Pls. Compl., Ex. F (providing that the affidavit ballot procedure applies only to people voters



who, among other requirements, have never before been registered to vote in New Hampshire).

22. Nor have the Plaintiffs identified: (1) a single voter who was “deterred” from voting because of RSA 659:23-a’s requirements; (2) a single voter who voted by affidavit ballot for democratic candidates; or (3) a single voter who voted by affidavit ballot for democratic candidates and who subsequently failed to provide proof of identity as required by RSA 659:23-a.

23. Nor have the Plaintiffs identified any money that Law 2022, Chapter 239 “has required” them to spend. Although the Plaintiffs speculate that they “will have to” engage in a broad-based education program, they have alleged neither that they have done so nor that they have taken any step toward doing so.

24. These failures are particularly telling RSA 659:23-a’s affidavit ballot process has been in effect for all elections held in 2023, including: (i) every town election in March, April, and May of 2023; (ii) every city election in November of 2023, including city primary elections; and (iii) five special elections for vacant house of representative seats, including associated primary elections.<sup>1</sup>

25. In sum, the Plaintiffs have not pled a single fact that would demonstrate a “concrete, personal injury” implicating the Plaintiffs’ legal or equitable rights, despite the fact Laws 2022, Chapter 239 has been in effect for numerous elections and for more than a year. The Plaintiffs’ alleged harm is at best speculative and hypothetical, which is not sufficient to confer standing. See Asmussen, 145 N.H. at 587.

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<sup>1</sup> Strafford County District 8 on February 21, 2023; Hillsborough County District 3 on May 16, 2023, and November 7, 2023; Rockingham County District 1 on September 19, 2023; and Grafton Count District 16 on August 22, 2023. Information regarding 2023 special elections is publicly available on the Secretary of State’s website at <https://www.sos.nh.gov/elections/2023-2024-special-elections>.

26. The Plaintiffs' allegations regarding speculative harm that may befall certain New Hampshire voters are additionally insufficient to confer standing because the Plaintiffs cannot assert alleged harm on behalf of other parties. See Emps. Liab. Assur. Corp., 96 N.H. at 298; Benson, 151 N.H. at 593. At best, the Plaintiffs seek to vindicate alleged injuries to the constitutional rights of unknown future voters who may be harmed by Laws 2022, Chapter 239. However, the Plaintiffs' abstract interest in challenging these speculative constitutional violations is not sufficient to confer standing. See State v. Actavis Pharma, Inc. 170 N.H. 211, 215 (2017) ("Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest." (quotations omitted)).

27. Because the Plaintiffs have not alleged any facts from which this Court could conclude that the Plaintiffs have a concrete, present injury to the Plaintiffs' own rights, the Plaintiffs' claims must be dismissed for lack of standing.

V. **Failure to State a Claim:**

A. Laws 2022, Chapter 239 does not violate Part II, Article 32 of the State Constitution.

28. The Plaintiffs claim that Laws 2022, Chapter 239 violates Part II, Article 32 of the State Constitution.

29. Part II, Article 32 provides:

The meetings for the choice of governor, council and senators, shall be warned by warrant from the selectmen, and governed by a moderator, who shall, in the presence of the selectmen (whose duty it shall be to attend) 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, in presence of the said selectmen, and of the town or city clerk, 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.

30. Therefore, as relevant here, a moderator's duties during an election include receiving, sorting, and counting votes; declaring the results of an election; and making a record of the same. A moderator's duties after an election include sending an attested copy of this record to the Secretary of State within five days of the election.

31. Laws 2022, Chapter 239 does not impede a moderator's duties under Part II, Article 32 in any way. A moderator must still receive, sort, and count votes; declare election results; and make a record of the same before an election ends, and a moderator must still send a copy of that report to the Secretary of State within five days following an election. The mere fact that the Secretary of State may subsequently direct a moderator to retrieve an affidavit ballot after an election and report the votes on such ballot to the Secretary of State to be deducted from final vote tallies has no impact on whether a moderator previously completed their duties under Part II, Article 32.

32. The Plaintiffs appear to argue that Part II, Article 32 somehow prohibits vote totals from being adjusted for any reason after five days. There is no textual support in the Constitution for that argument. The Constitution does not preclude vote totals from being adjusted after a town or ward submits their return of votes. Part II, Article 32 refers to a moderator's duties for conducting an open election—it does not in any way purport to prohibit election results from changing after a moderator's initial return of votes is recorded on election day and subsequently reported to the Secretary of State.

33. For example, election recounts may be requested under RSA chapter 660, and those recounts may be conducted eight days after an election has occurred. See RSA

660:4. The results of a recount may subsequently be appealed to the Superior Court or Ballot Law Commission. See RSA 660:6; RSA 665:8. Each of these processes may result in changes to the vote totals that a town or ward initially reports at the conclusion of an election.

34. Notably, the five-day reporting requirement on which the Plaintiffs rely was added to the Constitution in 1976, at which time New Hampshire law already provided for election recounts and Superior Court appeals to challenge and ultimately decide the final results of an election. See, e.g., Nikerson v. Aimo, 110 N.H. 348 (1970).

35. In other words, the Plaintiffs erroneously interpret Part II, Article 32's requirement that a moderator timely report the election-night results to the Secretary of State as a constitutional prohibition on election-night results being subsequently adjusted through lawful statutory procedures. The plain language of Part II, Article 32 provides no support for the Plaintiffs' interpretation. Accordingly, the Plaintiffs' argument that Laws 2022, Chapter 239 violates Part II, Article 32 fails as a matter of law.

B. Laws 2022, Chapter 239 does not violate procedural due process.

36. The Plaintiffs claim that Laws 2022, Chapter 239 violates the procedural due process rights of a voter's right to vote. Even if the Plaintiffs had standing to assert a procedural due process claim on behalf of unknown hypothetical voters, the Plaintiffs' claim fails as a matter of law.

37. Part I, Article 15 of the State constitution provides that "[n]o subject shall be ... deprived of his property, immunities, or privileges ... or deprived of his life, liberty, or estate, but by ... the law of the land." Law of the land means due process of law. See Gantert v. City of Rochester, 168 N.H. 640, 647 (2016). Due process involves a two-

part analysis: first, the Court determines whether the individual has an interest that entitles them to due process protection; and second, if such an interest exists, the Court determines what process is due. See id.

- i. The Plaintiffs do not have an interest that entitles them to due process protection.

38. Here, the Plaintiffs do not have any interest that entitles them to due process protection. Although the Plaintiffs claim the affected interest is the right to vote, the Plaintiffs are entities that have no right to vote in this State. Accordingly, the Plaintiffs procedural due process claim must be dismissed because the Plaintiffs cannot meet the first prong of the procedural due process analysis as a matter of law.

- ii. The Plaintiffs' allegations fail to support a claim that New Hampshire voting laws provide insufficient process for a voter to register to vote and vote.

39. Even if the Court addresses the second part of the due process analysis, the Plaintiffs' allegations fail to state a claim that New Hampshire voting laws provide insufficient process for a voter to register to vote and vote.

40. To determine what process is due, the Court balances three factors: "(1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements." Gantert, 168 N.H. at 647-48 (explaining that the "requirements for due process are flexible and call for such procedural protections as the particular situation demands" (quotation omitted)).

41. Laws 2022, Chapter 239's affidavit ballot process should not be viewed in a vacuum. Because the Plaintiffs have alleged that the right to vote of New Hampshire voters is implicated, the Court should consider all of the procedural safeguards that State

voting laws provide to ensure an individual is able to exercise their right to register to vote and vote.

42. To vote in New Hampshire, a person must at least 18 years of age, a citizen of the United States, and domiciled in a town, ward, or place in New Hampshire. See N.H. CONST., Pt. I, Art. 11; RSA 654:1, I. Consistent with these voter qualifications, a person registering to vote must be at least 18 on the day of the next election, a United States citizen, domiciled in the town or city in which the person is registering to vote, and not otherwise disqualified to vote. See RSA 654:7.

43. A person may register to vote in person ahead of an election, through the absentee voter registration process ahead of an election, or in person on election day. In each case, the person must present proof of their qualifications to vote, including identity.

44. A voter may register to vote ahead of an election by applying to the municipal clerk or the supervisors of the checklist. See RSA 654:8. Such person must present proof of identity, citizenship, age, and domicile. See RSA 654:7; RSA 654:12 (2016). A person who is qualified to vote may also register to vote through the absentee voter registration process if the person is temporarily absent from their municipality of domicile or unable to attend a meeting of the supervisors of checklist because of physical disability. See RSA 654:16-:17. Such person is similarly required to present proof of their qualifications, including a copy of current and valid photo identification. See RSA 654:17. A person may also register to vote on election day. See RSA 654:7-a. Such person is similarly required to present proof of their qualifications, including proving their identity. See id. On election day, a person may provide proof of their identity, age, and citizenship through the use of a qualified voter affidavit. See RSA 654:12 (2016).

45. If a person is registering to vote for the first time in New Hampshire, and on election day, and without proper photo identification or otherwise meeting the identity requirements of RSA 659:13, II, then the voter may still vote if they vote by affidavit ballot as provided in RSA 659:23-a. After voting by affidavit ballot, a voter has seven days to provide the Secretary of State's Office with a photocopy of valid photo identification and complete a short affidavit ballot verification letter. See RSA 659:23-a; Pls. Compl., Ex. E (requiring the voter to print their name, domicile address, domicile town/city, and date of birth). The voter may provide this information by using a postage pre-paid United States Postal Service Priority Mail envelope, which is tracked allowing the Secretary of State's Office to know if the letter has been placed in the mail. RSA 659:23-a, II(a); Pls. Compl., Ex. F.

46. Looking at this system as a whole, there are clearly sufficient procedural safeguards to ensure that a qualified voter who wishes to register to vote and vote may vote in an election. A person may register to vote prior to an election by provide proof of their identity and other voting qualifications, either in person or through the absentee voter registration process. A person may alternatively register to vote on election day by providing proof of their identity and other voting qualifications. A person may alternatively register to vote on election day without providing valid photo identification. However, if a person does so, the person must subsequently provide proof of their identity within seven days if that person had never before registered to vote in New Hampshire and could not otherwise meet the identity requirements of RSA 659:13, II.

47. The only circumstance in which a qualified voter would have to vote by affidavit ballot and not have their votes counted is in the narrow situation that a person: (1) is not

yet registered to vote in New Hampshire; (2) declines to register to vote ahead of an election; (3) declines to bring photo identification to the polls on election day to register to vote; (4) cannot have their identity verified by an eligible election official worker; and (5) fails to mail in a photocopy of valid identification using the pre-paid priority envelope within seven days following an election.

48. Given the numerous, alternative methods by which a voter may register to vote and prove their qualifications to vote both before an election, during an election, or following an election, there is a low risk of erroneous deprivation of a person's right to vote, and the government and the public have a high interest in ensuring that unqualified voters are not allowed to participate in elections and have their unlawful votes counted. Therefore, the Plaintiffs cannot prove that Laws 2022, Chapter 239—viewed in the context of all the alternative processes by which a voter may prove their voter qualifications, register to vote, and vote, and in the context of all the affidavit ballot procedure's procedural safeguards—violates a voter's procedural due process rights.

WHEREFORE, the Defendants respectfully request that this Honorable Court:

- A. Dismiss the Plaintiffs' claims for lack of standing;
- B. Dismiss the Plaintiffs' claims for failure to state a claim upon which relief may be granted; and
- C. Grant such other and further relief as justice may require.

Respectfully submitted,

DAVID SCANLAN,  
SECRETARY OF STATE;

AND

JOHN FORMELLA,  
ATTORNEY GENERAL



By their attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: February 5, 2024

By: /s/ Brendan A. O'Donnell  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic filing system to all parties of record.

Date: February 5, 2024

/s/ Brendan A. O'Donnell  
Brendan A. O'Donnell.

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